No. 19-1392

In The Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL.,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,

Respondents.

v.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE CENTER FOR FAMILY AND HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

C-Fam is a non-partisan, non-profit research institute in special consultative status with the Economic and Social Council of the United Nations. C-Fam experts have published influential scholarship on international human rights law as it relates to the right to life of the unborn, participate actively in the work of international human rights mechanisms, and contribute regularly to UN human rights and social policy debates. This submission transmits the accumulated knowledge and experience of C-Fam human rights scholars and practitioners on the bearing of international human rights law to the question presented of "whether all pre-viability prohibitions on elective abortions are unconstitutional."

SUMMARY OF THE ARGUMENT

The 2018 Mississippi Gestational Age Act banning most abortions after the 15th week of pregnancy, when the child *in utero* is known to suffer pain from common abortion procedures, is fully consistent with International Covenant on Civil and Political Rights ratified by the United States, which presumptively protects

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[1] All the parties have filed blanket consents with the Court to allow the submission of the amicus brief. Pursuant to Rule 37.6, counsel for amicus curiae authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity—other than amicus, its members, and its counsel—contributed monetarily to the preparation or submission of this brief.

the right to life of children in the womb (hereinafter, the "Covenant"), International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), as well as other human rights commitments and obligations of the United States.

A careful reading of the text and history of the Covenant reveals that children in the womb were never excluded from the right to life, and that, more broadly, international law does not establish a human right to abortion in any circumstance, either through treaty obligation or by custom. While the Covenant does not prescribe any express obligations to prevent the use of abortion to deprive a child in the womb of his or her right to life, sovereign nations retain wide discretion under its provisions to outlaw and regulate abortion.

Whether children in the womb may be protected under the Covenant is directly relevant to the question presented. Treaty law is the supreme Law of the Land and the Court has a constitutional responsibility to declare what the law is. The Court should make a finding of law that children in the womb are not excluded from the right to life under the Covenant, given the plain meaning of the text of the Covenant when it was ratified by the U.S., the interpretation of the Covenant by the Executive branch, and its implementation by other States who are party to the treaty, therefore, laws to protect children in the womb from being arbitrarily deprived of their right to life, regardless of viability, are consistent with the

international human rights obligations of the United States.

Because the question presented only regards the constitutionality of pre-viability abortion regulation it is not necessary for the Court to decide whether abortion is *per se* a violation of the right to life of the child under the Covenant, although it is a related question and one the Court could decide in this or a future case. The Court should nonetheless say something substantive on the topic of the status of the unborn in international human rights law without upsetting honest political debates that are legitimately carried out through democratic institutions. The Court should do this for prudential reasons, including that of shielding itself from accusations that it is avoiding foundational human rights questions and to preempt interference from international actors and foreign powers in U.S. domestic legal and political disputes.

ARGUMENT

I. STATE LAW PROTECTIONS FOR CHILDREN IN THE WOMB ARE CONSISTENT WITH THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF THE UNITED STATES.

Mississippi's Gestational Age Act, which prohibits abortion from the moment a child *in utero* is capable of suffering pain, does not contravene any obligations of the United States under the Covenant because Article

6 of the Covenant protects the right to life for "all human beings." The text of Article 6 cannot be interpreted to exclude unborn children from the right to life and the framers of the Covenant never agreed to exclude children in the womb from the right to life. In addition, subsequent implementation of the treaty by other state parties demonstrates that children in the womb are not excluded from the Covenant's Article 6 protections and the U.S. government ratified the treaty without rejecting the applicability of the Covenant's protections to children in the womb.

A. The Text of the International Covenant on Civil and Political Rights and Its Interpretation by the Executive Branch Do Not Exclude Children in the Womb from the Legal Protections Afforded by the Covenant.

The protections of the Covenant extend broadly to "all human beings" without exception. Article 6 of the International Covenant on Civil and Political Rights adopted by the United Nations General Assembly in December 1966 and entered into force in March 1976 states that "*every human being* has the inherent right to life." (Emphasis added). In addition, it states that the "inherent right to life" shall be protected by law and that "no one shall be arbitrarily deprived of his life." International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

To ascertain the scope of Article 6, it is necessary to analyze the terms of the Covenant, both individually and in context with the entirety of the Covenant. *Medellín v. Texas*, 552 U. S. 491, 506 (2008) (the interpretation of a treaty, like the interpretation of a statute, begins with its text). The Covenant's Preamble acknowledges that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The Preamble further recognizes that inalienable rights are "derive[d] from the inherent dignity of the human person."

Article 6.1 of the Covenant defines the obligations of the parties to the Covenant and asserts that all parties to the Covenant are obliged to protect the lives of all "human beings"—without exceptions. The article reads, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The text, by its categorical formulation, intended "human being" in the broadest possible sense. The terms of the Covenant contain no language qualifying the term "human being" to exclude certain types or classes of human being. In fact, to do so would undermine the purpose for which the Covenant was created as stated in the Preamble.

