

Nos. 24-1576(L), 24-1600, 24-1617

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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AMY BRYANT, M.D.,  
*Plaintiff-Appellee,*

v.

TIMOTHY K. MOORE, ET AL.,  
*Intervenors/Defendants-Appellants.*

and

JOSHUA H. STEIN, IN HIS OFFICIAL CAPACITY AS  
ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA, ET AL.,  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Middle District of North Carolina,  
No. 1:23-cv-00077-CCE-LPA, Hon. Catherine C. Eagles

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**BRIEF OF *AMICUS CURIAE*, THE AMERICAN CENTER FOR LAW AND JUSTICE,  
SUPPORTING INTERVENORS/DEFENDANTS-APPELLANTS ON THE MERITS AND  
URGING REVERSAL IN PART. BRIEF FILED WITH MOTION FOR LEAVE.**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A) and Circuit Rule 26.1(b), *amicus curiae* the American Center for Law and Justice (“ACLJ”) makes the following disclosures:

1. The ACLJ is a non-profit organization that has no parent corporation.
2. No publicly held corporation or other publicly held entity owns any portion of the ACLJ.
3. The ACLJ is unaware of any publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation.
4. This case does not arise out of a bankruptcy proceeding or criminal case.

August 16, 2024

Respectfully submitted,

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## **CERTIFICATION PURSUANT TO FED. R. APP. P. 29(a)(4)(E)**

Pursuant to Fed. R. App. P. 29(a)(4)(E), the American Center for Law and Justice (“ACLJ”) affirms that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus curiae*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

## **STATEMENT OF INTEREST OF *AMICUS CURIAE***

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus curiae* briefs before the Supreme Court of the United States, this Court, and other courts around the country in cases involving a variety of issues, including the right to life. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *June Medical Servs. v. Russo*, 591 U.S. 299 (2020); *GenBioPro, Inc. v. Raynes*, No. 23-2194 (4th Cir. amicus filed Apr. 15, 2024). The ACLJ is dedicated, *inter alia*, to combating the injustice of denying human rights to prenatal human beings and has filed as amicus in previous abortion cases. The parties have either consented to this filing or taken no position thereon. This brief is being submitted with a motion for leave.

## SUMMARY OF THE ARGUMENT

This amicus brief makes two points. First, that the FDA regulates a drug does not mean state law cannot restrict its use to commit a legal offense. Homicide committed with fentanyl, for example, is still homicide, and states can legislate to restrict the conditions governing its use. Second, mifepristone is by no means safe. By design, it aims to cause pregnancy loss, a serious adverse effect.

## ARGUMENT

### I. FDA REGULATION OF A DRUG DOES NOT PREEMPT STATE PROHIBITION OF ACTS USING THAT DRUG.

Plaintiff Bryant contends that this case presents a straightforward question:

When FDA, pursuant to its congressionally delegated REMS authority, determines that a particular mix of regulatory controls is commensurate with a drug's risks, may a State impose additional restrictions on that drug, including restrictions that FDA has determined are unwarranted and inappropriate?

*See* Plff. Mem. in Opp. to Intervenors' Mot. to Dismiss at 1 (Doc. 85) ("Plff. Opp. to MTD"). The obvious answer must be "Yes." That fentanyl is FDA-approved for pain relief, for example, does not mean a state is preempted from outlawing homicide because – or when – the killing was effectuated by use of fentanyl. *See Man Convicted of Killing Roseville Teen after Fentanyl Overdose Death*, ABC10 (July 7, 2023), <https://tinyurl.com/FentanylMurder>.

While a state may not *remove* a federal limit (and thus override FDA's limits) that does not mean a state is powerless to *add* limits. FDA rules set a federal *floor* of restrictions. States are free to add further limits on use so long as there are no conflicting obligations. *See Wyeth v. Levine*, 555 U.S. 555, 573-74 (2009) (rejecting drug manufacturer's argument that federal law "establishes both a floor and a ceiling for drug regulation"). That the FDA might approve a drug does not mean a state cannot forbid someone from using it to kill human beings under specified circumstances. *See* Charles Graber, *How a Serial-Killing Night Nurse Hacked Hospital Drug Protocol*, *Wired* (Apr. 29, 2013), <https://tinyurl.com/CullenMurder> (Charles Cullen used digoxin and insulin to lethally overdose patients). A legal prohibition applies whether the offense is committed with an FDA-approved drug, *e.g.*, *Texas Man Sentenced to 180 Days in Jail for Drugging Wife's Drinks to Induce an Abortion*, AP (Feb. 8, 2024), or a shish kabob skewer, *e.g.*, *UCCS Student Accused of Using Skewer to Force an Abortion, Report says*, *Denver7ABC* (Oct. 7, 2016) <https://tinyurl.com/SkewerAbortion>.

