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.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL CATHOLIC BIOETHICS CENTER, PRO-LIFE OBSTETRICIANS-GYNECOLOGISTS GIANINA CAZAN-LONDON MD AND MELISSA HALVORSON MD, AND RIGHT TO LIFE OF MICHIGAN, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether all pre-viability prohibitions on elective abortions are unconstitutional.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, the National Catholic Bioethics Center, Pro-life obstetricians-gynecologists Gianina Cazan-London MD and Melissa Halvorson MD, and Right to Life of Michigan, Inc. submit this brief.[1]

The National Catholic Bioethics Center is a non-profit research and educational institute that applies the Catholic Church's moral teachings to ethical issues that arise in healthcare and the life sciences. The Bioethics Center represents hundreds of members, many of whom are institutions. In collaboration with two graduate programs that provide degrees to dually-enrolled students concentrating in bioethics, the Center administers a certification program in bioethics. The Center also provides expert consultation regarding the application of Catholic moral teachings to ethical issues that impact the dignity of human life. Healthcare providers increasingly seek the Center's counsel concerning governmental action affecting sincerely held religious beliefs and moral values. The Center affirms that all direct abortions performed with the object and intent to terminate a pregnancy are contrary to natural

[1] Petitioners and Respondents granted blanket consent for the filing of *amicus curiae* briefs in this matter. *Amici Curiae* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

moral law, the wellbeing of women, and the good of society.

Pro-life obstetricians-gynecologists, Gianina Cazan-London MD (Maternal Fetal Medicine/ObGyn) and Melissa Halvorson MD, (ObGyn) are physicians who believe every human being holds the inalienable right to life from conception until natural death. They endeavor to ensure that pregnant women receive the highest quality medical care and are fully informed of the effects of abortion, including the potential long-term consequences of abortion on women's health. They hold special expertise and understanding of fetal development and abortion-related health risks helpful to this Court. Finally, these physicians educate the public truthfully about human development and the immense advancements made in their field over the last several years.

Right to Life of Michigan, Inc., (RTL) is a non-profit and nonpartisan organization that believes every human being holds the inalienable right to life from conception until natural death. RTL advocates and strives to achieve its goals by educating the public on right to life issues, motivating Michigan's citizenry to action, encouraging community support, and participating in programs and legislation that foster respect and protect human life. RTL, with its hundreds of thousands of members throughout the State of Michigan, dedicates its work to protecting the sanctity of life by supporting public policy, legislation, and laws that respect all life, including the lives of unborn children.

Amici Curiae have special knowledge and insight that can assist this Court concerning pre-viability prohibitions on elective abortions. *Amici Curiae* contributed many *amicus curiae* briefs throughout the years in federal and state appellate courts, including before the United States Supreme Court.

BACKGROUND

The Mississippi Legislature enacted the "Gestational Age Act" limiting the abortion of a pre-born infant after his or her gestational age of fifteen weeks, except in cases of medical emergency or severe fetal abnormality. Miss. Code Ann. §41-41-191 (2018). Because Mississippi already limited abortions taking place after the gestational age of twenty weeks, the law exclusively regulated abortion of pre-born children between fifteen and twenty weeks of development. Pet. at 17.

Over the last forty-eight years, significant medical advancements have changed, and continue to change, the landscape of obstetrics and gynecology in the United States. The district court, however, applied the scientific standard set forth in *Roe v. Wade*, 410 U.S. 113, 163-65 (1973), and sought the answer to only one question: whether a pre-born child of fifteen-week gestational age is viable. Pet. App. 60a. The district court ignored the undue burden standard set forth by this Court in *Hellerstedt* and held that *Roe* creates a bright line right to pre-viability abortion. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); Pet. App. 58-66a. The Court of Appeals for the Fifth Circuit affirmed, finding that the lower court need not consider this Court's undue burden standard or balance

the state's legitimate interests for enacting the law. Pet. App. 12a.

Underlying the question presented here stands the issue of whether *Roe* and its progeny wrongly read into the Fourteenth Amendment something not there. And, even more important, whether this Court should now, finally, correct course.

