**No. 17-13561**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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REPRODUCTIVE HEALTH SERVICES, et al.,
*Plaintiffs-Appellees*

v.

DARYL D. BAILEY, et al.,
*Defendants-Appellants*

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On Appeal from the United States District Court for the
Middle District of Alabama
(No. 2:14-cv-01014-SRW)

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# BRIEF OF *AMICI CURIAE* THE STATES OF TENNESSEE, ALASKA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Eleventh Circuit Rules 26.1-1, 28-1, and 29-2, the *Amici* States certify that the Certificate of Interested Persons filed by Defendants-Appellants on July 21, 2021, is complete with the following exceptions:

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## INTERESTS OF *AMICI CURIAE*

*Amici Curiae*—the States of Tennessee, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia[1]—have a significant interest in the issues presented by Alabama's petition for rehearing en banc. *Amici* have a strong interest in ensuring that federal courts adhere to the jurisdictional limits established by Article III. In addition to safeguarding the separation of powers, those limits further federalism principles by reserving for the States "a residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting The Federalist No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961)) (enumerating Article III, § 2 as one of the constitutional provisions that "established a system of dual sovereignty" (quotation marks omitted)). For state courts, that residual sovereignty includes the authority to decide issues of federal law. *See id.* at 907. The panel's mistaken conclusion that a federal court's decision on an issue of federal law is *binding* on state courts contravenes well-settled precedent and undermines state sovereignty.

*Amici* also have a strong interest in ensuring that federal courts evaluate the constitutionality of state abortion regulations under the correct legal standard. The

[1] *Amici* file this brief pursuant to Federal Rule of Appellate Procedure 29(b)(2).

panel erroneously invalidated Alabama's judicial bypass procedures by purporting to balance the laws' benefits against their burdens. But "the weighing of costs and benefits of an abortion regulation" is a job for legislators, not the courts. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in the judgment). As Chief Justice Roberts' controlling opinion in *June Medical* made clear, a federal court may enjoin a state abortion regulation only if it lacks a rational basis or poses a "substantial obstacle" to abortion. *Id.* at 2137. The panel's insistence that the balancing approach "continues to bind" this Court even after *June Medical* warrants immediate review. Op. 32 n.6.

## ARGUMENT

### I. En Banc Review Is Warranted Because the Panel Opinion Infringes State Sovereignty.

Alabama's en banc petition persuasively explains why the panel's jurisdictional holding was incorrect. *Amici* are particularly concerned about the panel's assertion that "Alabama courts are bound by a federal court's determination that a state statute violates the federal constitution" and would therefore be obligated to abide by a federal court's judgment that the Alabama's judicial bypass procedures are unconstitutional. Op. 19 n.3. That assertion contravenes precedent and is wholly inconsistent with the federalism principles Article III embodies.

The panel's erroneous conclusion that state courts are bound by a lower federal court's judgment on an issue of federal law conflicts with binding circuit and

Supreme Court precedent and a legion of other decisions by this Court's sister circuits and state supreme courts.

In *Lewis v. Governor of Alabama*, 944 F.3d 1287 (11th Cir. 2019), this Court, sitting en banc, dismissed on jurisdictional grounds a lawsuit against Alabama's Attorney General in which private employees challenged a state law that prevented local governments from adopting a minimum wage higher than the State's. This Court reasoned that relief against the Attorney General would not redress the plaintiffs' injury because the Attorney General had no authority to enforce the state law, and the mere possibility that private employers—or the state courts that would adjudicate disputes between private employers and employees—would voluntarily abide by a federal court's order was not sufficient to establish jurisdiction. *See id.* at 1301-05. This Court explained that a "federal-court judgment declaring [the state law] invalid" would not bind state courts, since the "only federal court whose decisions bind state courts is the United States Supreme Court." *Id.* at 1302 (quoting *Doe v. Pryor*, 344 F.3d 1282, 1286 (11th Cir. 2003)); *see also Glassroth v. Moore*, 335 F.3d 1282, 1302 n.6 (11th Cir. 2003).

The Supreme Court likewise has held that "state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *see also Arizonans for Official English v.*

*Arizona*, 520 U.S. 43, 58 n.11 (1997). As Justice Thomas put it in his concurrence in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), "neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation." *Id.* at 376. To the contrary, "[i]n our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located." *Id.*; *see also Steffel v. Thompson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring).

