Case Nos. 19-2882, 19-3134

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., *et al.*,	:	On Appeal from the United States District Court for the Western District of Missouri
Plaintiffs-Appellees,	:	
v.	:	District Court Case No. 2:19-cv-4155-BP
GOVERNOR MICHAEL L. PARSON, *et al.*,	:	
Defendants-Appellants.	:	

BRIEF OF *AMICI CURIAE* OHIO AND 21 OTHER STATES IN SUPPORT OF THE DEFENDANTS-APPELLANTS

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
Ohio Solicitor General
**Counsel of Record*
DIANE R. BREY
STEPHEN P. CARNEY
Deputy Solicitors General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@ohioago.gov

Counsel for State of Ohio

(Additional counsel listed on signature block)

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STATEMENT OF *AMICI* INTEREST

This case presents the question whether the United States Constitution guarantees a right to abort children based on their perceived genetic inferiority. The question should not have to be asked. But the question has been asked, and this Court has answered it in the affirmative. *See Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021); *see also Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 310 (7th Cir. 2018). This case gives the Court a chance to correct course. It should do so, making clear that nothing in the Constitution's text or the Supreme Court's case law establishes the right to a eugenic abortion. And the Court should move with all deliberate speed to provide that clarification. Centuries of painful lessons show the dangers that come with using law to protect the practice of evaluating human worth based on genetic traits.

The *amici* States are filing this brief because they have a "compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring.); *accord Preterm-Cleveland v. McCloud*, 994 F.3d 512, 518 (6th Cir. 2021) (*en banc*) & *id.* at 538–39 (Griffin, J., concurring). They cannot accept that a

Constitution designed to form "a more perfect Union" and to "establish Justice" bars them from doing so.

SUMMARY OF ARGUMENT

The United States Constitution guarantees equality under the law. *See* U.S. Const. amend. XIV, §1. The Constitution *does not* create a right to abort a child on the ground that, once she is born, she will exhibit "unwanted" traits. Nor does Supreme Court case law. True, the high court has held that women have a right to obtain an abortion before the unborn child is "viable." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality op.); *see also Roe v. Wade*, 410 U.S. 113 (1973). But the question whether women have a right to *an* abortion—a right to decide "whether to bear or beget *a* child," *Casey*, 505 U.S. at 859 (emphasis added)—is distinct from the question whether a women may abort a *particular* child based on the supposed undesirability of *that child's* genetic traits. And so the Court has never determined whether the Constitution creates a right to a trait-selective or "eugenic" abortion. That is the question this case presents.

Because the Supreme Court has yet to address the eugenic-abortion question, its past reasoning in cases about the right to an abortion is largely irrelevant. The Court justified creating the right to an abortion by balancing competing interests. On the one hand, it said, every woman is entitled to privacy in deciding

whether to bear or beget a child. *Roe*, 410 U.S. at 153. On the other hand, abortion implicates the States' interests "in safeguarding health, in maintaining medical standards, and in protecting potential life." *Id.* at 154. Balancing these interests, the Court determined that the States' interests, at least before viability, are not strong enough to justify a prohibition of abortion. *Id.* at 153–54; *Casey*, 505 U.S. at 846–53.

Eugenic abortions implicate different individual and state interests. On the one hand, eugenic abortions implicate the individual's interest in "choosing a child's genetic makeup," which is distinct from the interest in deciding whether to have a child at all. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of rehearing *en banc*). On the other hand, eugenic abortions implicate state interests that abortions generally may not. Here are three such interests: (1) "protecting vulnerable groups," *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); (2) protecting "the integrity and ethics of the medical profession," *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 518 (6th Cir. 2021) (*en banc*); and (3) protecting "families from coercive healthcare practices that encourage Down-syndrome-selective abortions," *id.*

In sum, eugenic abortions implicate interests different from those involved in abortions generally. Thus, the balancing of interests in the Supreme Court's abortion cases does not dictate the answer to the question presented. Given that, lower courts, including this one, should follow the Constitution.

With all this background, return to the precise issue in this case: Has Missouri violated the United States Constitution by prohibiting doctors from performing abortions that they know are motivated by a Down syndrome diagnosis? Mo. Rev. Stat. 188.038.2. The answer is "no." The Constitution requires federal courts, including this Circuit, to "decide every case faithful to the text and original understanding of the Constitution, to the maximum extent permitted by a faithful reading of binding precedent." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing *en banc*). The Constitution as originally understood conferred no right to a eugenic abortion. And a faithful reading of the Supreme Court's cases does not compel the conclusion that laws prohibiting eugenic abortions are unconstitutional. As such, the District Court erred when it preliminarily enjoined Missouri's law. The *en banc* Court should reverse.

