Rel: 04/18/2014

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2013-2014

1110620

Ex parte Sarah Janie Hicks

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Sarah Janie Hicks

v.

State of Alabama)

(Coffee Circuit Court, CC-09-268; Court of Criminal Appeals, CR-09-0642)

PARKER, Justice.

Sarah Janie Hicks petitioned this Court for a writ of certiorari to review the Court of Criminal Appeals' judgment affirming her conviction, following a guilty plea, for chemical endangerment of a child for exposing her unborn child to a controlled substance, in violation of Alabama's chemical-endangerment statute, § 26-15-3.2(a)(1), Ala. Code 1975. We granted her petition, and we now affirm the judgment of the Court of Criminal Appeals and hold that the use of the word "child" in the chemical-endangerment statute includes all children, born and unborn, and furthers Alabama's policy of protecting life from the earliest stages of development.

I. Facts and Procedural History

The Court of Criminal Appeals set forth the relevant facts and procedural history in its unpublished memorandum in Hicks v. State, [No. CR-09-0642, Nov. 4, 2011] ___ So. 3d ___ (Ala. Crim. App. 2011), as follows:

> "Hicks appeals from her conviction, following a guilty plea, for chemical endangerment of a child, a violation of § 26-15-3.2(a)(1), Ala. Code 1975. Hicks was sentenced to three years' imprisonment; the sentence was suspended and Hicks was placed on supervised probation for one year. Court costs and fees were assessed.
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> "Section 26-15-3.2, Ala. Code 1975, provides:

> "'(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:
>
> > "'(1) Knowingly, 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 as defined in Section 13A-12-260.'
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> "The indictment charged:
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> "'The Grand Jury of said County charges that before the finding of this indictment that, Sarah Janie Hicks; whose name is to the Grand Jury otherwise unknown, did knowingly, recklessly, or intentionally cause or permit a child, to-wit; [J.D.], a better description of which is to the Grand Jury otherwise unknown, to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260 of the Code of Alabama, 1975, to-wit: Cocaine, in violation of Section 26-[15-3.2](a)(1), Against the Peace and Dignity of the State of Alabama.'

"Concisely, the State charged that Hicks ingested cocaine while pregnant with J.D. and that that resulted in J.D. testing positive for the presence of cocaine in his body at the time of his birth. Documents in the record suggest that, since his birth, J.D. is 'doing fine.' Hicks filed a pretrial motion to dismiss the indictment in which she asserted: 1) that the plain language of § 26-15-3.2(a)(1) reflects that the legislature

intended for the statute to apply to a child and not to a fetus, i.e., an unborn child and that, therefore, her conduct in ingesting cocaine while pregnant did not constitute the offense of the chemical endangerment of a child; 2) that Hicks was denied due process because, although the statute as written is not vague, the statute, as applied to Hicks's conduct, is impermissibly vague because the statute provides no notice that it encompasses exposing a fetus, i.e, an unborn child, to a controlled substance; 3) that the State has violated the doctrine of separation of powers because it is the duty of the legislature and not a district attorney to proscribe criminal offenses, and the legislature recently declined to criminalize prenatal conduct that harms a fetus, i.e., an unborn child; and 4) that Hicks is being denied equal protection because the State is seeking to punish, as a class, women who abuse drugs while pregnant, whereas, a man may father a child while abusing drugs and not be prosecuted under the statute.

"On November 19, 2009, a hearing was conducted at which Hicks and the State presented arguments addressing the assertions in Hicks's motion to dismiss. At the conclusion of arguments, the trial court asserted that the motion to dismiss seemed 'based on factual arguments' and questioned whether the assertions in the motion would 'be more applicable for a motion for a judgment of acquittal at the end of the State's case.' The trial court asked the parties to explain '[h]ow does this Court reach out and dismiss an indictment that is a valid indictment?' Hicks argued that 'it's a question of law, not a question of fact whether a child includes the term "fetus"' and 'there's no crime that's been committed based on the set of circumstances alleged in that indictment.' The State responded that, as the trial court stated, 'if the indictment is valid, it then becomes ... a question of fact; and, therefore, it cannot be dismissed on a motion to dismiss the indictment when the indictment is

> correct on its face and is a valid indictment.' After the hearing, on November 30, 2009, the trial court entered a written order denying the motion to dismiss stating: 'Upon consideration of the pleadings and arguments presented at hearing, it is ordered that the Motion to Dismiss the Indictment filed by [Hicks] is denied.'
>
> "On December 7, 2009, Hicks filed a Motion to Declare the Statute Unconstitutional that presented arguments similar to those in her motion to dismiss. It does not appear that the trial court ruled on this motion.
>
> "On January 11, 2010, before entering a guilty plea, Hicks expressly reserved the right to appeal the issues presented in her motion to dismiss. Then, pursuant to a plea agreement, Hicks pleaded guilty to the chemical endangerment of a child as charged in the indictment. She was sentenced to three years' imprisonment; the sentence was suspended, and Hicks was placed on supervised probation for one year."

(References to the record omitted.)

The Court of Criminal Appeals, relying on its opinion in Ankrom v. State, [Ms. CR-09-1148, August 26, 2011] ___ So. 3d ___ (Ala. Crim. App. 2011), affirmed the trial court's judgment, stating:

> "Hicks contends on appeal, as she did in the trial court, that the plain language of the statute is clear and unambiguous, and 'the statute [(§ 26-15-3.2(a)(1))] does not mention unborn children or fetuses.' (Hicks's brief, at p. 11.) Thus, Hicks argues, the term 'child' in § 26-15-3.2 should not be construed to include an unborn child or fetus. Hicks argues that the settled rules of statutory

construction require this Court to construe the term 'child' as not including an unborn child or fetus. Specifically, she argues: (1) that the rule of lenity requires criminal statutes to be strictly construed in favor of the accused; (2) that the legislative history of the statute and the Alabama Legislature's failure to amend § 26-15-3.2 to specifically state that the statute applies to a fetus shows that the legislature did not intend for the statute to apply to the prenatal exposure of unborn children to controlled substances; and (3) that the majority of our sister states have refused to allow women to be prosecuted criminally for conduct occurring during pregnancy. Hicks also presented constitutional challenges to § 26-15-3.2: (1) the State's application of the statute is violative of the separation-of-powers doctrine; and (2) as applied to her, the statute is void for vagueness and violative of due process.

"Recently, in Ankrom v. State, [Ms. CR-09-1148, August 26, 2011] ___ So. 3d ___ (Ala. Crim. App. 2011), a case involving virtually identical facts as the facts in this case, this Court held that the plain language of § 26-15-3.2 was clear and unambiguous and that the plain meaning of the term 'child' in § 26-15-3.2 included an unborn child or viable fetus. Ankrom v. State, ___ So. 3d at ___ ('[T]he plain meaning of the term "child," as found in § 26-15-3.2, Ala. Code 1975, includes a viable fetus.'). This Court also noted that because the plain language of the statute was clear and no statutory construction was necessary, the rule of lenity was inapplicable, the fact that subsequent attempts to amend § 26-15-3.2 to include an unborn child within the definition of 'child' did not pass the legislature was irrelevant, and holdings from courts in other jurisdictions were either distinguishable from the facts in Ankrom or unpersuasive.

> "Applying the holding in Ankrom to this case, Hick's argument that the plain meaning of the term 'child' in § 26-15-3.2 does not include an unborn child or fetus must fail, given that it has already been rejected by this Court. Moreover, because this Court found no ambiguity in the statute, Hicks's constitutional challenges fail.
>
> "Based on the foregoing, the judgment of the trial court is affirmed."

On February 24, 2012, Hicks petitioned this Court for a writ of certiorari. On April 6, 2012, we granted her petition; we now affirm the judgment of the Court of Criminal Appeals.

II. Standard of Review

"We review questions of statutory construction and interpretation de novo, giving no deference to the trial court's conclusions." Pitts v. Gangi, 896 So. 2d 433, 434 (Ala. 2004) (citing Greene v. Thompson, 554 So. 2d 376 (Ala. 1989)).

III. Discussion

Hicks was convicted of violating § 26-15-3.2, Ala. Code 1975 ("the chemical-endangerment statute"), by causing her unborn child to be exposed to, to ingest or inhale, or to have contact with a controlled substance. The chemical-endangerment statute provides:

"(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:

> "(1) Knowingly, 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 as defined in Section 13A-12-260. A violation under this subdivision is a Class C felony.
>
> "(2) Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.
>
> "(3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. A violation under this subdivision is a Class A felony.

"(b) The court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

"(c) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance."

The facts of Hicks's case are undisputed; the only issue before this Court is whether the chemical-endangerment statute applies to Hicks's conduct. After the parties submitted their briefs in this case, this Court released its opinion in Ex parte Ankrom, [Ms. 1110176, Jan. 11, 2013] ___ So. 3d ___ (Ala. 2013), a case involving facts virtually identical to the facts in this case, in which it addressed the same issue. In Ankrom, as will be discussed in greater detail below, this Court held that the plain meaning of the word "child," as that word is used in the chemical-endangerment statute, includes an unborn child. Accordingly, for the reasons given below, we hold that chemical-endangerment statute also applies to Hicks's conduct.

Hicks raises three main arguments on appeal. First, Hicks argues that the legislature did not intend for the word "child" in the chemical-endangerment statute to apply to an unborn child. Next, Hicks argues that applying the chemical-endangerment statute to protect unborn children is bad public policy. Finally, Hicks argues that she was denied due process of law. Each of Hicks's arguments is addressed below.

A. Legislative Intent

Hicks argues that the legislature did not intend for the word "child" in the chemical-endangerment statute to include an unborn child. First, Hicks argues that, under the rules of statutory interpretation, the word "child" in the chemical-endangerment statute cannot include an unborn child because the word "child" is not defined in the statute. Hicks argues that the statute is, therefore, unconstitutionally ambiguous and should be declared void for vagueness.[1] Hicks's brief, at pp. 6-7. In the alternative, Hicks argues that, if this Court does not find that the chemical-endangerment statute is impermissibly and unconstitutionally vague, then the Court must follow the rule of lenity and construe the statute in her favor.