This Court's sister circuits have reached the same conclusion. *See, e.g.*, *Wofford v. Woods*, 969 F.3d 685, 688 (6th Cir. 2020) ("[T]he state courts are not bound by the federal appellate courts' decisions on constitutional questions."); *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 959 (8th Cir. 2015) ("Arkansas courts are not bound . . . to accept the decision of an inferior federal court on the meaning of the federal Constitution."); *Evans v. Thompson*, 518 F.3d 1, 8 (1st Cir. 2008) ("State courts are not bound by the dictates of the *lower* federal courts . . . ."); *Magouirk v. Phillips*, 144 F.3d 348, 361 (5th Cir. 1998) ("[T]he Louisiana state courts are not bound by Fifth Circuit precedent when making a determination of federal law."); *Powers v. Southland Corp.*, 4 F.3d 223, 235 (3d Cir. 1993) ("[T]he state appellate courts are not legally bound to follow [a] federal district court's decision."); *Bromley v. Crisp*, 561 F.2d 1351, 1354 (10th Cir. 1977) (State

courts "may express their differing views on . . . federal questions until we are all guided by a binding decision of the Supreme Court."); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970) ("[T]he state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority . . . ." (quotation marks omitted)); *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965) (State courts "are not obliged" to "follow the decisions of the Court of Appeals whose circuit includes their state[.]"). *But see Yniguez v. Arizona*, 939 F.2d 727, 736 (9th Cir. 1991) (expressing "serious doubts as to the wisdom" of the "view that the state courts are free to ignore decisions of the lower federal courts on federal questions" but acknowledging that it has "gained considerable acceptance").

And so too has nearly every state supreme court to consider the question. "[T]he courts of at least 46 states and the District of Columbia regard federal-court precedent" on issues of federal law "as not binding on the state court." Bryan A. Garner et al., The Law of Judicial Precedent 536 (2016); *see also* Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 Notre Dame L. Rev. 235, 251 & n.111, 280-81 (2014) (collecting cases). That includes the Alabama Supreme Court, which has unequivocally held that Alabama courts are "not bound by decisions of the United

States Courts of Appeals or the United States District Courts." *Ex parte Johnson*, 993 So. 2d 875, 886 (Ala. 2008).

The panel did not even acknowledge these contrary precedents. And the only case it cited to support its outlier position—the Supreme Court's decision in *Printz*, Op. 19 n.3—involved a completely different issue. *Printz* held that Congress may not compel a State's executive officials to administer federal laws. 521 U.S. at 933-34. In reaching that conclusion, the Court distinguished its earlier holding in *Testa v. Katt*, 330 U.S. 386 (1947), as standing only for the proposition that "state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause." *Printz*, 521 U.S. at 928. The proposition that state courts cannot refuse to *apply* federal law of course tells us nothing about whether, in applying that law, they must follow lower federal-court decisions.

The Constitution's text, structure, and history make clear that state courts possess inherent and independent authority to decide issues of federal law. Article III, § 1 of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This provision was the product of the so-called Madisonian Compromise, which closed the gap "between those who thought that the establishment of lower federal courts should be constitutionally mandatory and those who thought there should be no federal courts

at all except for a Supreme Court with, *inter alia*, appellate jurisdiction to review state court judgments." Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 319 (5th ed. 2003). Key to this compromise was the understanding that state courts would retain what Alexander Hamilton called their "primitive jurisdiction" to adjudicate claims arising under federal law, even after the establishment of lower federal courts. The Federalist No. 82, at 427 (A. Hamilton) (George W. Carey & James McClellan eds. 2001); *see also Haywood v. Drown*, 556 U.S. 729, 747 (2009) (Thomas, J., dissenting) (noting the "Constitution's implicit preservation of state authority to entertain federal claims").

State courts thus "have inherent authority" to "adjudicate claims arising under the laws of the United States" and are "presumptively competent" to do so. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *see also Claflin v. Houseman*, 93 U.S. 130, 140 (1876) (noting the "prevalent opinion which existed, that the State courts were competent to have jurisdiction in cases arising wholly under the laws of the United States"). The Supreme Court has consistently expressed confidence in the ability of state courts to "render correct decisions on constitutional issues." *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *see also Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). And only the Supreme Court—not federal district courts or courts of appeals—may exercise appellate authority to reverse or modify a state court's decision. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284-85 (2005)

(discussing origins of *Rooker-Feldman* doctrine). The notion that state courts are *bound* to follow lower federal-court determinations about federal law cannot be reconciled with the historical role of state courts as coequal sovereign actors.

By denying state courts their inherent authority and competency to adjudicate federal claims without assistance from lower federal courts, the panel adopted exactly the sort of "dim . . . view of Alabama's judges" that it tried to disclaim. Op. 19. This Court should grant rehearing en banc to correct that view and the panel's related jurisdictional holding.