The child *in utero*'s right to life is also recognized in Article 6.5 of the Covenant, which states, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be

carried out on pregnant women." The plain meaning of this Article is to afford special protections to innocent children in the womb because their lives are held to be separate and apart from their mother's lives. There is no plausible reading of these provisions that would exclude children in the womb from the protections of the Covenant.

When analyzing the Covenant's text to ascertain the meaning of its provision, the Court may also take into consideration the Executive Branch's interpretation of the treaty at the time it was ratified by the U.S. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U. S. 176, 184–185, n. 10 (1982) (the Executive Branch's interpretation of a treaty "is entitled to great weight").

In this case, at the time the U.S. ratified the Covenant, it made several reservations, understandings and declarations in regard to federalism, separation of powers, and the Constitution, including reservations relating to the substantive areas of the Covenant, like free speech and the application of the death penalty to minors. *See* Resolution of Ratification: Senate Consideration of Treaty Document 95-20 (April 2, 1992). The U.S. did not make any reservations, understandings or declarations that would effectively exclude unborn children from the right to life. *Id.*

In fact, the Executive Branch ratified the Covenant with the understanding that children in the womb were *not* excluded from the right to life, regardless of the stage of development of the child *in*

utero or the concept of viability. In presenting reservations, understandings, and declarations to the U.S. Senate, the administration of President George H.W. Bush stated that "The Administration accepted the obligation (to not apply capital punishment) with respect to pregnant women," in Article 6.5 of the Covenant. S. Rep. No. 102-23 (1992). The Bush administration also stated that, "Legislation giving effect to the Covenant's prohibition against executions of pregnant women will not be required, since neither the Federal nor the state governments in fact carry out executions *until after the birth of the condemned woman's child*." *Id* (emphasis added). The Bush administration submission to the Senate does not include caveats or exceptions to Article 6.5 for cases of pre-viability abortion. Therefore, the ratification of the Covenant by the executive branch included the recognition that children in the womb presumptively have a right to life independent of their mother and independent of viability.

This understanding is consistent with the position of the U.S. government in international agreements during the time when the Covenant was being framed. At the same time the Covenant was negotiated, the 1959 Declaration on the Rights of the Child was adopted by the United Nations General Assembly, recognizing that the "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Declaration of the Rights of the

Child, G.A. Res. 1386(XIV), U.N. Doc. A/RES/1386(XIV) at preambular paragraph 3 (20 November 1959).

More recently, the U.S. government took positions in United Nations debates and in its interactions with United Nations bodies consistent with the view that children in the womb are not excluded from the Covenant's protections. For example, when the Human Rights Committee began drafting a comprehensive commentary of Article 6 of the Covenant in 2016, eventually published as General Comment 36, it called on state parties and stakeholders broadly to provide inputs. The U.S. State Department submitted comments explicitly refuting the notion that abortion could be considered a right under Article 6 of the Covenant, as in the draft of the committee's general comment. *See* Observations of the United States of America On the Human Rights Committee's Draft General Comment No. 36 On Article 6—Right to Life, October 6, 2017, made available by the Office of the United Nations High Commissioner of Human Rights at: https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx. The U.S. government's submission stated that "bearing in mind the history of the negotiations of the two Covenants, any issues concerning access to abortion (paragraph 9 of the Committee's draft) are outside the scope of Article 6." *Id*.

Similarly, the U.S. government took the same and similar views with regards to the meaning of the Article 6 on multiple occasions. *See* Section 3(C) below.

B. The *Travaux Preparatoir* of the Covenant Affirm a Wide Agreement Among the Covenant's Framers That Children in the Womb Were Not Excluded from Its Protections.

The Court may also consider a treaty's negotiating and drafting history (*travaux preparatoires*), in addition to the treaty's text and the Executive Branch's disposition, to ascertain the binding legal obligations of the United States. *Zicherman v. Korean Air Lines Co.*, 516 U. S. 217, 226. The Court's interpretation of the "specific words of a treaty" must also be "consistent with the contracting parties" shared expectations. *Air France v. Saks*, 470 U. S. 392, 399 (1985).[2]

Here, the debates surrounding the adoption of Article 6.5 of the Covenant against the application of capital punishment to a pregnant women prove that Article 6.5 was specifically included in the Covenant because the parties were concerned for the right to life of the innocent unborn child in the womb, in the same way as they were concerned about the application of the death penalty to children more broadly. Thomas Finegan, *International Human Rights Law and the*

[2] In this case, the understanding of other state parties to the treaty is based on similar interpretative methodology as that developed by this Court. In fact, this Court's principles of interpretation for a treaty are consistent with the relevant articles of 1986 the Vienna Convention on the Law of Treaties, which has near universal ratification. *See* Vienna Convention on the Law of Treaties Between State and International Organizations or Between International Organizations arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331.