In Ankrom, this Court applied the rules of statutory construction to interpret the chemical-endangerment statute:

> "In [Ex parte] Bertram, [884 So. 2d 889 (Ala. 2003),] this Court stated:
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> > "'"A basic rule of review in criminal cases is that criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants.

[1]We discuss Hicks's constitutional arguments in Part III.C of this opinion.

> "'"Penal statutes are to reach no further in meaning than their words.
>
> "'"One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words, when they are not used technically, is not to be punished thereunder, merely because the act may contravene the policy of the statute.
>
> "'"No person is to be made subject to penal statutes by implication and all doubts concerning their interpretation are to predominate in favor of the accused."'

"884 So. 2d at 891 (quoting Clements v. State, 370 So. 2d 723, 725 (Ala. 1979) (citations omitted; emphasis added in Bertram)).

"In ascertaining the legislature's intent in enacting a statute, this Court will first attempt to assign plain meaning to the language used by the legislature. As the Court of Criminal Appeals explained in Walker v. State, 428 So. 2d 139, 141 (Ala. Crim. App. 1982), '[a]lthough penal statutes are to be strictly construed, courts are not required to abandon common sense. Absent any indication to the contrary, the words must be given their ordinary and normal meaning.' (Citations omitted.) Similarly, this Court has held that '[t]he fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. If possible, the intent of the legislature should be gathered from the language of the statute itself.' Volkswagen of America, Inc. v. Dillard, 579 So. 2d 1301, 1305 (Ala. 1991).

"We look first for that intent in the words of the statute. As this Court stated in Ex parte Pfizer, Inc., 746 So. 2d 960, 964 (Ala. 1999):

"'"When the language of a statute is plain and unambiguous, as in this case, courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning -- they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature." Ex parte T.B., 698 So. 2d 127, 130 (Ala. 1997). Justice Houston wrote the following for this Court in DeKalb County LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270 (Ala. 1998):

> "'"In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature. As we have said:
>
> > "'"'"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."'

"'"Blue Cross & Blue Shield v. Nielsen, 714 So. 2d 293, 296

> (Ala. 1998) (quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)); see also Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n, 589 So. 2d 687, 689 (Ala. 1991); Coastal States Gas Transmission Co. v. Alabama Pub. Serv. Comm'n, 524 So. 2d 357, 360 (Ala. 1988); Alabama Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle, 460 So. 2d 1219, 1223 (Ala. 1984); Dumas Brothers Mfg. Co. v. Southern Guar. Ins. Co., 431 So. 2d 534, 536 (Ala. 1983); Town of Loxley v. Rosinton Water, Sewer & Fire Protection Auth., Inc., 376 So. 2d 705, 708 (Ala. 1979). It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative intent. To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers. See Ex parte T.B., 698 So. 2d 127, 130 (Ala. 1997)."'

"Thus, only when language in a statute is ambiguous will this Court engage in statutory construction. As we stated in Ex parte Pratt, 815 So. 2d 532, 535 (Ala. 2001), '[p]rinciples of statutory construction

> instruct this Court to interpret the plain language of a statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous.'
>
> "As the Court of Criminal Appeals explained in Ankrom[v. State, [Ms. CR-09-1148, Aug. 26, 2011] ___ So. 3d ___ (Ala. Crim. App. 2011)], the rule of construction referenced in Bertram applies only where the language of the statute in question is ambiguous; the issue in these cases is whether the plain, ordinary, and normal meaning of the word 'child' includes an unborn child."

Ankrom, ___ So. 3d at ___.

This Court concluded in Ankrom that

> "the plain meaning of the word 'child' is broad enough to encompass all children -- born and unborn -- including [the] unborn children in the cases before us. As the Court of Criminal Appeals said in Ankrom:
>
> > "'Likewise, in the present case, we do not see any reason to hold that a viable[2] 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. For example, it is not uncommon for someone

[2]This Court expressly rejected the Court of Criminal Appeals' limitation of the statute to only unborn children who are viable at the time of their exposure to a controlled substance. See Ankrom, ___ So. 3d at ___.

> to state that a mother is pregnant with her first "child." Unless the legislature specifically states otherwise, the term "child" is simply a more general term that encompasses the more specific term "viable fetus." If the legislature desires to proscribe conduct against only a "viable fetus," it is necessary to use that specific term. However, if the legislature desires to proscribe conduct against a viable fetus and all other persons under a certain age, the term "child" is sufficient to convey that meaning. In fact, proscribing conduct against a "child" and a "viable fetus" would be redundant.
>
> "'The term "child" in § 26-15-3.2, Ala. Code 1975, is unambiguous; thus, this Court must interpret the plain language of the statute to mean exactly what it says and not engage in judicial construction of the language in the statute. Also, because the statute is unambiguous, the rule of lenity does not apply. We do not see any rational basis for concluding that the plain and ordinary meaning of the term "child" does not include a viable fetus.'
>
> "We find this reasoning persuasive and agree with the Court of Criminal Appeals that the plain meaning of the word 'child' in the chemical-endangerment statute includes unborn children."

Ankrom, ___ So. 3d at ___. As thoroughly explained in Ankrom, the use of the word "child" in the chemical-endangerment statute is clear and unambiguous; thus, we reject Hicks's argument that the rule of lenity should apply to our interpretation of the statute.

Next, Hicks argues that the legislature's intended definition of the word "child" as that term is used in the chemical-endangerment statute can be discerned from the legislature's use of the word in the surrounding chapters of the Alabama Code, which define the word "child" as "[a] person under the age of 18 years," § 26-14-1(3), Ala. Code 1975,[3] and as "[a] person who has not yet reached his or her eighteenth birthday," § 26-16-91(2), Ala. Code 1975.[4] Hicks argues that the placement of the chemical-endangerment statute in the title and chapter of the Alabama Code in which it was placed is meaningful and that "the legislature is presumed to know the definition of child in the preceding and subsequent chapters." Hicks's brief, at p. 8. Hicks also argues that the legislature's intended definition of the word "child" in the chemical-endangerment statute is evidenced by Alabama's partial-birth-abortion statute, § 26-23-3, Ala. Code 1975, which refers to an unborn child as "a human fetus" as opposed to "a child." Hicks also argues that the legislature's intent is further demonstrated in the definition section of the

[3]Chapter 14 is titled "Reporting of Child Abuse or Neglect."

[4]Chapter 16 is titled "Child Abuse and Neglect."

"Woman's Right to Know Act," § 26-23A-1 et seq., Ala. Code 1975, which defines "unborn child" as "the offspring of any human person from conception until birth." § 26-23A-3(10), Ala. Code 1975. Additionally, Hicks argues that the legislature's intent to exclude unborn children from the definition of the word "child" in the chemical-endangerment statute is evidenced by the fact that § 13A-6-1(d), Ala. Code 1975, forbids the prosecution under "Article 1 or Article 2 ... of ... any woman with respect to her unborn child," while at the same time defining "person" as "including an unborn child in utero at any stage of development, regardless of viability." § 13A-6-1(a)(3), Ala. Code 1975.

This Court addressed arguments similar to those raised by Hicks in Ankrom, as follows:

> "A review of the statutes cited by the petitioners and of the context of the chemical-endangerment statute provides no conclusive evidence as to how this Court should interpret the word 'child' as that term is used in the chemical-endangerment statute. The statutory definitions of the word 'child' cited ... are not conclusive because both set a maximum age for childhood without setting a minimum age. Similarly, [the argument] that 'the examples put forth ... show that the legislature uses the explicit term "unborn child" to refer to the unborn, rather than rely on the ... ambiguous term "child,"' ... fails to note that the legislature's decision to use the more restrictive

> words 'fetus' and 'unborn child' was appropriate in those other statutes because those statutes applied only to protect unborn children.[6] In sum, nothing in the statutes cited ... contradicts the plain meaning of the word 'child' in the chemical-endangerment statute to include an unborn child or requires this Court to interpret the word 'child' as excluding unborn children.
>
> "_____
>
> "[6]Using the word 'fetus' or 'unborn child' in place of the word 'child' would not have been appropriate in the chemical-endangerment statute because that statute also protects children after they have been born."

Ankrom, ___ So. 3d at ___ (citations omitted). As this Court held in Ankrom, the statutory definitions of the word "child" in other chapters of the Code do not limit "child" to only a child who has been born but simply set a maximum age at which the person is no longer regarded as a "child" under a particular statutory scheme. Also, the references to a "human fetus" or "unborn child" in the partial-birth-abortion statute and the Woman's Right to Know Act both deal exclusively with unborn children. Thus, it would be inappropriate to use the word "child" because that would, nonsensically in that context, include children who have already been born. Because both born and unborn children can be exposed to controlled substances, we have no reason to doubt that the legislature

intended for the chemical-endangerment statute to be using the plain meaning of the word "child" and thereby protecting all children.

Hicks also argues that a majority of other jurisdictions have refused to define the word "child" as including an unborn child and that the Court of Criminal Appeals erred by following the minority view espoused by the South Carolina Supreme Court in Whitner v. State, 492 S.E.2d 777 (1997). This Court addressed this argument in Ankrom, as follows:

> "[A]lthough, as the petitioners correctly state, a majority of jurisdictions have held that unborn children are not afforded protection from the use of a controlled substance by their mothers, they nonetheless fail to convince this Court that the decisions of those courts are persuasive and should be followed by this Court. See Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) ('[T]he State has legitimate interests from the outset of the pregnancy in protecting ... the life of the fetus that may become a child.' (quoted with approval in Hamilton v. Scott, 97 So. 3d 728, 740 (Ala. 2012) (Parker, J., concurring specially, joined by Stuart, Bolin, and Wise, JJ.)))."

___ So. 3d at ___. As set forth in Ankrom, the State has a legitimate interest in protecting the life of children from the earliest stages of their development and has done so by enacting the chemical-endangerment statute. The fact that other states have failed to do so does not persuade us to look

beyond the plain meaning of the word "child" as that word is used in the chemical-endangerment statute.