ARGUMENT

Missouri law prohibits a doctor from performing an abortion if the doctor "knows that the woman is seeking the abortion solely because of a prenatal diagno-

sis, test, or screening indicating Down Syndrome or the potential of Down syndrome in an unborn child." Mo. Rev. Stat. 188.038.2. This case presents the following question: Does Missouri's prohibition on the knowing performance of Down-syndrome-selective abortions violate the Constitution?

The answer is "no." Lower courts are dutybound to "decide every case faithful to the text and original understanding of the Constitution, to the maximum extent permitted by a faithful reading of binding precedent." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing *en banc*). Because neither the Constitution nor binding precedent recognizes any right to a eugenic abortion, this Court must not recognize any such right.

1. The United States Constitution is "the supreme Law of the Land." U.S. Const. art. VI, cl.2. As a result, legislative acts that violate the Constitution are "void." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The same is true of executive actions that violate the Constitution. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952). Curiously, the rules are different for the judiciary: judicial rulings that misinterpret the Constitution may persist as binding precedent. The Supreme Court, for example, sometimes invokes *stare decisis* to justify continued adherence to incorrectly decided precedents. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443 (2000). And lower courts must always adhere to any

Supreme Court precedent that "directly controls, leaving to" the Supreme Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Stare decisis stands in tension with constitutionalism. For if the Constitution is the law of the land, what justifies courts in consciously deciding not to follow it? There are plausible answers. For example, good evidence suggests that the judicial power Article III vests in federal courts includes the power to adhere to precedent. *See* John O. McGinnis and Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U. L. Rev. 803 (2009). And the very notion of "inferior" courts, *see* U.S. Const. art. III, §1, seems to justify the lower courts' adherence to Supreme Court precedent, *see* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 833 (1994).

But whatever power the judiciary has to *adhere* to wrongly decided constitutional precedents, it has no power—and surely no duty—to *extend* those precedents. After all, to extend a wrongfully decided precedent is to violate the Constitution where precedent does not compel the violation. If the Constitution (as opposed to judicial decisions interpreting it) is to remain the supreme law of the land, then courts must "decide every case faithful to the text and original understanding of the Constitution, to the maximum extent permitted by a faithful reading of bind-

ing precedent." *Rettig*, 993 F.3d at 409 (Ho, J., dissenting from denial of rehearing *en banc*). This means that, "if a faithful reading of precedent shows it is not directly controlling, the rule of law may dictate confining the precedent, rather than extending it further." *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229*, 974 F.3d 1106, 1117 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing *en banc*). In sum, when "no holding of the Supreme Court" dictates the answer to a constitutional question, the court's "duty [is] to 'interpret the Constitution in light of its text, structure, and original understanding.'" *Preterm*, 994 F.3d at 543 (Bush, J., concurring in the judgment) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring in the judgment)).

The duty not to extend wrongfully decided precedents is not a duty to evade them. Courts cannot "create razor-thin distinctions to evade precedent's grasp." *NLRB*, 974 F.3d at 1117 (Bumatay, J., dissenting from denial of rehearing *en banc*) (quotation omitted). And lower courts cannot adopt "a cramped reading" of precedent in order to "functionally overrule" it. *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 814 (6th Cir. 2020). But if a "faithful reading" of precedent does not resolve a constitutional question, courts should resolve that question "in light of and in the direction of the constitutional text and constitutional history." *Free Enter.*

Fund v. PCAOB, 537 F.3d 667, 698 (2008) (Kavanaugh, J., dissenting), *rev'd* 561 U.S. 477.

2. These principles reveal the District Court's error. More precisely, they confirm that the Supreme Court's cases recognizing a right to an abortion do not justify lower courts in recognizing a right to a eugenic abortion.

The *amici* States begin by acknowledging the obvious: the Supreme Court's abortion cases—for example, *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)—bind the lower courts, including this one. The question this Court faces, however, is not whether those cases are binding. Instead, the question is whether they require holding that the Constitution protects the right to a eugenic abortion. And the answer to that question is "no."