"*Unborn*"*: Texts and Travaux Préparatories* 25 Tul. J. Int'l & Comp. L. (2016-2017), 89-126. Not a single delegation denied the right to life of children in the womb while voting on Article 6.5. In fact, several delegations insisted from the earliest stages of the Covenant's negotiations, without any contrary views being voiced, that children in the womb were protected by the Covenant, including in the context of debates on Article 6.5. It was under these circumstances and with this understanding that the delegates voted in favor of adopting Article 6.5 to the Covenant. *Id*.

In addition, to adopting Article 6.5, the framers of the Covenant rejected the inclusion of a Covenant obligation permitting state parties to allow for abortion in cases where a child is conceived by rape, incest, or when carrying a pregnancy to term might endanger the life of a mother. The proposal of the United Kingdom was criticized for its similarities to Nazi legislation during negotiations. It should be noted that even that proposal did *not* exclude children in the womb from the right to life. According to Finegan:

> "Paragraph 2 contained a very limited right to abortion as a derogation from the unborn child's human right to life. From the available records, it is fair to assume that the most likely reason for its rejection was concern for domestic sovereignty over the matter, a concern expressly motivated by a forthright rejection of all forms of abortion on human rights grounds." *Id*.

Throughout the period when the Covenant was negotiated from 1947 to 1966, a majority of the state parties' laws provided comprehensive and whole protections for children in the womb. With the exception of communist nations like the Soviet Union and China, most countries prohibited abortion in their criminal laws. However, even the Soviet Union and China did not deny that children in the womb were protected by the Covenant during negotiations for the Covenant, but instead they simply made arguments to defend their own sovereign prerogative to define their own abortion laws. *Id*.

In 1957 the framers of the Covenant voted to exclude a positive affirmation of the right to life "from the moment of conception" as in the Inter-American Convention on Human Rights. American Convention on Human Rights art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123. However, this vote cannot be seen as having the effect of excluding children in the womb from the Covenant's right to life. Instead, this vote should be understood in light of the rejection of the 1947 proposal to expressly derogate from the right to life to allow abortion in some circumstances. *Id*. This is because states only expressed concern about the indeterminacy of the 1957 proposal in voting against it. Overwhelmingly, they did not deny that children in the womb had a right to legal protection *Id*. The United Kingdom alone, with support from its former colony Ceylon, denied that the protections of the Covenant were meant for children in the womb. *Id*. Therefore, the rejection of an express recognition of the right to life of

children in the womb "from conception" should not be seen as excluding children in the womb from the right to life. Rather, it should be viewed as allowing state parties to the Covenant wide latitude in measures to protect the right to life of children in the womb. *Id.*

Notwithstanding, the debates about the status of unborn children during the negotiations of the Convention, the widespread understanding of the parties was that the protections of the Covenant presumptively applied to all human beings, including unborn children in the womb. This understanding is evidenced by the fact that not a single state party made a reservation, understanding, or declaration stating that the protections of the Covenant do not apply to children in the womb. *See* ICCPR. Although some state parties to the Covenant eventually made reservations, understandings, and declaration to exclude the child *in utero* from the right to life in their subsequent ratification of the Convention on the Rights of the Child, the same reservations, declarations, and understandings were *not* made at the time they entered the Covenant by parties who ratified both treaties. *See* Convention on the Rights of the Child pmbl., Nov. 20, 1989, 1577 U.N.T.S. 3 (China, France, Tunisia, Luxembourg, and the United Kingdom). Ultimately, the compromises reached by the negotiating state parties allowed nations with vastly different understandings of when and how the right to life applies in the prenatal phase to ratify the treaty.

For the aforementioned reasons, to assert or imply that unborn children are excluded from the Covenant's

Article 6 "right to life" provision is not consistent with the text and drafting history (*travaux preparatoires*) of the treaty, which must be read as presumptively allowing for the protections of the Covenant to apply to children in the womb.

C. Other State Parties to the Covenant Do Not Exclude Children in the Womb from the Protections of the Covenant.

To determine the legal effect of Articles 6.1 and 6.5, the Court may also consider "the post-ratification understanding of the contracting parties" in addition to the drafting history of a treaty to interpret its provisions. *Zicherman*, *supra*, 516 U. S. at 226. Historically, the Court has recognized, the "opinions of our sister signatories" to any treaty are "entitled to considerable weight." *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U. S. 155, 176 (1999), *Air France v. Saks*, 470 U. S. 392, 404 (1985).

Many state parties to the Covenant, including those nations with established abortion regimes, continue to understand the Covenant as including protections for children in the womb in the context of abortion legislation and regulation. Although a vast majority of state parties to the Covenant punish abortion in their penal legislation, the state parties with permissive abortion laws and regulations generally apply criminal penalties to abortions. For these state parties, the criminal penalties for abortion remain in place, but they are not enforced in those cases excepted

by laws and regulations. *See* Thomas W. Jacobson and Wm. Robert Johnston (eds.), Abortion Worldwide Report (2018), available at: https://www.globallifecampaign.com/abortion-worldwide-report (accessed July 2021).