Hicks also argues that legislative intent can be discerned by the failure of several proposed amendments to the chemical-endangerment statute that would have specifically defined the word "child" to include unborn children. This Court addressed this argument in Ankrom, as follows:

> "Interpreting a statute based on later attempts to amend that statute is problematic. As the United States Supreme Court stated in Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 650 (1990):
>
> > "'[S]ubsequent legislative history is a "hazardous basis for inferring the intent of an earlier" Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks "persuasive significance" because "several equally tenable inferences" may be drawn from such inaction, "including the inference that the existing legislation already incorporated the offered change."'
>
> "(Citations omitted.)
>
> "In this case, it is possible to conclude ... that the legislature understood the original chemical-endangerment statute to protect only children who were already born. It is also possible to conclude ... that the legislature understood the original chemical-endangerment statute to protect

> all children -- born and unborn -- and that proposals to amend the statute were unnecessary attempts to clarify the legislature's original intent. This Court cannot determine the intentions of the legislature apart from the language in the chemical-endangerment statute that is now before us; ... the plain meaning of that statutory language is to include within its protection unborn children. See LTV Corp., supra; Becton v. Rhone-Poulenc, Inc., 706 So. 2d 1134, 1139 (Ala. 1997) ('"'[S]ubsequent legislative history' is not helpful as a guide to understanding a law."' (quoting Covalt v. Carey Canada Inc., 860 F.2d 1434, 1438 (7th Cir. 1988), citing in turn Pierce v. Underwood, 487 U.S. 552, 565 (1988)))."

Ankrom, ___ So. 3d at ___. Because the legislature could have failed to pass the proposed amendments for a plethora of reasons, Hicks's argument that the legislature's inaction in that regard should influence our interpretation of the chemical-endangerment statute is unpersuasive.

B. Public Policy

Hicks argues that the overwhelming majority of medical and public-health organizations agree that, as a matter of public policy, prosecuting women for drug use during pregnancy does not protect human life. Hicks's brief, at p. 17.

In Ankrom, this Court rejected the notion that public-policy arguments should play a role in this Court's interpretation of a statute:

"Although the briefs of the petitioners and of several amici curiae recite numerous potential public-policy implications of this Court's decision in these cases, policy cannot be the determining factor in our decision; public-policy arguments should be directed to the legislature, not to this Court. As we stated in Boles v. Parris, 952 So. 2d 364, 367 (Ala. 2006): '[I]t is well established that the legislature, and not this Court, has the exclusive domain to formulate public policy in Alabama.'

"This is not because policy is unimportant but because policy arguments are ill-suited to judicial resolution. See M & Assocs., Inc. v. City of Irondale, 723 So. 2d 592, 599 (Ala. 1998) ('"There are reasonable policy arguments on both sides of this issue; however, the Legislature is the body that must choose between such conflicting policy considerations."' (quoting City of Tuscaloosa v. Tuscaloosa Vending Co., 545 So. 2d 13, 14 (Ala. 1989))). For this reason, although we recognize that the public policy of this State is relevant to the application of this statute, we decline to address the petitioners' public-policy arguments; we leave those matters for resolution by the legislature. As we stated in Marsh v. Green, 782 So. 2d 223, 231 (Ala. 2000), '[t]hese concerns deal with the wisdom of legislative policy rather than constitutional issues. Matters of public policy are for the Legislature and, whether wise or unwise, legislative policies are of no concern to the courts.' See also Cavalier Mfg., Inc. v. Jackson, 823 So. 2d 1237, 1248 (Ala. 2001), overruled on other grounds, Ex parte Thicklin, 824 So. 2d 723 (Ala. 2002) ('The Legislature is endowed with the exclusive domain to formulate public policy in Alabama, a domain upon which the judiciary shall not trod.'). We therefore refrain from considering the policy issues raised by the petitioners or amici curiae, limiting ourselves to interpreting the text of the chemical-endangerment statute."

Ankrom, ___ So. 3d at ___. For the reasons set forth in Ankrom, we refrain from considering Hick's public-policy arguments.

C. Constitutional Arguments

Hicks argues that the application of the chemical-endangerment statute is unconstitutional as applied to her because, she says, the statute is vague and, therefore, did not provide her with adequate notice of what conduct was prohibited, in violation of her due-process rights. Hicks's brief, at p. 24. Hicks argues that a vague statute is one that fails to give adequate "'"'notice of the required conduct to one who would avoid its penalties.'"'" Vaughn v. State, 880 So. 2d 1178, 1194 (Ala. Crim. App. 2003) (quoting McCall v. State, 565 So. 2d 1163, 1165 (Ala. Crim. App. 1990), quoting in turn Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952)). Hicks also argues that "[m]en of common intelligence cannot be required to guess at the meaning of [an] enactment." Winters v. New York, 333 U.S. 507, 515 (1948). To support her arguments, Hicks cites Kolender v. Lawson, 461 U.S. 352, 357 (1983), in which the United States Supreme Court stated that "the void-for-vagueness doctrine

requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Hicks argues that the chemical-endangerment statute is facially vague because it does not define the word "child," leaving her unaware that it includes unborn children. Hicks also argues that the prosecution of women under similar circumstances, as well as news reports of such prosecutions, did not provide her with adequate notice that her conduct was criminal. Hicks, therefore, argues that she was not afforded constitutionally adequate notice that her conduct would violate the chemical-endangerment statute. Hicks's brief, at pp. 24-25.

In Vaughn v. State, supra, the Court of Criminal Appeals explained the doctrine of vagueness:

> "'"The doctrine of vagueness ... originates in the due process clause of the Fourteenth Amendment, see Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939), and is the basis for striking down legislation which contains insufficient warning of what conduct is unlawful, see United States v. National Dairy Products

Corporation, 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963).

"'"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 811, 98 L. Ed. 989, 996 (1954). A vague statute does not give adequate 'notice of the required conduct to one who would avoid its penalties,' Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S. Ct. 329, 330, 96 L. Ed. 367, 371 (195[2]), is not 'sufficiently focused to forewarn of both its reach and coverage,' United States v. National Dairy Products Corporation, 372 U.S. at 33, 83 S. Ct. at 598, 9 L. Ed. 2d at 566, and 'may trap the innocent by not providing fair warning,' Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222, 227-28 (1972).

"'"As the United States Supreme Court observed in Winters v. New York, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948):

> "'"'There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the

> enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt.'
>
> "'"333 U.S. at 515-16, 68 S. Ct. at 670, 92 [L. Ed. at] 849-50 [citations omitted]."
>
> "'McCrary v. State, 429 So. 2d 1121, 1123-24 (Ala. Cr. App. 1982), cert. denied, 464 U.S. 913, 104 S.Ct. 273, 78 L. Ed. 2d 254 (1983).'

"McCall v. State, 565 So. 2d 1163, 1165 (Ala. Crim. App. 1990).

> "'"'As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' Kolender v. Lawson, 461 U.S. 352 [357], 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903 (1983) (citations omitted). A statute challenged for vagueness must therefore be scrutinized to determine whether it provides both fair notice to the public that certain conduct is proscribed and minimal guidelines to aid officials in the enforcement of that proscription. See Kolender, supra; Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)."'

"Timmons v. City of Montgomery, 641 So. 2d 1263, 1264 (Ala. Crim. App. 1993), quoting McCorkle v. State, 446 So. 2d 684, 685 (Ala. Crim. App. 1983). However,

> "'"'[t]his prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." Robinson v. United States, 324 U.S. 282, 286, 65 S. Ct. 666, 668, 89 L. Ed. 944 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.'"'

"Sterling v. State, 701 So. 2d 71, 73 (Ala. Crim. App. 1997), quoting Culbreath v. State, 667 So. 2d 156, 158 (Ala. Crim. App. 1995), abrogated on other grounds by Hayes v. State, 717 So. 2d 30 (Ala. Crim. App. 1997), quoting in turn, Rose v. Locke, 423 U.S. 48, 49-50, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975).

"'"Mere difficulty of ascertaining its meaning or the fact that it is susceptible of different interpretations will not render a statute or ordinance too vague or uncertain to be enforced."' Scott & Scott, Inc. v. City of Mountain Brook, 844 So. 2d 577, 589 (Ala. 2002), quoting City of Birmingham v. Samford, 274 Ala. 367, 372, 149 So. 2d 271, 275 (1963). The judicial power to declare a statute void for vagueness 'should be exercised only when a statute is so incomplete, so irreconcilably conflicting, or so vague or indefinite, that it cannot be executed, and the court is unable, by the application of known and accepted rules of construction, to determine, with any reasonable degree of certainty, what the legislature intended.'

> Jansen v. State ex rel. Downing, 273 Ala. 166, 170, 137 So. 2d 47, 50 (1962)."

Vaughn v. State, 880 So. 2d at 1194-96. Therefore, to survive scrutiny under the void-for-vagueness doctrine, the chemical-endangerment statute must provide fair notice to the public of what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement.

As discussed above, by its plain meaning, the chemical-endangerment statute unambiguously protects all children, born and unborn, from exposure to controlled substances. A person is presumed to know the law and is expected to conform his conduct to it. See § 13A-2-6(b), Ala. Code 1975 ("A person is not relieved of criminal liability for conduct because he engages in that conduct under a mistaken belief that it does not, as a matter of law, constitute an offense ...."); Ex parte Tuscaloosa Cnty., 770 So. 2d 602, 605 (Ala. 2000) ("Mistake of law, however, is not a defense to a crime."); White v. Birmingham Post Co., 235 Ala. 278, 279, 178 So. 449, 450 (1938) ("All persons are presumed to know the law."); Gordon v. State, 52 Ala. 308, 310 (1875) ("Ignorance of the law is never an excuse, whether a party is charged civilly or criminally."). Accordingly, because the chemical-endangerment

statute is unambiguous, it provides "fair notice to the public that certain conduct is proscribed." Timmons v. City of Montgomery, 641 So. 2d 1263, 1264 (Ala. Crim. App. 1993) (quoting McCorkle v. State, 446 So. 2d 684, 685 (Ala. Crim. App. 1983)).

Hicks has presented no evidence indicating that the chemical-endangerment statute "encourage[s] arbitrary and discriminatory enforcement." Kolender, 461 U.S. at 361. Therefore, Hicks has not demonstrated that the chemical-endangerment statute is unconstitutionally vague.