Again, lower courts must adhere to the Constitution unless a fair reading of binding precedent forbids them from doing so. *Rettig*, 993 F.3d at 409 (Ho, J., dissenting from denial of rehearing *en banc*). The first step in the analysis is easy: neither the text nor the original understanding of the Constitution confers a right to abort a baby based on the perceived undesirability of her genetic traits. Indeed, for the first two centuries of the country's existence, few seriously contended that the Constitution contained a right to an abortion at all. True, in 1973, the Supreme

Court held that the Constitution guarantees such a right. *Roe*, 410 U.S. at 152–53. But in doing so, the Court made no attempt to ground its ruling in the Constitution's text or original meaning. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 947 (1973).

Because the Constitution's text does not protect the right to a eugenic abortion, the lower courts may not recognize such a right unless they are compelled to do so "by a faithful reading of binding precedent." *Rettig*, 993 F.3d at 409 (Ho, J., dissenting from denial of rehearing *en banc*). No faithful reading of precedent compels that result. "Judicial opinions are not statutes; they resolve only the situations presented for decision." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of rehearing *en banc*). And critically, "[n]one of" the Supreme Court's "abortion decisions" considered whether "states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." *Id.* Neither *Roe* nor any other precedent considered whether the right to an abortion—the right to decide "whether to bear or beget a child," *Casey*, 505 U.S. at 859—includes a right to decide whether to bear or beget a particular child because of that child's genetic traits. Indeed, *Roe* expressly rejected the argument that a woman has the right "to terminate her pregnancy … for whatever reason she alone choos-

es." *Roe*, 410 U.S. at 153. Thus, *Roe* limited its own holding in a way that forecloses reading the case as creating a right to obtain an abortion because of a child's genetics.

No doubt, a "faithful reading" of precedent requires its application to materially identical questions, including questions the Supreme Court never specifically grappled with. But as Judge Sutton has recognized, nothing in the reasoning of the Supreme Court's abortion cases "indicates that a State may not ban doctors from knowingly performing an abortion premised on the undesirability of" the unborn child's "disability, sex, or race." *Preterm*, 994 F.3d at 536 (Sutton, J., concurring). To the contrary, the reasoning the Supreme Court has offered to justify creating the abortion right has little relevance to the question whether there is a right to abort a child *because of* her genetic makeup. *Roe* created the right to an abortion, and other cases perpetuated it, based on an *ad hoc* balancing of the interests abortion implicates. On the one side, there is the mother's privacy interest regarding the decision whether to bear or beget a child. On the other side, there are the States' interests "in safeguarding health, in maintaining medical standards, and in protecting potential life." *Roe*, 410 U.S. at 154. The balance of *these* interests, the Court explained, justified recognizing some right to decide whether to terminate a pregnancy. *Id.* at 153–54; *Casey*, 505 U.S. at 846–53.

Critically, however, eugenic abortions present different interests on both sides of the scale. Begin with the States' interests—in particular, three state interests that eugenic abortions implicate and that *Roe* never discussed.

First, prohibitions on eugenic abortions promote the State's significant interest in "protecting vulnerable groups." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). The practice of selectively aborting children with a particular trait sends an undeniable message to those living with the trait that they are less valuable, and that they are less desirable, than others. Consider, for example, the practice of sex-selective abortions. Some nations disproportionately abort girls. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1791 (2019) (Thomas, J., concurring). Is there any doubt this practice tells females that they "are, as a group, less valuable and unwanted"? April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice*?, 10 Wis. Women's L.J. 161, 185 (1995). Is there any doubt that this message leads to (or perpetuates) worse treatment of girls and women? Of course not. That is why, until recently, the Ethics Committee of the American College of Obstetricians and Gynecologists, like the United Nations, opposed the practice. *Planned Parenthood*, 888 F.3d at 315 n.5 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part). And it is pre-

sumably why abortion activists have tended not to challenge prohibitions on sex-selective abortions.

Just as sex-selective abortions demean females, Down-syndrome-selective abortions demean people with Down syndrome. The States have a quite-obvious interest in counteracting that by sending an "unambiguous moral message" that "Down syndrome children, whether born or unborn, are equal in dignity and value to the rest of us." *Preterm*, 994 F.3d at 518. And the need to do so is quite urgent. In America, *two-thirds* of unborn children diagnosed with Down syndrome are aborted. *Box*, 139 S. Ct. at 1790–91 (Thomas, J., concurring). The rates are even higher in other countries, including in European countries not so different from our own. *See id.* This means that the phenomenon of eugenic abortions targeting children with Down syndrome is very real. It is happening already. And as medical technology enhances our ability to detect a child's traits in the womb, there will be more opportunities for the trend to worsen.