National officials recently responded to official periodic surveys about abortion laws and policies carried out by the United Nations Secretariat among all United Nations Member States, of which a majority have ratified the Covenant. Officials from ninety-five per cent of the surveyed countries affirmed in their responses that they would enforce their criminal laws against abortion in circumstances not excepted by law. U.N. Dep't of Econ. and Soc. Affairs, Population Div. (2020), World Population Policies 2017: Abortion laws and policies—A global assessment: Highlights, U.N. Doc. No. ST/ESA/SER.A/448 (2020).

Since the establishment of the *Roe v. Wade* precedent, U.S. law permits abortion-on-demand, also referred to as "elective abortion," throughout pregnancy—notwithstanding viability. The U.S. approach to abortion regulation is much more permissive than most nations in the world, even compared to those nations that allow for legal abortion. In fact, organizations promoting abortion internationally acknowledge that abortion-on-demand after the twelfth week of a child's development *in utero* is only legal in a small minority of countries. *See* Center for Reproductive Rights, The World's Abortion Laws, https://maps.reproductiverights.org/worldabortionlaws (last visited July 15, 2021).

These laws and policies reflect the understanding of civilized nations that children should be protected before as well as after birth. This understanding is further evidenced by the Declaration of the Rights of the Child which is incorporated into the Preamble of the United Nations Convention on the Rights of the Child and which states, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, *including appropriate legal protection, before as well as after birth*. . . ." Declaration of the Rights of the Child, G.A. Res. 1386(XIV), U.N. Doc. A/RES/1386(XIV) at preambular paragraph 3 (20 November 1959). The Convention on the Rights of the Child achieved near universal ratification. *See* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, preambular paragraph 9. Only five of the one hundred and ninety-six nations that ratified the Convention on the Rights of the Child did so with a reservation against the applicability of the Covenant's protection of the right to life in Article 6 to children before birth. *See* Convention on the Rights of the Child, *supra*, at pmbl.

II. INTERNATIONAL HUMAN RIGHTS LAW DOES NOT ESTABLISH A RIGHT TO ABORTION BY CUSTOM.

Abortion proponents argue that even though the text and history of international human rights treaties do not establish a right to abortion, such a right is emerging or has already emerged by way of customary international law. This argument is not well founded.

Customary international law historically emerged in areas of law where direct interactions between sovereign states is common and expected, like admiralty law, the law of consular relations, and the laws of war. Human rights law is notably different from these areas of law because it governs the relation of a state to its own citizens and not the relationships between separate sovereign states, and therefore does not evince the exchanges and retaliation between sovereign states that is normally required for a customary international norm to emerge. Nevertheless, it is easily demonstrable that no human right to abortion has emerged by custom.

When assessing claims of customary international law Federal Courts follow the rule that, "customary international law is determined by examining state practice and *opinio juris*. . . ." *U.S. v. Bellaizac–Hurtado*, 700 F.3d 1245, 1252 (11th Cir. 2012). As discussed above in Section I(C), there is no widespread general practice against all pre-viability regulation of abortion. In fact, most civilized nations do not allow abortion-on-demand after twelve (12) weeks of gestation (*See* Jacobson and Center for Reproductive Rights, *supra*) and there is no evidence of a widely held understanding by sovereign states that abortion is a human right under any circumstance. On the contrary, there is ample evidence that abortion is not widely understood to be an international human right.

A. International Consensus is Against an International Right to Abortion.

The United Nations General Assembly in 1994 at the International Conference on Population and Development, hereinafter "ICPD," legitimized abortion as part of "sexual and reproductive health" in UN policy alongside other non-controversial elements like maternal health and family planning. Rep. of the Int'l Conf. on Pop. and Dev., Cairo, September 5-13, 1994, U.N. Document No. A/CONF.171/13/Rev.l (1994). The following terms are all defined in the ICPD agreement as generally including abortion: "sexual and reproductive health," "reproductive health," "reproductive health care," "primary health-care," and "reproductive health services." *See* ICPD 7.6 and 13.14. Abortion is also declared part of a "comprehensive" approach to reproductive health. *See* ICPD 13.15.

Notwithstanding the ICPD outcome's acknowledgment of abortion procedures as part of "sexual and reproductive health" programs, the agreement does not create or establish a *right* to abortion. In fact, the ICPD agreement includes specific caveats that cast abortion in a negative light and make it impossible to consider abortion a human right or even a humane solution to a crisis pregnancy. Specifically, it affirms that:

(1) Abortion is a subject that must be exclusively addressed in national legislation without external interference (ICPD 8.25);

(2) Governments should take appropriate steps to help women avoid abortion (ICPD 7.24);

(3) In no case should abortion be promoted as a method of family planning (ICPD 8.25);

(4) Women must be provided with post-abortion healthcare and counseling (ICPD 8.25); and

(5) The ICPD agreement does not establish any new international human right (ICPD 1.15).