IV. Conclusion

Consistent with this Court's opinion in Ankrom, by its plain meaning, the word "child" in the chemical-endangerment statute includes an unborn child, and, therefore, the statute furthers the State's interest in protecting the life of children from the earliest stages of their development. See § 26-22-1(a), Ala. Code 1975 ("The public policy of the State of Alabama is to protect life, born, and unborn."); see also Ankrom, ___ So. 3d at ___ (Parker, J., concurring specially) (explaining that the application of the chemical-endangerment statute to protect the life of unborn children "is consistent

with many statutes and decisions throughout our nation that recognize unborn children as persons with legally enforceable rights in many areas of the law"). Accordingly, we affirm the judgment of the Court of Criminal Appeals.

AFFIRMED.

Stuart, Bolin, Main, Wise, and Bryan, JJ., concur.

Moore, C.J., and Parker, J., concur specially.

Shaw, J., concurs in the result.

Murdock, J., dissents.

MOORE, Chief Justice (concurring specially).

I concur with the main opinion and with Justice Parker's specially concurring opinion, which rightly notes that "[b]ecause an unborn child has an inalienable right to life from its earliest stages of development, it is entitled ... to a life free from the harmful effects of chemicals at all stages of development." ___ So. 3d at ___. I write separately to emphasize that the inalienable right to life is a gift of God that civil government must secure for all persons--born and unborn.

I. Our Creator, Not Government, Gives to All People "Unalienable" Natural Rights.

According to our Nation's charter, the Declaration of Independence, the United States was founded upon the "self-evident" truth that "all Men are created equal, [and] that they are endowed by their Creator with certain unalienable Rights." Declaration of Independence, ¶ 2 (1776). Denominated in the United States Code Annotated as one of the "Organic Laws of the United States of America," the Declaration acknowledges as "self-evident" the truth that all human beings are endowed with inherent dignity and the right to life as a direct result of having been created by God. When

it was signed by our Founding Fathers in 1776, the Declaration returned to first principles of God, His law, and human rights and government.

As Thomas Jefferson explained, "[t]he object of the Declaration of Independence" was "[n]ot to find out new principles, or new arguments, never before thought of ... but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent .... [I]t was intended to be an expression of the American mind."[5] Thomas Jefferson, Letter to Henry Lee, May 8, 1825, in VIII The Writings of Thomas Jefferson 407 (H.A. Washington ed., 1854). The American mind of the founding era had been nurtured

[5]Jefferson further explained:

> "Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, [the Declaration] was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, [etc.]. The historical documents which you mention as in your possession, ought all to be found, and I am persuaded you will find, to be corroborative of the facts and principles advanced in that Declaration."

Letter to Henry Lee, May 8, 1825, VIII Writings at 407.

in its views of law and life by the most influential legal treatise of the time, Sir William Blackstone's Commentaries on the Laws of England (1765). See, e.g., District of Columbia v. Heller, 554 U.S. 570, 593-94 (2008) (recognizing Blackstone's work as "'the preeminent authority on English law for the founding generation'" (quoting Alden v. Maine, 527 U.S. 706, 715 (1999))). Blackstone recognized that God's law was superior to all other laws:

> "This law of nature, being co-eval [beginning at the same time] with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this ...."

1 William Blackstone, Commentaries at *41 (emphasis added). See also id. at *42 ("Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.").

Like Jefferson, Alexander Hamilton defended American independence based on the "law of nature" and emphasized that divine law was the source of our human rights:

> "[T]he Deity, from the relations we stand in to Himself and to each other, has constituted an eternal and immutable law, which is indispensably

> obligatory upon all mankind, prior to any human institution whatever.
>
> "This is what is called the law of nature ....
>
> "Upon this law depend the natural rights of mankind ...."

Alexander Hamilton, "The Farmer Refuted," in 2 The Works of Alexander Hamilton 43 (John C. Hamilton ed., 1850) (emphasis added). According to Blackstone, God, not governments and legislatures, gives persons these inherent natural rights:

> "Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable."

1 Commentaries at *54 (emphasis added). Government, in fact, has no "power to abridge or destroy" natural rights God directly bestows to mankind, id., and, indeed, no power to contravene what God declares right or wrong:

> "The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore st[y]led mala in se, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only ... in subordination to the great lawgiver, transcribing and publishing his precepts."

Id. Therefore, as stated by James Wilson, one of the first Justices on the United States Supreme Court: "Human law must rest its authority ultimately upon the authority of that law which is divine." James Wilson, "Of the General Principles of Law and Obligation," in 1 The Works of the Honourable James Wilson, L.L.D., 104-05 (Bird Wilson ed., 1804) (hereinafter "Works of James Wilson").

II. The Right to Life is an "Unalienable" Gift of God.

The first right listed in the Declaration as among our unalienable rights is the right to "Life." Blackstone wrote that "[l]ife 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."[6] 1 Commentaries at *125. See also id. at *126 (stating

[6]Blackstone's reference to the point in time when the unborn child "is able to stir" or when "a woman is quick with child," 1 Commentaries at *125, acknowledges the notice sufficient for criminal intent to form under the common law, but should not be read as a definitive statement about when life begins in fact. Indeed, Blackstone (in footnote "o," id.) quoted a relevant passage from Henry de Bracton's classic work, On the Laws and Customs of England, namely, "If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, especially if it is quickened, he commits homicide." II Bracton, On the Laws and Customs of England 341 (S.E. Thorne trans., 1968) (emphasis added), cited in Charles I. Lugosi, When Abortion Was A Crime: A Historical

that an infant "in the mother's womb, [was] supposed in law to be born" for various legal purposes and rights, e.g., legacy and guardianship). As the gift of God, this right to life[7] is not subject to violation by another's unilateral choice: "This natural life being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself

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Perspective, 83 U. Det. Mercy L. Rev. 51, 53 (2006). Modern medicine and prenatal technology, of course, have given us a clearer and much earlier view into when a "foetus is already formed" or when a woman is pregnant and has notice thereof. As this Court first noted in 1973: "'"Medical authority has recognized long since that the child is in existence from the moment of conception ...."'" Mack v. Carmack, 79 So. 3d 597, 602 (Ala. 2011) (quoting Wolfe v. Isbell, 291 Ala. 327, 330, 280 So. 2d 758, 760 (1973), quoting, in turn, Prosser, Law of Torts 336 (4th ed. 1971)).

[7]God's creation of man and woman "in His own image," Genesis 1:27 (King James), together with the divine command, "Thou shalt not kill," provides the baseline for the right to life. See Exodus 20:13 (King James). Exodus 21 provides express protection for the unborn: where fighting men "hurt a woman with child, so that her fruit depart from her ... [a]nd if any mischief follow, then thou shalt give life for life." Exodus 21:22-23; see id. (requiring that if "no mischief follow" then the offender must pay a fine). Both testaments attest to the sanctity and personhood of unborn life. See, e.g., Psalm 139:13-15 ("For you formed my inward parts; you knitted me together in my mother's womb. I praise you, for I am fearfully and wonderfully made. Wonderful are your works; my soul knows it very well. My frame was not hidden from you, when I was being made in secret, intricately woven in the depths of the earth."); Luke 1:44 (Elizabeth declaring that "the babe leaped in my womb for joy").

nor by any other of his fellow creatures, merely upon their own authority." Id. at *129 (emphasis added). Even the United States Supreme Court has recognized that "'[t]he 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, 1018-19, 37 S.E.2d 43, 47 (1946)).

III. All Governments Must Secure God-Given Rights.

Although not the source of our rights, governments are instituted in order to "secure these rights" given by God, the Declaration continues, and are fashioned by the people "in such form, as to them shall seem most likely to effect their Safety and Happiness." Thomas Jefferson identified "the first and only legitimate object of good government" to be "[t]he care of human life and happiness, and not their destruction." Thomas Jefferson, Letter to the Republican Citizens of Washington County, Maryland, Assembled at Hagerstown on the 6th Instant, March 31, 1809, in VIII Writings at 165. But what if a government, its positive laws, and "settled" judicial opinions become destructive of these ends, violating the people's preexistent rights to life, liberty, and the pursuit

of happiness? We have an illustrative example in the preceding century: the trials at Nuremberg, Germany.

IV. Nuremberg: The Law of Nature Applied Internationally.

When Germany was defeated in World War II, German officers were tried for "war crimes" and "crimes against humanity" in Nuremberg from 1945-46 before an International Military Tribunal formed by France, Great Britain, the United States, and the Soviet Union.[8] See Indictments, Nurnberg Military Tribunals 3 (Office of Military Gov't for Germany (US), Nuremberg 1946). The German defendants contended that they were only following orders and the laws of their country and that prosecuting them for crimes not previously specified as crimes in their own country constituted an improper ex post facto application. "Motion Adopted By All Defense Counsel," Nov. 19, 1945, 1 Trial of the Major War Criminals before the International Military Tribunal 169 (International Military Tribunal, Nuremberg 1947) In his opening statement, however,

[8]The crimes against humanity prosecuted at Nuremberg included promoting abortion and even compelling abortion in an attempt to exterminate Poles, Slavs, and others the Nazis considered racially inferior. See Jeffrey C. Tuomala, Nuremberg and the Crime of Abortion, 42 U. Tol. L. Rev. 283 (2011). For example, the Germans were prosecuted at Nuremberg for preventing Poland's courts from enforcing its statute criminalizing abortion. Id. at 376-77.

lead prosecutor Robert Jackson (then an Associate Justice on the United States Supreme Court) argued that "even rulers are, as Lord Chief Justice Coke said to King James, 'under God and the law.'" Robert Jackson, "Opening Statement," Nov. 21, 1945, in 2 Trial, supra, at 143. Likewise, British prosecutor Sir Hartley Shawcross declared no immunity "for those who obey orders which--whether legal or not in the country where they are issued--are manifestly contrary to the very law of nature from which international law has grown." Hartley Shawcross, "Closing Arguments," July 26, 1946, in 19 Trial, supra, at 466. The Nuremberg Court rejected the arguments of the German defendants, noting that "so far from it being unjust to punish [them], it would be unjust if [their] wrong[s] were allowed to go unpunished." Judgment, "The Law of the Charter," in 1 Trial, supra, at 219.