## **II. MEDICATION ABORTION IS NOT SAFE: ABORTION PILLS INHERENTLY CAUSE THE HARM OF PREGNANCY LOSS.**

Abortion pills by their very design cause an adverse event: pregnancy loss.



Pregnancy loss is a dreaded complication. Consequently, medical authorities make efforts to warn pregnant women which drugs to avoid during pregnancy. *See, e.g., Medicines to Avoid When Pregnant*, WebMD (June 8, 2023), <https://www.webmd.com/baby/medicines-avoid-pregnant> (“Some drugs can harm a developing baby or cause a miscarriage or stillbirth.”); *Medicine and Pregnancy*, CDC, <http://tinyurl.com/4zahm7hr> (Apr. 10, 2023) (“Some medicines may cause birth defects, pregnancy loss, prematurity, infant death, or developmental disabilities.”); Chaunie Brusie, *Medications You Should Avoid During Pregnancy*, Healthline (May 7, 2019), <https://tinyurl.com/HlthLnMeds>. The whole point of abortion pills, however, is to cause that adverse event. As the FDA concedes: “Mifepristone, when used together with another medicine called misoprostol, is used to end a pregnancy . . . .” *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA (Sept. 1, 2023), <https://tinyurl.com/FDAMifeQA> (emphasis added).

It is therefore flatly misleading to claim that, with mifepristone, “[s]erious complications are extremely rare.” Plff. Opp to MTD at 8. To the contrary, except when the drug does not work, *every single woman* who takes mifepristone undergoes a serious complication: pregnancy loss. Diana Cuenca, *Pregnancy Loss: Consequences for Mental Health*, *Frontiers Glob. Women’s Health*, Jan. 23, 2023

(Abstract) (“Pregnancy loss, in all its forms (miscarriage, abortion, and fetal death), is one of the most common adverse pregnancy outcomes . . .”). That the loss may have been *sought* by someone (not necessarily the woman) for nonmedical reasons (financial, relational, etc.) does not alter the reality of the loss. A woman who blinds herself suffers an adverse event even if she desires the outcome. Char Adams, *Woman Claims She Blinded Herself with Drain Cleaner to Fulfill Her Life-Long Dream of Being Disabled: ‘I Should Have Been Blind from Birth,’* People (Oct. 1, 2015), <https://people.com/celebrity/jewel-shuping-blinds-herself-with-drain-cleaner/>. A man who has his finger amputated suffers an adverse event even if he chooses that harm for a chance at an Olympic medal. Jon Haworth, *Olympic athlete amputates finger to play in 2024 Paris Games*, abcNews (July 26, 2024).<sup>1</sup>

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<sup>1</sup> As the article explains, *id.*:

Just two weeks ago, Matthew Dawson, a 30-year-old hockey player from Australia, suffered a badly broken finger on his right-hand during a team training session in Perth, Australia, and, after consulting with doctors, he found out the injury would take months to recover from and that he would miss out on the opportunity to play in his third Olympic Games.

But instead of opting for a long recovery, Dawson made a decision that would shock his teammates and has already made headlines around the world. He decided to amputate his finger so that he could compete in the 2024 Paris Olympic Games.

The question whether, or under what conditions, people should be able to cause self-harm – or, in this case, harm to innocent third parties (prenatal humans) – should not be distorted by pretending that the physical harm is not physical harm.

## CONCLUSION

This Court should reverse the judgment of the district court insofar as it declared certain provisions preempted and preliminarily enjoined those provisions.

Respectfully submitted,

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**CERTIFICATION PURSUANT TO FED. R. APP. P. 29 AND 32**

This *amicus curiae* brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7) because it contains 1070 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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## CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2024, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using CM/ECF, which will send notification of such filing to counsel of record.

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