None of this should be read to suggest, and none of this requires this Court to infer, that women who obtain Down-syndrome-selective abortions are motivated by discriminatory *animus*. *Contra, e.g.*, *Preterm*, 994 F.3d at 568 (Gibbons, J., dissenting); *id.* at 589 (Donald, J., dissenting). Rather, the point is that, regardless of any individual mother's intent, trait-selective abortions reveal a societal preference

for children with or without certain traits—a preference that stigmatizes those exhibiting the "unwanted" traits.

Second, laws like Missouri's play a critical role in "protecting the integrity and ethics of the medical profession." *Glucksberg*, 521 U.S. at 731; *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). It is hard to imagine anything more damaging to the medical profession than a re-emergence of the early twentieth century's pro-eugenics mindset. *See* Jeffrey S. Sutton, *51 Imperfect Solutions* 87–91 (2018). But today, medical ethicists, along with foreign governments, openly advocate Down-syndrome-selective abortions. *See, e.g.*, David A. Savitz, *How Far Can Prenatal Screening Go in Preventing Birth Defects?*, 152 J. of Pediatrics 3, 3 (2008). And academic research confirms that doctors—sometimes subtly, sometimes not so subtly—pressure women to abort children with Down syndrome. *See, e.g.*, Karen L. Lawson et al., *The Portrayal of Down Syndrome in Prenatal Screening Information Pamphlets*, 34 J. Obstet. Gynaecol. Can. 760, 762, 764 (2012); Linda L. McCabe & Edward R.B. McCabe, *Down Syndrome: Coercion and Eugenics,* 13 Genetics in Medicine 708, 709 (2011). "An industry associated with the view that some lives are worth more than others is not likely to earn or retain the public's trust." *Preterm*, 994 F.3d at 518 (alteration omitted). Certainly, the profession is not likely to earn the trust of people who bear, or whose loved ones bear, the disapproved-of traits.

Nor is it likely to earn the trust of others with conditions or traits that might similarly be deemed undesirable, some of whom may be among those most in need of medical care. Laws like Missouri's, by preventing the medical profession from being associated with these heinous perspectives, protects the public's faith in the practice of medicine.

Sadly, the reemergence of eugenic thinking is not confined to the medical profession. One other learned profession—the legal profession—is similarly afflicted. Anyone inclined to disagree ought to consult the District Court's opinion in this very case. That court, relying on "[c]ommon understanding and judicial notice," declared that "a Down syndrome diagnosis … would often be received with dismay by a pregnant woman and any family members." *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 408 F. Supp. 3d 1049, 1052 (W.D. Mo. 2019). This statement—the correctness of which the District Court deemed too obvious for evidence—reflects "the very discrimination that Missouri seeks to prevent." Panel op. 19 (Stras, J., dissenting). One hears in the District Court's phrasing "the distant echo of the sorry case of *Buck v. Bell*." *Preterm-Cleveland v. Himes*, 940 F.3d 318, 326 (6th Cir. 2019) (Batchelder, dissenting), *vacated* 994 F.3d 512. In *Buck*, the Supreme Court wholeheartedly embraced the eugenic movement in an opinion rejecting the constitutional challenges of a woman

who sought not be sterilized based on her (supposed) intellectual deficits. It notoriously declared: "Three generations of imbeciles are enough." 274 U.S. 200, 207 (1927). That statement, which appears in an opinion that *eight justices* joined, reflects the culmination of a decades-long movement that succeeded in persuading too many Americans to prioritize genetic fitness over shared humanity. *See* Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* (2016). It is fair to wonder whether the appearance of a similar statement in another judicial opinion almost a century later reflects a similarly widespread understanding of the relationship between genetics and human worth.

Finally, laws like Missouri's protect "families from coercive healthcare practices that encourage Down-syndrome-selective abortions." *Preterm*, 994 F.3d at 518. "Empirical reports from parents of children with Down syndrome attest that their doctors explicitly encouraged abortion or emphasized the challenges of raising children with Down syndrome." *Id.* "Academic literature" backs this up, confirming that health professionals give families "inaccurate and overly negative information, perceivably intended to coerce a woman into a decision to terminate her pregnancy if the fetus is diagnosed with Down syndrome." *Id.* (quotations omitted). Missouri's law, by prohibiting doctors from performing abortions they *know* are Down-syndrome-selective, helps counteract this. Any doctor who pressures a

woman to abort because of Down syndrome is more likely to know the woman's reason, and so more likely to be prohibited by Missouri's law from performing the abortion. This decreases the incentive for doctors to pressure women into having eugenic abortions. And to the extent this law leads the industry to separate abortion counseling from abortion performance, it will increase the space for women to decide, without a doctor's pressure, whether an abortion really is in her best interest.