Although the Nuremberg defendants were following orders and the laws of their own officials and country, they were guilty of violating a higher law to which all nations are equally subject: the laws of nature and of nature's God. As Justice James Wilson explained:

> "The law of nature, when applied to states or political societies, receives a new name, that of the law of nations. ...
>
> "....
>
> "... Though the law ... receives a new appellation; it retains, unimpaired, its qualities and its power. The law of nations as well as the law of nature is of obligation indispensable: the law of nations, as well as the law of nature, is of origin divine."

Works of James Wilson at 145-47. The law of nations "depends entirely upon the rules of natural law" such that, even in the construction of compacts and treaties between nations, "we have no other rule to resort to, but the law of nature[,] being the only one to which both communities are equally subject." 1 Commentaries at *43. See also 2 Samuel Pufendorf, Of the Law of Nature and Nations 150 (1729) (agreeing with Thomas Hobbes that "what ... we call the Law of nature, the same we term the Law of Nations, when we apply it to whole States, Nations, or People"). From local to international, all law "flows from the same divine source: it is the law of God." Works of James Wilson at 104. The law of nature and of nature's God therefore binds all nations, states, and all government officials--from Great Britain to Germany to

Alabama--regardless of positive laws or orders to the contrary.

V. Alabama Recognizes the Right to Life is "Inalienable."

As this Court has recognized, the unalienable right to life is duly secured under Alabama law:

> "[T]he Declaration of Rights in the Alabama Constitution ... states that '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). These words, borrowed from the Declaration of Independence ..., affirm that each person has a God-given right to life."

Hamilton v. Scott, 97 So. 3d 728, 734 n.4 (Ala. 2012). Alabama statutory law provides that "[t]he public policy of the State of Alabama is to protect life, born, and unborn." § 26-22-1(a), Ala. Code 1975. In 2006, the Alabama Legislature amended the homicide statute to define "person" to include "an unborn child in utero at any stage of development, regardless of viability," § 13A-6-1(a)(3), Ala. Code 1975, "'thus recogniz[ing] under that statute that, when an "unborn child" is killed, a "person" is killed.'" Hamilton, 97 So. 3d at 739 (Parker, J., concurring specially) (quoting Ziade v. Koch, 952 So. 2d 1072, 1082 (Ala. 2006) (See, J., concurring

specially)).[9] This Court in Ex parte Ankrom, [Ms. 1110176, Jan. 11, 2013] ___ So. 3d ___ (Ala. 2013), and again today, merely applies equally to born and unborn children the statute prohibiting the chemical endangerment of any child in Alabama, a protection commensurate with the constitutional and statutory protections Alabama gives to all unborn life.

VI. States Have an Affirmative Duty to Protect Unborn Human Life Under the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment provides that a state may not "deny to any person within its

[9]Although I was not on the Court when Hamilton was decided, I fully agree with the decision in that case and with Justice Parker's special concurrence describing the invalidity of Roe v. Wade, 410 U.S. 113 (1973), at its inception (or rather, judicial creation) and its complete irrelevance outside the abortion context. I would go further and state that the judicially created "right" to abortion identified in Roe has no basis in the text or even the spirit of the Constitution and is therefore an illegitimate opinion of mere men and not law. See id., 410 U.S. at 174 (Rehnquist, J., dissenting) (describing Roe as finding "within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment"); Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting) (finding "nothing in the language or history of the Constitution to support the Court's judgments .... fashion[ing] and announc[ing] a new constitutional right"). Roe and its progeny therefore have no applicability in any case, in any context, and, like the German laws nullified at Nuremberg, should be jettisoned from federal and state jurisprudence.

jurisdiction the equal protection of the laws." U.S. Const. amend. XIV (emphasis added). "[T]he framers [of the Fourteenth Amendment] attempted to create a legal bridge between their understanding of the Declaration of Independence, with its grand declarations of equality and rights endowed by a Creator God, and constitutional jurisprudence." The Heritage Guide to the Constitution 400 (Edwin Meese III et al. eds., 2005). The Equal Protection Clause expressly applies to "any person" within a state's jurisdiction. By contrast, the Privileges and Immunities Clause applies to "citizens," namely, "[a]ll persons born or naturalized in the United States ...." U.S. Const. amend XIV, § 1 (emphasis added). This definitional distinction necessarily implies that personhood--and therefore the protection of the Equal Protection Clause--is not dependent, as is citizenship, 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."). "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." Civil Rights Cases, 109 U.S. 3, 31 (1883) (emphasis added). Unborn children are a class of persons entitled to equal protection of the laws.

A plain reading of the Equal Protection Clause, therefore, indicates that states have an affirmative constitutional duty to protect unborn persons within their jurisdiction to the same degree as born persons.[10] "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against

[10]This principle was violated by the United States Supreme Court in 1973 in Roe v. Wade, 410 U.S. 113 (1973). The Court in Roe, ignoring the broad sense of "person" in the Fourteenth Amendment, cited other "postnatal" uses of "person" in other corners of the Constitution, and then referred to its own historical review of 19th Century abortion laws--all of which "persuade[d]" the Court to believe "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158. Yet even in the midst of this constitutional misdirection, the Roe Court conceded that if the unborn child's "personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." Id. at 156-57. Thus, the very opinion in which the "right" to abortion was judicially created also left open the possibility that if an unborn child's personhood is established, he or she must be equally protected under law. See id. at 157 n.54 (noting Texas's dilemma in arguing for fetal personhood because the state did not equally protect born and unborn life: "Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists."). Although personhood amendments and statutes have been proposed in many states (including Alabama), and voted on in a few, none have become law.

intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Sunday Lake Iron Co. v. Wakefield Twp., 247 U.S. 350, 352 (1918) (quoted in Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)). Any state's discriminatory failure to provide legal protection equally to born and unborn persons under, for instance, its statutes prohibiting homicide, assault, or chemical endangerment violates, therefore, the Equal Protection Clause of the United States Constitution. See Dobbins v. City of Los Angeles, 195 U.S. 223, 237 (1904) (stating that where a state's police powers "amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void"). Therefore, the State of Alabama's application of its chemical-endangerment statute, § 26-15-3.2(a)(1), Ala. Code 1975, equally to protect born and unborn children is entirely consistent with its constitutional duty under the Equal Protection Clause.

VII. Conclusion.

Under the Equal Protection Clause of the Fourteenth Amendment, states have an obligation to provide to unborn

children at any stage of their development the same legal protection from injury and death they provide to persons already born. Because a human life with a full genetic endowment comes into existence at the moment of conception, the self-evident truth that "all men are created equal and are endowed by their Creator with certain unalienable rights" encompasses the moment of conception. Legal recognition of the unborn as members of the human family derives ultimately from the laws of nature and of nature's God, Who created human life in His image and protected it with the commandment: "Thou shalt not kill." Therefore, the interpretation of the word "child" in Alabama's chemical-endangerment statute, § 26-15-3.2, Ala. Code 1975, to include all human beings from the moment of conception is fully consistent with these first principles regarding life and law.

PARKER, Justice (concurring specially).

This case presents an opportunity for this Court to continue a line of decisions affirming Alabama's recognition of the sanctity of life from the earliest stages of development. We have done so in three recent cases;[11] we do so again today by holding that the word "child" as used in Alabama's chemical-endangerment statute, § 26-15-3.2(a)(1), Ala. Code 1975, unambiguously includes an unborn child.

"Liberty finds no refuge in a jurisprudence of doubt." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 844 (1992)(plurality opinion). A plurality of United States Supreme Court Justices stated this truism in their misguided effort to stabilize our nation's abortion jurisprudence by reaffirming "the essential holding of Roe v. Wade[, 410 U.S. 113 (1973)]."[12] Casey, 505 U.S. at 846.

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[11]Ex parte Ankrom, [Ms. 1110176, Jan. 11, 2013] ___ So. 3d ___ (Ala. 2013); Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012); and Mack v. Carmack, 79 So. 3d 597 (Ala. 2011).

[12]In Casey, the Court held that the "essential holding of Roe v. Wade" included the following three parts:

> "First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion

However, as discussed below, by affirming the rejection in Roe v. Wade, 410 U.S. 113 (1973), of an unborn child's inalienable right to life, Casey did anything but dispel the shroud of doubt hovering over our nation's abortion jurisprudence. Rather, Casey has resulted in a jurisprudential quagmire of arbitrary and inconsistent decisions addressing the recognition of an unborn child's right to life. This legal conundrum has been described as follows:

> "While logic may not be the life of the law in all circumstances, should logic and law be at swords' point? One does not have to be an Aristotelian to recognize the law of non-contradiction. This principle states that it is impossible for a thing to be and not to be at the same time and in the same respect. When it comes to the personhood of the unborn, the law of logic is today sorely challenged by the collision course of fetal rights laws and abortion laws."

> or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle 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. These principles do not contradict one another; and we adhere to each."

Casey, 505 U.S. at 846.

Roger J. Magnuson & Joshua M. Lederman, Aristotle, Abortion, and Fetal Rights, 33 Wm. Mitchell L. Rev. 767, 769 (2007)(footnotes omitted).

In contrast to the reasoning of Roe and Casey, Alabama's reliance upon objective principles has led this Court to consistently recognize the inalienable right to life inherently possessed by every human being and to dispel the shroud of doubt cast by the United States Supreme Court's violation of the law of noncontradiction. This sound foundation allows Alabama to provide refuge to liberty -- the purported objective of the plurality opinion in Casey. Liberty will continue to find no refuge in abortion jurisprudence until courts refuse to violate the law of noncontradiction and, like Alabama, recognize an unborn child's inalienable right to life at every point in time and in every respect.