## II. En Banc Review Is Warranted Because the Panel Applied the Wrong Legal Standard.

En banc review is also needed because the panel applied the wrong legal standard in evaluating the constitutionality of Alabama's judicial bypass procedures. In a single footnote, the panel concluded that "[t]he benefits-burdens approach to the undue burden analysis from *Whole Woman's Health* . . . continues to bind us." Op. 32 n.6. The panel surmised that the "Chief Justice's concurrence cannot fairly be considered narrower than the plurality opinion" under *Marks v. United States*, 430 U.S. 188 (1977), because "although they came to the same result, the Chief Justice and the plurality diverged on the reasoning supporting that result." Op. 32 n.6.

The panel fundamentally misunderstood *Marks*. A *Marks* analysis is only necessary "[w]hen a fragmented Court decides a case *and no single rationale explaining the result* enjoys the assent of five Justices." 430 U.S. at 193 (emphasis

added). The fact that the Chief Justice's reasoning diverged from that of the plurality merely raises the question which rationale was narrower. The panel made no attempt to answer that critical question.

Under a straightforward application of *Marks*, the Chief Justice's rationale was narrower than the plurality's and is therefore controlling. When a splintered decision holds a law unconstitutional, "the narrowest opinion is the one whose rationale would invalidate the fewest laws going forward." *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 431-32 (6th Cir. 2020). The Chief Justice understood the Supreme Court's precedents to say that an abortion regulation is unconstitutional only if it is not reasonably related to a legitimate state interest or poses a "substantial obstacle to abortion access." *June Med.*, 140 S. Ct. at 2135 (2020) (Roberts, C.J., concurring in the judgment). Under the plurality's balancing approach, meanwhile, a court could invalidate an abortion law not only for those reasons, but also if "the balance" between the law's benefits and burdens "tipped against the statute's constitutionality." *Id.* at 2120 (plurality opinion). "Because all laws invalid under the Chief Justice's rationale are invalid under the plurality's, but not all laws invalid under the plurality's rationale are invalid under the Chief Justice's, the Chief Justice's position is the narrowest under *Marks*." *EMW*, 978 F.3d at 433.

The panel's contrary conclusion squarely conflicts with decisions of the Sixth Circuit and Eighth Circuit that adopted the Chief Justice's concurrence as "the governing standard." *EMW*, 978 F.3d at 433 (quotation marks omitted); *see also Hopkins v. Jegley*, 968 F.3d 912, 916 (8th Cir. 2020) (per curiam). Although a divided panel of the Fifth Circuit held that "*June Medical* . . . does not furnish a controlling rule of law," the en banc Fifth Circuit vacated that opinion, and the issue is now pending before the full Court. *Whole Woman's Health v. Paxton*, 978 F.3d 896, 904 (5th Cir. 2020), *reh'g en banc granted, opinion vacated*, 978 F.3d 974 (5th Cir. 2020). Only the Seventh Circuit shares the panel's view that "the balancing test . . . remains binding precedent." *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 752 (7th Cir. 2021), *petition for cert. pending*, No. 20-1375 (filed Mar. 29, 2021).

The proper legal standard for evaluating the constitutionality of abortion regulations is a question of exceptional importance. As the Chief Justice explained in *June Medical*, the balancing approach is rife with problems. It asks courts "to weigh the State's interests in 'protecting the potentiality of human life' and the health of the woman, on the one hand, against the woman's liberty interest in defining her 'own concept of existence, of meaning, of the universe, and of the mystery of human life' on the other." *June Med.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851

(1992) (opinion of the Court); *id.* at 871 (plurality opinion)). But "[t]here is no plausible sense" in which anyone, let alone federal judges, can "objectively assign weight to such imponderable values" and "no meaningful way to compare them if there were." *Id.*

Unless the en banc Court grants review, future panels of this Court will be forced to adhere to the balancing approach of *Whole Woman's Health* based on nothing more than a poorly reasoned footnote that failed to meaningfully apply *Marks*. En banc review will ensure, at the very least, that the panel's footnote will have no precedential effect. If the en banc Court reaches the merits of the plaintiffs' claims, it should adopt the Chief Justice's concurrence as the controlling standard.

## CONCLUSION

This Court should grant Appellants' petition for rehearing en banc.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,595 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in proportionally spaced typeface using Times New Roman 14-point font.

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July 27, 2021

## CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for *Amicus Curiae* the State of Tennessee and a member of the Bar of this Court, certify that, on July 27, 2021, a copy of the Brief of *Amici Curiae* the States of Tennessee, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia in Support of Appellants' Petition for Rehearing En Banc was filed electronically through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

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