Consistent with these caveats, the U.S. delegation to the ICPD denied the belief that abortion is an international human right, stating:

> "The United States Constitution guarantees every woman within our borders a right to choose an abortion, subject to limited and specific exceptions. We are committed to that principle. But let us take a false issue off the table: the United States does not seek to establish a new international right to abortion, and we do not believe that abortion should be encouraged as a method of family planning. We also believe that policy-making in these matters should be the province of each Government, within the context of its own laws and national circumstances, and consistent with previously agreed human rights standards."

See Rep. of the Int'l Conf. on Pop. and Dev., *supra*, at 177.

When the ICPD agreement was received and adopted by the United Nations General Assembly, several UN member states expressed the position that abortion was not an international right and that they did not consider it part of "sexual and reproductive health" in their national legislation. Not one UN member state responded by making a claim that abortion was, in fact, an international right pursuant to the agreement of the ICPD. *See* General Assembly, 49th Session, 92nd plenary meetings December, 19 December 1994, U.N. Doc. No. A/49/PV.92.

The consensus reached at the ICPD was re-affirmed verbatim at the Fourth World Conference on Women, held in Beijing in 1995, hereinafter "Beijing." *See* Rep. of the Fourth World Conf. on Women, Beijing, September 4–15, 1995, U.N. Doc. No. A/CONF.177/20/Rev.1, at paragraph 106(k) (1995). This consensus is still held among UN member states today.

When the United Nations General Assembly adopted the current overarching pact for international cooperation on sustainable development for the years 2015-2030, known as Sustainable Development Goals, it reaffirmed a commitment to "sexual and reproductive health" only "as agreed in accordance with" the outcomes of ICPD and Beijing and the official review outcomes of those conferences by the General Assembly. G.A. Res. 70/1, U.N. GAOR, 70th Sess., U.N. Doc. A/RES/70/1 at target 5.6 (Oct. 21, 2015). The target commitment reads, "Ensure universal access to sexual and reproductive health and reproductive rights *as agreed in accordance with the Programme of*

Action of the International Conference on Population and Development and the Beijing Platform for Action and the outcome documents of their review conferences." *Id.* (emphasis added). This language is repeated verbatim in dozens of resolutions adopted by the General Assembly each year. *See* G.A. Res. 75/49, U.N. GAOR, 75th Sess., Supp. No. 49, U.N. Doc. A/75/49 (Vol. I).

On more than one occasion, the General Assembly has had an opportunity to re-define and evaluate the term "sexual and reproductive health" in binding international human rights treaties, but it has always done so with the understanding that it did not establish an international human right to abortion. For example, in the Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (hereinafter, the "CRPD"), the states negotiating the convention once again agreed that abortion was not an international right. The report of the drafting committee transmitting to the General Assembly, included a footnote 4 to Article 25 on the right to health, clarifying that the use of the phrase "sexual and reproductive health in the convention would *not* constitute recognition of any new international law obligations or human rights." Rep. of the Ad Hoc Comm., 7th Sess., Jan. 16–Feb. 3, 2006, U.N. Doc. No. A/AC.265/2006/2 (2006) (emphasis added).

To this day, sovereign states continue to make known their position against an international right to abortion. For example, the Geneva Consensus Declaration On Promoting Women's Health and

Strengthening the Family signed by 35 UN member states affirmed that "there is no international right to abortion, nor any international obligation on the part of States to finance or facilitate abortion, consistent with the long-standing international consensus that each nation has the sovereign right to implement programs and activities consistent with their laws and policies." Annex to the letter dated 2 December 2020 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Document No. A/75/626 (December 7, 2020). There is no alternate declaration by any number of UN member states declaring the opposite, namely, that abortion is an international right. And few governments assert that abortion is an international right in official UN meetings.

B. When International Human Rights Mechanisms Promote Abortion as a Human Right, They Are Acting *Ultra Vires* and Cannot Create New Obligations.

The persistence of criminal abortion laws as well as restrictions on abortion is a testament to the enduring norm in favor of protections for children in the womb. For over two decades international human rights mechanisms have been exploited by the abortion industry lobby to promote abortion. Under the influence of this powerful lobby, UN treaty bodies have systematically read a right to abortion in various treaties and multinational agreements as part of a deliberate attempt to manufacture a right to abortion

under customary international law. Douglas A. Sylva & Susan Yoshihara, Rights by Stealth: The Role of the UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion, 8 INT'L ORG. RES. GRP.: WHITE PAPER SERIES 1, 10 (2d ed. 2009). Strategic documents of the pro-abortion legal group Center for Reproductive Rights that document this plan were introduced in the congressional record by Rep. Christopher Smith. *See* 149 CONG. REC. E2534-35 (daily ed. Dec. 8, 2003) (statement of Rep. Christopher Smith). As of this writing, almost all nine expert bodies monitoring compliance with the core United Nations human rights treaties have made recommendations to United Nations Member States to change their abortion laws to make abortion progressively more available. *See* Office of the High Commissioner for Human Rights, Information Series on Sexual and Reproductive Health, (updated 2020), available at: https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf (last visited July 15, 2021, 7:10 PM).