I. Alabama recognizes an unborn child's inalienable right to life

"The public policy of the State of Alabama is to protect life, born, and unborn." § 26-22-1(a), Ala. Code 1975. This inalienable right is a proper subject of protection by our

laws at all times and in every respect. The Declaration of Independence, one of our nation's organic laws, recognized that governments are "instituted among men" to protect this sacred right.[13] Accordingly, protecting the inalienable right to life is a proper subject of state action.[14] We have affirmed Alabama's policy of protecting life at every stage of development in our recent decisions in Mack v. Carmack, 79 So. 3d 597 (Ala. 2011), Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012), Ex parte Ankrom, [Ms. 1110176, January 11, 2013] ___

[13]The Declaration of Independence set forth this basic function of government, as follows:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ...."

Declaration of Independence ¶ 2 (U.S. 1776).

[14]The preamble to the United States Constitution recognized that the new constitution did not create inalienable rights but rather was "ordain[ed] and establish[ed]" to "secure the Blessings of Liberty" to every person. U.S. Const. pmbl. Likewise, the preamble to the Alabama Constitution states: "We, the people of the State of Alabama, in order to ... secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama." Ala. Const. 1901 pmbl.

So. 3d ___ (Ala. 2013), and in our decision today, by consistently recognizing that an unborn child is a human being from the earliest stage of development and thus possesses the same right to life as a born person.

In Mack,[15] a wrongful-death case, this Court held that § 6-5-391(a), Ala. Code 1975,[16] and § 6-5-410(a), Ala. Code 1975,[17] "permit[] an action for the death of a previable

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[15]Mack contains an exhaustive history of wrongful-death actions brought on behalf of unborn children in Alabama.

[16]Section 6-5-391(a) provides:

> "When the death of a minor child is caused by the wrongful act, omission, or negligence of any person, persons, or corporation, or the servants or agents of either, the father, or the mother as specified in Section 6-5-390, or, if the father and mother are both dead or if they decline to commence the action, or fail to do so, within six months from the death of the minor, the personal representative of the minor may commence an action."

[17]Section 6-5-410(a) provides, in relevant part, as follows:

> "A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama where provided for in subsection (e), and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or her or their servants or agents, whereby the death of the testator or intestate was caused, provided the testator or intestate could have commenced an action for the wrongful act, omission,

fetus." Mack, 79 So. 3d at 611. Our decision in Hamilton affirmed this holding. In Ankrom, this Court held that the chemical-endangerment statute at issue in the present case, § 26-15-3.2, Ala. Code 1975, protects unborn children from exposure to controlled substances. Today, this Court reaffirms Ankrom. This Court's decisions consistently recognize that an unborn child's right to life vests at the earliest stage of development. Although Alabama's ban on postviability abortions, § 26-22-3(a), Ala. Code 1975,[18] is

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or negligence if it had not caused death."

[18]Section 26-22-3 provides, in relevant part:

> "(a) Prohibition. Except as provided in subsection (b), no person shall intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable.
>
> "(b) Exceptions.
>
> "(1) It shall not be a violation of subsection (a) if an abortion is performed by a physician and that physician reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman. No abortion shall be deemed authorized under this paragraph if performed on the basis of a claim or a diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible impairment

constrained by the United States Supreme Court's viability limitation for abortion set forth in Roe and its progeny, this Court has consistently affirmed Alabama's recognition of the right to life of all unborn children. In my special concurrence in Hamilton, 97 So. 3d at 737-47 (Parker, J., concurring specially, joined by Stuart, Bolin, and Wise, JJ.), I explained why the viability standard is arbitrary[19] and

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> of a major bodily function.
>
> "(2) It shall not be a violation of subsection (a) if the abortion is performed by a physician and that physician reasonably believes ... that the unborn child is not viable."

[19]The arbitrary nature of the viability standard was explained by United States Supreme Court Justice Scalia, as follows:

> "The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life 'can in reason and all fairness' be thought to override the interests of the mother. Ante, at 870. Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves."

should be abandoned altogether. As I noted in Hamilton, I am not alone.[20]

Casey, 505 U.S. at 990 n. 5 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J., and White and Thomas, JJ.).

[20]In Hamilton, I noted:

> "Numerous scholars have criticized the viability rule of Roe.[16] Today, 'there is broad academic agreement that Roe failed to provide an adequate explanation for the viability rule.' Randy Beck, Gonzales, Casey, and the Viability Rule, 103 Nw. U.L. Rev. 249, 268-69 (2009).
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> "_____
>
> "[16]Randy Beck, Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework, 51 Am. J. Legal Hist. 505, 516-26 (2011); Randy Beck, Gonzales, Casey, and the Viability Rule, 103 Nw. U.L. Rev. 249, 268-70 (2009); Paul Benjamin Linton, Planned Parenthood v. Casey : The Flight From Reason in the Supreme Court, 13 St. Louis U. Pub. L. Rev. 15, 38-40 (1993); Mark Tushnet, Two Notes on the Jurisprudence of Privacy, 8 Const. Com. 75, 83 (1991) ('[U]sing the line of viability to distinguish the time when abortion is permitted from the time after viability when it is prohibited (as Roe v. Wade does), is entirely perverse.'); John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 924-25 (1973); and Mark J. Beutler, Abortion and the Viability Standard -- Toward a More Reasoned Determination of the State's Countervailing Interest in Protecting Prenatal Life, 21 Seton Hall L. Rev. 347, 359 (1991) ('It is difficult to understand why viability should be relevant to, much less control, the measure of a state's interest in protecting prenatal life.'). See generally Douglas E. Ruston, The Tortious Loss of a

My special concurrence in Hamilton was not the first time members of this Court have criticized the viability standard. In Mack, this Court expressed its recognition of the separate and distinct existence of unborn children by quoting Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 758 (1973): "'"[M]edical authority has recognized ... that the child is in existence from the moment of conception ...."'" Mack, 79 So. 3d at 602 (quoting Wolfe, 291 Ala. at 330, 280 So. 2d at 760, quoting in turn Prosser, Law of Torts, p. 336 (4th ed. 1971)). In Wolfe, this Court criticized the viability distinction, as follows:

> "[T]he more recent authorities emphasize that there is no valid medical basis for a distinction based on viability .... These proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother."

> Nonviable Fetus: A Miscarriage Leads to a Miscarriage of Justice, 61 S.C. L. Rev. 915 (2010); Justin Curtis, Including Victims Without a Voice: Amending Indiana's Child Wrongful Death Statute, 43 Val. U.L. Rev. 1211 (2009); and Sarah J. Loquist, The Wrongful Death of a Fetus: Erasing the Barrier Between Viability and Nonviability, 36 Washburn L.J. 259 (1997); see also the sources cited by Justice Maddox in his dissent in Gentry v. Gilmore, 613 So. 2d [1241] at 1248-49 [(Ala. 1993)]."

Hamilton, 97 So. 3d at 742.

Wolfe, 291 Ala. at 330-31, 280 So. 2d at 761. Forty years later, this Court again held that there is no valid basis for the viability standard by expressly rejecting the Court of Criminal Appeals' application of the chemical-endangerment statute solely to a viable unborn child. See Ankrom, ___ So. 3d at ___. Today, we affirm this Court's holding in Ankrom.

Alabama's recognition of an unborn child's right to life at all stages of development is distinct from the vague standard delineated in Casey of "the State's 'important and legitimate interest in protecting the potentiality of human life.'" Casey, 505 U.S. at 871 (quoting Roe, 410 U.S. at 162).[21] Although subtle, the distinction is nonetheless profound. As explained above, Alabama recognizes that, from the child's earliest stage of development, the existence of an unborn child is separate from that of its mother's. Accordingly, Alabama has an interest not only in promoting a sustainable society and a culture that appreciates life, but also in "secur[ing] the blessings of liberty" by protecting

[21]See Martin Wishnatsky, The Supreme Court's Use of the Term "Potential Life": Verbal Engineering and the Abortion Holocaust, 6 Liberty U.L. Rev. 327 (2012) (analyzing the United States Supreme Court's use of the term "potential life").

the right to life inherent in the new life itself. Ala. Const. 1901 pmbl.

Consistent protection of an unborn child's right to life at every point in time and in every respect is essential to the duty of the judiciary because, as stated above, "[l]iberty finds no refuge in a jurisprudence of doubt." Casey, 505 U.S. at 844. Ironically, by affirming "the essential holding of Roe v. Wade," the plurality in Casey cast a shroud of doubt over our nation's jurisprudence by suppressing an unborn child's inalienable right to life.

II. Examples of a jurisprudence of doubt

Despite Casey's reaffirmation of the unsupported "essential holding of Roe v. Wade,"[22] asserted in the vain hope of stabilizing abortion jurisprudence, we have seen just the opposite since Casey was decided.[23] In court opinions

[22]See Hamilton, 97 So. 3d at 742-47 (Parker, J., concurring specially), for a discussion of why the viability standard delineated in Roe was, and remains, unsupportable.

[23]Chief Justice Rehnquist criticized the authors of the plurality and concurring opinions in Casey for their blind application of stare decisis:

> "Of course, what might be called the basic facts which gave rise to Roe have remained the same —– women become pregnant, there is a point somewhere, depending on medical technology, where a fetus

subsequent to Casey, unborn children are contradictorily treated as human beings at one particular point in time and in one particular respect while at the same point in time, but in another respect, are discarded as mere tissue or "products of conception." See, e.g., Carhart v. Stenberg, 192 F.3d 1142, 1146 (8th Cir. 1999), aff'd, 530 U.S. 914 (2000) (describing one method of second-trimester abortion as "remov[ing] the fetus and other products of conception"). The particular status afforded unborn children often depends entirely upon a subjective perception of them in a particular context or from a particular vantage point, rather than upon objective factors that would dispel the shroud of doubt that Casey's affirmation

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> becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to Roe will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question. And surely there is no requirement, in considering whether to depart from stare decisis in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered."