As all this shows, eugenic abortions implicate significant state interests—interests distinct from, and in addition to, those relevant to abortion generally. And they implicate different *individual* interests, too. A mother's interest in obtaining a eugenic abortion does not implicate the question "whether to bear or beget a child." *Casey*, 505 U.S. at 859. Instead, the only interest implicated is the interest in bearing or begetting a particular child, or a child with (or without) particular traits. The difference matters. Few would question, for example, the constitutionality of a law prohibiting women from choosing their children's traits through preconception genetic manipulation. *Planned Parenthood*, 917 F.3d at 536 (Easterbrook, J., dissenting from denial of rehearing *en banc*). Yet that law burdens the mother's interest in having a child with particular traits to a similar degree as a law

prohibiting eugenic abortions. If the one law undermines no fundamental privacy interest, it is hard to see how the other could.

For what it is worth, there is no evidence that laws like Missouri's impose any meaningful burden on the ability to obtain a pre-viability abortion generally. In fact, after Ohio prevailed in upholding its anti-eugenics law, *Preterm*, 994 F.3d 512, the challengers declined to even petition for *certiorari*. They instead returned to district court, where they are no longer seeking broad, facial relief. *See* Resp. in Opp. to Defts' Mot. for Judgment on the Pleadings and Cross-Mot. for Partial Judgment on the Pleadings, *Preterm-Cleveland v. McCloud*, No. 18-cv-109, R.49 (June 17, 2021). The law has now been in force for months. Surely if such laws brought about the burdens that abortion advocates claim to fear, the Ohio challengers would not have given up without exhausting their appeals.

All told, these different interests show that no Supreme Court precedent establishes a right to a eugenic abortion. The Supreme Court has never considered, and the reasoning in its cases has little relevance to, this issue. While the Court recognized the right to abortion generally based on an *ad hoc* balancing of certain interests, those interests are different than the state and individual interests implicated by the legality of eugenic abortions.

Because no Supreme Court precedent speaks to the permissibility of State laws prohibiting doctors from performing eugenic abortions, "a faithful reading of binding precedent" does not dictate the answer to the question presented. *Rettig*, 993 F.3d at 409 (Ho, J., dissenting from denial of rehearing *en banc*). Thus, this Court should decide this case based on the "text and original understanding" of the Constitution. *Id.* Because Missouri's law is inarguably constitutional under the text and original understanding of the Constitution, the Court should reverse the District Court's decision preliminarily enjoining that law. In so doing, it would prevent the Supreme Court's abortion precedents from further metastasizing, while simultaneously providing guidance on the role of vertical precedent in a system governed by a written constitution.

CONCLUSION

The Court should reverse and vacate the District Court's judgment enjoining Mo. Rev. Stat. 188.038.2.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS*
Ohio Solicitor General
**Counsel of Record*
DIANE R. BREY
STEPHEN P. CARNEY
Deputy Solicitors General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@ohioago.gov

STEVE MARSHALL
Alabama Attorney General

TREG R. TAYLOR
Alaska Attorney General

MARK BRNOVICH
Arizona Attorney General

LESLIE RUTLEDGE
Arkansas Attorney General

CHRISTOPHER M. CARR
Georgia Attorney General

LAWRENCE G. WASDEN
Idaho Attorney General

THEODORE E. ROKITA
Indiana Attorney General

DEREK SCHMIDT
Kansas Attorney General

DANIEL CAMERON
Kentucky Attorney General

JEFF LANDRY
Louisiana Attorney General

LYNN FITCH
Mississippi Attorney General

AUSTIN KNUDSEN
Montana Attorney General

DOUGLAS J. PETERSON
Nebraska Attorney General

WAYNE STENEHJEM
North Dakota Attorney General

JOHN M. O'CONNOR
Oklahoma Attorney General

ALAN WILSON
South Carolina Attorney General

JASON RAVNSBORG
South Dakota Attorney General

HERBERT H. SLATERY III
Attorney General and
Reporter of Tennessee

KEN PAXTON
Texas Attorney General

SEAN D. REYES
Utah Attorney General

PATRICK MORRISEY
West Virginia Attorney General

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I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume for an *amicus* brief supporting an appellant and contains 4,015 words. *See* Fed. R. App. P. 32(a)(7)(B)(i), 29(a)(5).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
Benjamin M. Flowers
Ohio Solicitor General

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Benjamin M. Flowers
Ohio Solicitor General