Despite these systematic, and ever more intrusive, attempts by international human rights mechanisms to change the abortion laws of sovereign states, most states remain committed to enforcing their abortion laws, as noted above. *See* U.N. Dep't of Econ. and Soc. Affairs, Population Div. (2020), World Population Policies 2017: Abortion laws and policies—A global assessment: Highlights, *supra*.

Treaty monitoring bodies have no authority, either under the treaties that created them or under general

international law, to create new state obligations or to interpret the treaties in ways that alter the substance of the treaties. *See* San Jose Articles, Article 6, https://sanjosearticles.com/ (last visited July 15, 2021, 7:15 PM). United Nations bodies do not have a mandate to interpret a treaty to include a right to abortion. *Id*. Such *ultra vires* acts are illegal and cannot create any new legal obligations for states parties to the treaty beyond those already assumed in the treaty. *Id*. Moreover, states should not accept treaty bodies as contributing to the formation of new customary international law. *Id*.

Treaty bodies do not have the authority to act as an international "council of revision." *See* The Records of the Federal Convention of 1787, 21 (Farrand ed. 1911), cf. Justice Black Dissent in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Under the terms of United Nations human rights treaties, the opinions of any treaty body are neither binding nor authoritative because the authority to contract and interpret treaties is a fundamental attribute of sovereignty, and no provision of any United Nations human rights treaty requires its signatories to forfeit their sovereignty to the United Nations treaty bodies in this regard. Andrew Kloster and Joanne Pedone, *Human Rights Treaty Body Reform: New Proposals*, Journal of Transnat'l Law & Policy, Vol. 22, Spring 2013.

III. THE COURT HAS THE CONSTITUTIONAL RESPONSIBILITY TO CLARIFY WHETHER THE MISSISSIPPI GESTATIONAL AGE ACT IS CONSISTENT WITH THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF THE UNITED STATES.

In accordance with its constitutional authority, the Court may declare that Mississippi's Gestational Age Act is consistent with U.S. obligations under the Covenant. Making this declaration would not only discourage interference by foreign powers and international actors in U.S. domestic debates about abortion, but would also help resolve inconsistent interpretations of U.S. Covenant obligations by the executive branch. It would also shield the Court and the U.S. government more broadly from accusations of ignoring fundamental human rights obligations.

A. Pursuant to Its Constitutional Authority, the Court May Declare Its Interpretation of Article 6 of the Covenant.

The U.S. government ratified the Covenant in 1992 and even though the Covenant is not self-executing, it still enjoys the status under the U.S. Constitution as "supreme law of the land." U.S. Const., art. VI, cl. 2. For this reason, any finding of law by the Court on the status of the child in the womb under the Covenant will pre-empt any act or decision on the same by state legislatures, executive officers, and judges.

To date, the Court has not set forth an opinion interpretating Article 6 of the Covenant. Because "it is emphatically the province and duty of the judicial department to say what the law is" (*Marbury v. Madison*, 5 U.S. 137 (1803)) and, in particular, to declare the legal understanding of treaty law and customary international law (U.S. Const., art. III, cl. 2), the Court should exercise its authority to interpret the obligations of the U.S. under the Covenant.

B. The Court Should Define U.S. Human Rights Obligations to Prevent Interference by International Human Rights Mechanisms and Foreign Powers in U.S. Domestic Abortion Debates.

The Court should declare the legal status of the child in the womb under the Covenant because foreign governments and other international actors, including official human rights mechanisms, increasingly interfere in federal and state law matters to pontificate on U.S. federal and state abortion regulation, with direct and indirect influence on legislators, executives, and judges at the federal and state levels.

For example, in an official communication sent to the U.S. Secretary of State, a group of United Nations mandate holders complained about legislation limiting access to abortion passed in the states of Alabama, Texas, Iowa, Louisiana, and Ohio during the COVID-19 pandemic. The UN mandate holders claimed this legislation "*r[an] contrary to international human*

rights standards and to the obligations undertaken by the United States, including through its ratification of the International Covenant on Civil and Political Rights (ICCPR)." OHCHR Internal Communications Clearance Form, Document No. AL USA 11/2020 (emphasis added).