Casey, 505 U.S. at 955-56 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part, joined by White, Scalia, and Thomas, JJ.).

of Roe cast over our nation's abortion jurisprudence. Two examples demonstrating the violation of the law of noncontradiction in our nation's abortion jurisprudence follow.[24]

A. Partial-birth-abortion cases

One of the most puzzling instances of the doubtful jurisprudence resulting from Casey's affirmation of Roe is the violation of the law of noncontradiction that is exposed by a comparison of the United States Supreme Court's "partial-birth-abortion" cases of Stenberg v. Carhart, 530 U.S. 914 (2000), and Gonzales v. Carhart, 550 U.S. 124 (2007). In Stenberg, the Court struck down a Nebraska statute because it interpreted the statute to ban the two most common late-term abortion procedures. In Gonzales, the Court upheld a federal statute that banned only one of the two "equally gruesome"

[24]In addition to the examples demonstrating the violation of the law of noncontradiction that are discussed in this writing, which is limited to the context of abortion, my special concurrence in Ankrom, ___ So. 3d at ___ (Parker, J., concurring specially), illustrates how unborn children are recognized as persons in five additional areas of law -- property law, criminal law, tort law, guardianship law, and health-care law -- despite Roe's rejection of the unborn child's right to life. These provide additional examples of our abortion jurisprudence's violation of the law of noncontradiction. See also Roger J. Magnuson & Joshua M. Lederman, Aristotle, Abortion, and Fetal Rights, supra.

procedures. Stenberg, 530 U.S. at 946 (Stevens, J., concurring). As discussed below, an unborn child at a particular stage of gestation is treated as a child in Gonzales while referred to merely as "potential life" in Stenberg. This clearly violates the law of noncontradiction.

In Stenberg, an abortion provider challenged the constitutionality of a Nebraska statute providing as follows:

> "'No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.' Neb. Rev. Stat. Ann. § 28-328(1) (Supp. 1999).

"The statute defines 'partial birth abortion' as:

> "'an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.' § 28-326(9).

"It further defines 'partially delivers vaginally a living unborn child before killing the unborn child' to mean

> "'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will

> kill the unborn child and does kill the unborn child.' Ibid."

Stenberg, 530 U.S. at 921-22.

Justice Kennedy described the two abortion procedures prohibited by the statute and explained the legal challenge to the statute in his dissent:

> "The person challenging Nebraska's law is Dr. Leroy Carhart, a physician who received his medical degree from Hahnemann Hospital and University in 1973. Dr. Carhart performs the procedures in a clinic in Nebraska and will also travel to Ohio to perform abortions there. Dr. Carhart has no specialty certifications in a field related to childbirth or abortion and lacks admitting privileges at any hospital. He performs abortions throughout pregnancy, including when he is unsure whether the fetus is viable. In contrast to the physicians who provided expert testimony in this case (who are board certified instructors at leading medical education institutions and members of the American Board of Obstetricians and Gynecologists), Dr. Carhart performs the partial birth abortion procedure (D & X[25]) that Nebraska seeks to ban. He also performs the other method of abortion at issue in the case, the D & E.[26]
>
> "As described by Dr. Carhart, the D & E procedure requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina.

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[25]"D & X" is a common abbreviation for a procedure known as "dilation and extraction."

[26]"D & E" is a common abbreviation for a procedure known as "dilation and evacuation."

> Dr. Carhart uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body. The traction between the uterus and vagina is essential to the procedure because attempting to abort a fetus without using that traction is described by Dr. Carhart as 'pulling the cat's tail' or 'drag[ging] a string across the floor, you'll just keep dragging it. It's not until something grabs the other end that you are going to develop traction.' The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. Dr. Carhart agreed that '[w]hen you pull out a piece of the fetus, let's say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, ... the fetus [is] alive.' Dr. Carhart has observed fetal heartbeat via ultrasound with 'extensive parts of the fetus removed,' and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born 'as a living child with one arm.' At the conclusion of a D & E abortion no intact fetus remains. In Dr. Carhart's words, the abortionist is left with 'a tray full of pieces.'
>
> "The other procedure implicated today is called 'partial birth abortion' or the D & X. The D & X can be used, as a general matter, after 19 weeks' gestation because the fetus has become so developed that it may survive intact partial delivery from the uterus into the vagina. In the D & X, the abortionist initiates the woman's natural delivery process by causing the cervix of the woman to be dilated, sometimes over a sequence of days. The fetus' arms and legs are delivered outside the uterus while the fetus is alive; witnesses to the procedure report seeing the body of the fetus moving

> outside the woman's body. At this point, the abortion procedure has the appearance of a live birth. As stated by one group of physicians, '[a]s the physician manually performs breech extraction of the body of a live fetus, excepting the head, she continues in the apparent role of an obstetrician delivering a child.' With only the head of the fetus remaining in utero, the abortionist tears open the skull. According to Dr. Martin Haskell, a leading proponent of the procedure, the appropriate instrument to be used at this stage of the abortion is a pair of scissors. Witnesses report observing the portion of the fetus outside the woman react to the skull penetration. The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull. The process of making the size of the fetus' head smaller is given the clinically neutral term 'reduction procedure.' Brain death does not occur until after the skull invasion, and, according to Dr. Carhart, the heart of the fetus may continue to beat for minutes after the contents of the skull are vacuumed out. The abortionist next completes the delivery of a dead fetus, intact except for the damage to the head and the missing contents of the skull."

Stenberg, 530 U.S. at 958-60 (Kennedy, J., dissenting, joined by Rehnquist, C.J.(citations omitted)).[27]

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[27]Justice Kennedy found the need to supplement the majority's description of the procedures at issue in the case for the following reasons:

> "The Court's failure to accord any weight to Nebraska's interest in prohibiting partial-birth abortion is erroneous and undermines its discussion and holding. The Court's approach in this regard is revealed by its description of the abortion methods at issue, which the Court is correct to describe as 'clinically cold or callous.' The majority views the procedures from the perspective of the abortionist,

Although Nebraska argued that it intended to ban only the dilation and extraction ("D & X") procedure, the United States Supreme Court held that the wording of the statute could be interpreted to encompass the dilation and evacuation ("D & E") procedure as well. Therefore, the Court concluded that the Nebraska statute violated the United States Constitution:

> "In sum, using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D & E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional."

> rather than from the perspective of a society shocked when confronted with a new method of ending human life. Words invoked by the majority, such as 'transcervical procedures,' '[o]smotic dilators,' 'instrumental disarticulation,' and 'paracervical block,' may be accurate and are to some extent necessary; but for citizens who seek to know why laws on this subject have been enacted across the Nation, the words are insufficient. Repeated references to sources understandable only to a trained physician may obscure matters for persons not trained in medical terminology. Thus it seems necessary at the outset to set forth what may happen during an abortion."

Stenberg, 530 U.S. at 957-58 (Kennedy, J., dissenting, joined by Rehnquist, C.J. (citations omitted)).

Stenberg, 530 U.S. at 945-46. Thus, the Nebraska statute that was enacted to "prohibit a method of abortion that millions find hard to distinguish from infanticide and that the Court hesitates even to describe" was held to be an undue burden and prohibited by Casey because the description in the statute of this horrendous procedure could be read to also apply to D & E procedures. Stenberg, 530 U.S. at 983 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.). Two of the Justices who formed the majority in Stenberg recognized in a special concurrence that abortions using the D & E procedure are as "equally gruesome" as those using the D & X procedure, yet they argued that the state has no legitimate interest in prohibiting only abortions performed by D & X in its attempt to establish an ethical line between abortion and infanticide.[28]

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[28]Justice Stevens noted that the statute would be irrational for banning one method of abortion, but not the other:

> "Although much ink is spilled today describing the gruesome nature of late-term abortion procedures, that rhetoric does not provide me a reason to believe that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of 'potential life' than the equally gruesome procedure Nebraska claims it still allows. ... For the notion that either of

The irony of the idea that a state has no legitimate interest in banning one, but not all, "brutal" or "gruesome" methods of killing unborn children[29] was made evident seven years later when the United States Supreme Court issued its opinion in Gonzales. The question presented to the Court in

> these two equally gruesome procedures performed at this late stage of gestation is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational."

Stenberg, 530 U.S. at 946-47 (Stevens, J., concurring, joined by Ginsburg, J.).

[29]Justice Scalia articulated the irony of Stenberg's creation of a Constitutional right to a brutal abortion in his dissent:

> "I am optimistic enough to believe that, one day, Stenberg v. Carhart will be assigned its rightful place in the history of this Court's jurisprudence beside Korematsu[v. United States, 323 U.S. 214 (1944),] and Dred Scott[v. Sandford, 60 U.S. 393 (1856)]. The method of killing a human child —- one cannot even accurately say an entirely unborn human child —- proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion. ... The notion that the Constitution of the United States, designed, among other things, 'to establish Justice, insure domestic Tranquility, ... and secure the Blessings of Liberty to ourselves and our Posterity,' prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd."

Stenberg, 530 U.S. at 953 (Scalia, J., dissenting).

Gonzales was whether the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 ("the Act"), was constitutional.[30] Armed with the Court's dissection of the Nebraska statute in Stenberg, Congress recognized that it must clearly articulate that the Act banned only abortions performed by D & X, as opposed to the piece-by-piece dismemberment of an unborn child during an abortion by D & E, to avoid having the Act overturned by the United States Supreme Court. Thus, the Act artfully defined "partial-birth abortion" as an abortion in which the person performing the abortion

> "'deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the

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[30]Gonzales recites the history of the passage of the Act:

> "In 1996, Congress ... acted to ban partial-birth abortion. President Clinton vetoed the congressional legislation, and the Senate failed to override the veto. Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. In 2003, after this Court's decision in Stenberg, Congress passed the Act at issue here. H.R. Rep. No. 108-58, at 12-14. On November 5, 2003, President Bush signed the Act into law. It was to take effect the following day. 18 U.S.C. § 1531(a)."

Gonzales, 550 U.S. at 140-41 (some citations omitted).

> navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.'"

Gonzales, 550 U.S. at 142 (quoting 18 U.S.C. § 1531(b)(1)(A)).