This was not the first occasion where UN mandate holders interfered with the domestic legal affairs of the U.S. On June 20, 2017, a group of UN mandate holders sent an official communication to the New York state legislature urging them to pass the Reproductive Health Act (NYS S2796), reforming New York's penal and public health law regarding abortion. *See* OHCHR Internal Communications Clearance Form, Document No. OL USA 8/2017. The mandate holders sent an official communication, transmitted by the Office of the United Nations High Commissioner for Human Rights in official letterhead, which stated that "*This Act would bring New York State legislation regarding abortion more closely into compliance with international human rights standards* as regards the right of women to sexual and reproductive health, physical integrity and nondiscrimination. It would not only deviate from the negative trend on women's reproductive rights; *it would be a welcome precedent for other states in the country* and a hopeful signal that much needed reform can and should be initiated." *Id.* (emphasis added).

It would be a mistake to view these unsolicited interferences in the internal affairs of the U.S. as merely hortatory or comparable to a letter from a group representing civil society. United Nations

mandate holders are established pursuant to resolutions adopted by United Nations Member States that are legally binding on United Nations mandate holders. They hold themselves out as authoritative interpreters of human rights obligations in their official communications with governments and view these as having legal significance for *opinio juris*.

In addition, the Human Rights Committee, the treaty monitoring body established under Article 28 of the Covenant, has also criticized the U.S. government based on U.S. state and federal abortion policies. Following the submission of the U.S. report on state party compliance, as required by the Covenant, the Human Rights Committee criticized U.S. federal and state laws that do not align with "the Committee's interpretation of Article 6 of the Covenant, which according to the Committee requires that any State party's regulation of pregnancy or abortion must ensure that women and girls do not have to undergo unsafe abortions." Human Rights Committee, List of issues prior to submission of the fifth periodic report of the United States of America, U.N. Doc. No. CCPR/C/USA/QPR/5 (18 April 2019).

This interference of foreign actors is not limited to international human rights mechanisms. During the most recent Universal Periodic Review conducted by the Human Rights Council, which was established to review "the fulfilment by each State of its human rights obligations and commitments" (G.A. Res. 60/251, U.N. GAOR, 60th Sess., U.N. Doc. No. A/RES/60/251 (April 3, 2006)), foreign governments called on the

United States to change its stance on abortion funding internationally. In the 2020 Universal Periodic Review, fourteen countries (Australia, Austria, Canada, Denmark, Finland, France, Iceland, Luxembourg, Mexico, Malaysia, the Netherlands, Norway, New Zealand, and the United Kingdom) called on the U.S. to "ensure access to sexual and reproductive health" and to "remove restrictions" on abortion funding in U.S. law and policy. The Netherlands explicitly called on the executive branch of the U.S. government to "repeal the Helms Amendment and the Protecting Life in Global Health Assistance Policy and, in the interim, allow U.S. foreign assistance to be used, at a minimum, for safe abortion in cases of rape, incest and life endangerment." Human Rights Council Forty-sixth session, Report of the Working Group on the Universal Periodic Review: United States of America, U.N. Doc. No. A/HRC/46/15

Because the interference by foreign powers and actors takes place, almost exclusively, outside the purview of the judicial branch it is unlikely that the Court will ever be called upon to resolve this fundamental legal question on the human rights obligations of the United States. Unless the Court declares what the legal status of the children in the womb is under the Covenant, foreign governments and international organizations may have the final say on what the obligations of the U.S. government are under international human rights law without the U.S. Supreme Court having a chance to exercise its

Constitutional responsibility to declare what the law is.

C. The Court Should Define the Legal Status of Children in the Womb Pursuant to U.S. Treaty Obligations to Promote a Consistent Approach to Fundamental Human Rights by the Executive Branch.

Because it is the Court's responsibility to declare what the law is, including the legal obligations established by the U.S. government through treaties, the Court should define the legal status of children in the womb as an exigent prudential consideration.

Because the regulation of abortion is a question that divides the principal political parties in the United States, when Republican and Democrat presidents alternate each other, the position of the U.S. government domestically and abroad changes significantly. Nevertheless, the legal obligations of the U.S. under international human rights law should not be subject to political manipulation and should be consistent with changing executive administrations. Any difference in position taken by the U.S. government because of a political change in administration should still be consistent with the obligations of the U.S. as legally defined in binding international instruments. Providing clarity on the legal status of the child in the womb could help limit and avoid inconsistent interpretations of U.S. international obligations.

The executive branch has had inconsistent and contradictory approaches on abortion internationally in the highest international fora. In fact, the official U.S. government response to the Human Rights Committee's questions, mentioned above, under the administration of U.S. President Donald J. Trump, affirmed that the legal status of abortion was outside the scope of the Covenant, stating that "there is no international human right to abortion under the Covenant or elsewhere." Fifth periodic report submitted by the United States of America under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020, U.N. Doc. No. CCPR/C/USA/5, Annex B (January 19, 2021).

Similarly, the same U.S. administration joined thirty-four countries in a multilateral statement called the "Geneva Consensus Declaration On Promoting Women's Health and Strengthening the Family." Annex to the letter dated 2 December 2020 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Document No. A/75/626 (December 7, 2020). The statement affirmed that "there is no international right to abortion, nor any international obligation on the part of States to finance or facilitate abortion, consistent with the long-standing international consensus that each nation has the sovereign right to implement programs and activities consistent with their laws and policies." *Id*.

Consistent with these positions, the U.S. government made several statements and reservations

related to the term "sexual and reproductive health" and "reproductive rights" in the United Nations General Assembly and Economic and Social Council. The official U.S. government position during the previous administration was that general terms such as "health services" and "health-care services" were not legally defined to include "access to legal abortion" and that the U.S. held the right to implement health care programs consistent with its laws on multiple occasions. *See* Statement of the United States, General Assembly, 74th Session, 50th plenary meetings Wednesday, December 18, 2019, U.N. Doc. No. A/74/PV.50. The same administration also asserted that there was no international right to abortion. *See* Statement of the United States, General Assembly, 74th Session, 49th plenary meetings Monday, December 16, 2019, U.N. Doc. No. A/74/PV.49, *see also* Statement of the United States, General Assembly, 73rd session, 55th plenary meeting Monday, December 17, 2018, U.N. Doc. No. A/73/PV.55 ("there is international consensus that the Declaration and Programme of Action do not create new international rights, including any right to abortion"). Further, the administration did not accept references to "sexual and reproductive health" that would "promote abortion or suggest a right to abortion." *See* Statement of the U.S., General Assembly, 73rd session, 54th plenary meeting Monday, December 14, 2018, U.N. Doc. No. A/73/PV.54.

In stark contrast to the previous administration, the administration of U.S. President Joseph R. Biden, Jr. issued a Memorandum on Protecting Women's

Health at Home and Abroad, in which he declared, "It is the policy of my Administration to support women's and girls' sexual and reproductive health and rights in the United States, as well as globally." *See* Administration of Joseph R. Biden, Jr., Memorandum on Protecting Women's Health at Home and Abroad (Jan. 28, 2021). The Memorandum goes on to describe restrictions on abortion-related activities in federal law as well those added by his predecessor in the executive branch as "excessive." *Id*. The Memorandum instructs the Secretary of State to withdraw co-sponsorship and signature from the Geneva Consensus Declaration."

In another dramatic shift, the Biden Administration "supported" each of the fourteen recommendations by foreign powers to remove federal restrictions on abortion funding in the last cycle of the Universal Periodic Review, mentioned above in sub-section III(B). To "support" human rights claims such as these in the context of the Universal Periodic Review, means to accept that they are legally founded and to commit to remedy any human rights violations. *See* U.N. Human Rights Council Res. on U.N. Human Rights Council: Institution-Building, U.N. Doc. No. A/HRC/RES/5/1, June 18, 2007. Rather than reject the claim that the U.S. is obligated to promote and fund abortion because of an "international right to abortion" like the preceding administration, the Biden Administration seemingly accepted a legal obligation imposed upon it by the Universal Periodic Review.

Although, the Biden Administration has not expressly stated that abortion is an international human right, the administration's actions through the Universal Periodic Review, it's withdrawal from the Geneva Consensus Declaration and its support for terminology on "sexual and reproductive health" to include abortion, indicates the possibility of recognizing an international human right to abortion.

The shift in how U.S. administrations interpret international human rights law is even straining the normal functioning of independent U.S. government entities established pursuant to Federal Law. The U.S. Commission on Unalienable Rights, established pursuant to the Federal Advisory Committee Act, acknowledged the existence of conflicting human rights claims on issues such as abortion. *See* Report of the Commission on Unalienable Rights (2021), at 48, https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf (last visited July 22, 2021). The commission's report was "repudiated" by U.S. Secretary Anthony Blinken. In his statement announcing the "disbanding" of the commission, Secretary Blinken did not hide the differences with the previous administration on this subject, stating that, "women's rights—including sexual and reproductive rights—are human rights." Secretary Antony J. Blinken Remarks to the Press, March 30, 2021, available at: https://www.state.gov/secretary-antony-j-blinken-on-release-of-the-2020-country-reports-on-human-rights-practices/.

The aforementioned examples are just a few instances where shifting political paradigms result in confusing and inconsistent legal interpretations of treaty obligations by the U.S. State Department. The Court should define the legal status of children in the womb under international human rights law in order to promote a consistent approach to human rights between alternating administrations with widely divergent views on abortion.

CONCLUSION

Much as the framers of the U.S. Constitution compromised on slavery to allow Southern states to join the Union, the compromises reached in the Covenant and subsequent international agreements have allowed nations with vastly different understandings of when and how the right to life applies in the prenatal phase to ratify the same instruments and cooperate internationally. It behooves the Court to interpret international instruments in a way that respects the fundamental human dignity of all members of the human family without exclusion and avoid the mistakes of the past. *See Dred Scott v. Sandford*, 60 U.S. 393 (1856). For these reasons the Court should declare Mississippi's law consistent with

the obligations of the United States under international human rights law.

Respectfully submitted,

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