The Court's majority opinion in Gonzales had a completely different tone than the majority opinion in Stenberg.[31]

[31]Writing for the majority, Justice Kennedy refrained from using the term "potential life," except when quoting Casey, in reference to the unborn children who would be protected by the Act. Martin Wishnatsky notes the significance of the Court's change in tone:

> "[Gonzales], the Court's most recent major abortion case, addressed partial-birth abortion, this time upholding a state ban. Justice Kennedy's majority opinion, quoting Casey, twice mentioned 'the State's interest in potential life.' Justice Ginsburg, in dissent, mentioned it once. But more significant than fewer mentions of 'potential life' was Justice Kennedy's adoption of new terminology to describe life in the womb. Instead of 'potential life,' he used the phrase 'the life of the fetus that may become a child.' Is this an improvement? The infant in the womb is still subject to a dehumanizing medical term -- considered less than a child. Yet somehow the departure from 'potential life' with its heavy freight of association with abortion-on-demand seems a step in the right direction. But Justice Kennedy went further, noting that the State has a legitimate purpose 'to promote respect for life, including life of the unborn.' He spoke of the 'stage of the unborn child's development,' and, quoting Casey, 'profound respect for the life of the unborn.' He twice referred to 'fetal life' and also quoted a nurse's description of the puncturing of a child's skull that used the term 'baby' eight times.

Gonzales contained the following description of the type of procedure the Act intended to ban:

> "Here is ... [a] description from a nurse who witnessed the [prohibited] method performed on a 26 1/2-week fetus and who testified before the Senate Judiciary Committee:
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> > "'"Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms -- everything but the head. The doctor kept the head right inside the uterus ....
> >
> > "'"The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and

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> "From 'potential life,' the Court has progressed to 'unborn life,' which is a significant step. Later, Justice Kennedy referred to 'the fast-developing brain of [an] unborn child, a child assuming the human form.' A child halfway out of the womb has certainly long since assumed 'the human form.' The Court's acknowledgment of the humanity of the unborn child is a labored form of intellectual birth, a 'rough beast' slouching towards Bethlehem to be born. Justice Ginsburg, in dissent, complained about the majority's new nomenclature. 'A fetus is described as an "unborn child,"' she objected, 'and as a "baby."' She has reason for concern. Once the 'potential life' misnomer is discarded, the Court's abortion jurisprudence may go with it."

Martin Wishnatsky, The Supreme Court's Use of the Term "Potential Life": Verbal Engineering and the Abortion Holocaust, 6 Liberty U.L. Rev. 327, 342-43 (2012) (footnotes omitted).

> the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.
>
> "'"The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp ....
>
> "'"He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used."'"

Gonzales, 550 U.S. at 138-39 (quoting H.R. Rep. No. 108-58, p. 3 (2003)). Such a description is difficult to read; it shocks even the most callous conscience. Yet, this is the procedure several of the Justices who formed the majority in Stenberg found to be no more gruesome than the procedure they approved in Stenberg -- D & E. See Gonzales, 550 U.S. at 181-82 (Ginsburg, J., dissenting).

In Gonzales, the Court held that the Act did not ban abortions by D & E or several other rarely used procedures. Therefore, the Court concluded that the Act was consistent with the guidelines of Casey because it did not unduly burden the ability to have an abortion.[32]

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[32]Justice Thomas wrote a short concurring opinion to "reiterate [his] view that the Court's abortion jurisprudence, including Casey and Roe v. Wade, has no basis in the Constitution" but that the he joined the Court's opinion

The United States Supreme Court's opinions in Stenberg and Gonzales cast a thick shroud of doubt over abortion jurisprudence. A reconciliation of the two opinions leads to a conclusion that a state is free "to draw a bright line that clearly distinguishes abortion and infanticide" by banning the killing of a completely intact infant mere seconds from being fully delivered so long as another, and perhaps equally gruesome, method of killing the child is permitted. Gonzales, 550 U.S. at 158. Justice Ginsburg's dissent in Gonzales notes the illogicality of banning only one method of abortion:

> "Today's ruling, the Court declares, advances 'a premise central to [Casey's] conclusion' -- i.e., the Government's 'legitimate and substantial interest in preserving and promoting fetal life.' ('[W]e must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.'). But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a method of performing abortion. See Stenberg, 530 U.S., at 930. ... In short, the Court upholds a law that, while doing nothing to 'preserv[e] ... fetal life,' bars a woman from choosing intact D & E[, i.e., D & X,] although her doctor 'reasonably believes [that procedure] will best protect [her],' Stenberg, 530 U.S., at 946, (Stevens J., concurring).

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because it "accurately applies current jurisprudence." Gonzales, 550 U.S. at 169 (Thomas, J., concurring, joined by Scalia, J.).

> "As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D & E procedure. But why not, one might ask. Nonintact D & E could equally be characterized as 'brutal,' involving as it does 'tear[ing] [a fetus] apart' and 'ripp[ing] off' its limbs. '[T]he notion that either of these two equally gruesome procedures ... is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational.' Stenberg, 530 U.S., at 946-947, (Stevens, J., concurring).
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> "Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, or a fetus delivered through medical induction or cesarean. Yet, the availability of those procedures -- along with D & E by dismemberment -- the Court says, saves the ban on intact D & E from a declaration of unconstitutionality."

Gonzales, 550 U.S. at 181-82 (Ginsburg, J., dissenting).

Although Justice Ginsburg was not arguing for a ban of all abortions, her analysis exposes a violation of the law of noncontradiction resulting from a joint reading of Stenberg and Gonzales. If an unborn child is nothing more than a piece of tissue, why should it be afforded any protection at all? On the other hand, if it does have an existence distinct from its mother's, why is it protected from having its life annihilated by one method but not all methods? The unborn

child cannot logically be a separate and distinct human for the purpose of one abortion procedure but not another. Protecting the unborn child's right to life at all stages of development would eliminate the contradictory reasoning of the Court's abortion decisions and dispel the shroud of doubt obscuring the unborn child's right to life.

B. Botched abortions

A second example of our abortion jurisprudence's violation of the law of noncontradiction is the effect that the current jurisprudence has on the prosecution of abortionists who either intentionally or negligently kill a born child after failing to kill it in the womb. This issue was thrust to the forefront of the abortion debate by the recent trial of Kermit Gosnell, a Philadelphia abortionist who was recently convicted of murdering three unwanted babies by snipping their spinal cords with scissors after they were born alive.[33] Gosnell argued that the babies were killed in the womb by an injection of the drug Digoxin and that they then had their spinal cords snipped for some other reason after

[33]Commonwealth of Pennsylvania v. Gosnell, (CP-51-CR-0001667-2011) (Pa. Ct. of Common Pleas of Philadelphia Cnty. 2013).

they were stillborn. The prosecution contended that the babies were not killed in the womb but were born alive and were then murdered by cutting their spinal cords. Witnesses testified that some of the babies whined, moved their limbs, and shrugged their shoulders before being killed. That the location or method of killing was the decisive factor is an affront to logic.

Consider a tragic hypothetical situation of two lifeless corpses lying side-by-side. One of the corpses belongs to a baby who was born alive and then killed by having its spinal cord snipped while the other baby was killed while in the womb by an injection of Digoxin. The fact that the two corpses may be virtually indistinguishable demonstrates the doubtfulness of our nation's abortion jurisprudence. Did one of the innocent babies have a right to life, while the other did not? If so, why? Both babies were distinct human beings with a genetic makeup completely separate from their mothers; both were completely dependent upon others for nourishment and care; both were intentionally killed. The only distinction between the two lifeless bodies is the subjective value, simply based upon the location and method of their demise,

that our jurisprudence of doubt affords them. It is morally indefensible to suggest that the actions taken against one child violates an inalienable right to life, while those against the other do not. Why should legal protection of an individual at a particular point in time depend entirely upon his or her subjective relationship to the killer? Such irrational protection defies logic. Recognition of a child's right to life from the earliest stages of its development would dispel the shroud of doubt from this area of jurisprudence and avoid unequal protection of the two children.

Conclusion

It is impossible for an unborn child to be a separate and distinct person at a particular point in time in one respect and not to be a separate and distinct person at the same point in time but in another respect. Because an unborn child has an inalienable right to life from its earliest stages of development, it is entitled not only to a life free from the harmful effects of chemicals at all stages of development but also to life itself at all stages of development. Treating an

unborn child as a separate and distinct person in only select respects defies logic and our deepest sense of morality.

Courts do not have the luxury of hiding behind ipse dixit[34] assertions. The United States Supreme Court has attempted to do so by setting the line for state protection of unborn children at viability in the area of abortion. "It is in fact comforting to witness the reality that he who lives by the ipse dixit dies by the ipse dixit. But one must grieve for the Constitution." Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting). To dispel the shroud of doubt shadowing our nation's abortion jurisprudence, courts must have the courage to allow the law of noncontradiction to dismantle the ipse dixit reasoning of Roe, Casey, and Stenberg and recognize a child's inalienable right to life at all stages of development. Until then, our grief is not for the Constitution alone; we also grieve for the millions of

[34]"[H]e himself said it." Black's Law Dictionary 743 (5th ed. 1979).

children who have not been afforded equal value, love, and protection since Roe.[35]

[35]It is estimated that as of January 2014 over 56 million children have been killed before birth. See The State of Abortion In the United States 27 (National Right to Life Committee, Inc., January 2014)("On the basis of the most recent reports from the U.S. Centers for Disease Control (CDC) and the private research Guttmacher Institute, National Right to Life estimates that there have been more than 56 million abortions in America since 1973 ....").

SHAW, Justice (concurring in the result).

I concur in the result. I adhere to my writing in Ex parte Ankrom, [Ms. 1110176, January 11, 2013] ___ So. 3d ___ (Ala. 2013) (Shaw, J., concurring in part and concurring in the result), in which I explain that the word "child" in Ala. Code 1975, § 26-15-3.2, plainly and unambiguously refers to both born and unborn persons.

MURDOCK, Justice (dissenting).

I concurred in this Court's decisions in Mack v. Carmack, 79 So. 3d 597 (Ala. 2011), and Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012). The proper outcome in the present case, however, is impacted by constitutional requirements of due process and related concerns regarding the construction and application of a criminal statute (e.g., a criminal statute must give clear notice of what is and is not illegal conduct). For the reasons stated in my dissenting opinion in Ex parte Ankrom,[Ms. 1110176, Jan. 11, 2013] ___ So. 3d ___ (Ala. 2013), I respectfully dissent in this case as well.