SUMMARY OF THE ARGUMENT

States have a strong interest in prohibiting pre-viability abortion to protect the life and dignity of pre-born children, women's health, and the integrity of the medical profession. This interest is not contradicted by a "right to abortion" under the Fourteenth Amendment, and even if it were, it is not limited by a viability standard. This Honorable Court should, therefore, correct the fatal errors on these issues effected in *Roe*, 410 U.S. at 163-65. This Court has recognized that a "state's interest in protecting unborn life can justify a pre-viability restriction on abortion." *Gonzales v. Carhart*, 550 U.S. 124 (2007). Here, the interests in the humanity of the pre-born child, the health of the pregnant mother, and the integrity of the medical profession allow the state to limit unnecessary and inhumane abortion practices.

This Court in *Roe* incorrectly concluded that the Fourteenth Amendment includes a liberty interest in the right to abort a pre-born child. Not a single word uttered or written in the promulgation of the Fourteenth Amendment even remotely suggests that the Amendment includes a right to abortion. It is clear from the historical record that the authors of the

Amendment never contemplated including such a diabolical entitlement. Judicially contriving such a liberty interest exceeds the scope of the Judicial Power. The *Roe* Court, venturing far beyond the scope of its Article III powers, improperly expanded the Fourteenth Amendment from something designed to protect the inherent value of human life, to instead add an interest rooted in bodily privacy in the right to abortion.

Stare decisis does not constrain this Court when a precedent violates the Constitution. By ignoring the true meaning of a constitutional provision, and changing it to mean something else, *Roe* disregarded the Supremacy Clause, exceeded the scope of its Article III Judicial Power, and usurped the people's authority contrary to Article V's explicit amending process. In doing so, *Roe* undermined republican governance and the Rule of Law. This Court must, therefore, reject *Roe's* unconstitutional precedent.

Considering both the significant new insights into the history of the Fourteenth Amendment vis a vis abortion laws and the advances in medical science over the past forty-eight years, this Court should reverse the decision of the Fifth Circuit and permit states to enforce pre-viability prohibitions on elective abortions, many of which have been part of their laws for well over a century.

ARGUMENT

I. A STATE MAY ENACT PRE-VIABILITY ABORTION REGULATIONS TO PROMOTE ITS LEGITIMATE INTERESTS.

This Court correctly recognizes that states hold a "legitimate and substantial interest in preserving and promoting fetal life" and women's health. *See, e.g., Gonzales v. Carhart* (*Carhart II*), 550 U.S. 124, 145 (2007); *Planned Parenthood v.* Casey, 505 U.S. 833, 871 (1992) (recognizing that a state's interests in protecting "the potentiality" of human life and the health of pregnant women were both important and legitimate). This Court in *Roe* observed that these legitimate interests "were separate and distinct" and grew "in substantiality as the woman approaches term." 410 U.S. at 162-63. The *Roe* Court determined that "[i]n the second semester, the state interest in maternal health was found to be sufficiently substantial to justify regulation reasonably related to that concern. And at viability, usually in the third trimester, the state interest in protecting the potential life of the fetus was found to justify a criminal prohibition against abortion." *Harris v. McRae*, 448 U.S. 297, 313 (1980) (citing *Roe*, 410 U.S. at 162-63).

This Court later departed from the trimester framework of *Roe*. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 497 U.S. 417 (1990). And the constitutional standard under which abortion regulation must be scrutinized has transmogrified over time. *Compare Roe*, 410 U.S. 113 to *Casey*, 505 U.S. 833 and *Hellerstedt*, 136 S. Ct. 2292. Yet, the principle set forth in *Roe*, that a state's

legitimate interests should weigh more heavily in the Court's analysis as the child develops and as the pregnant mother faces increased health risks from late-term abortion, remains. *Roe*, 410 U.S. at 145 ("The factor of gestational age is of overriding importance.").

A. Mississippi Holds a Profound Governmental Interest in the Inherent Value of Life.

There is no state interest greater than the protection of human life. And there is no life more in need of state protection than those most vulnerable, such as a pre-born child. The state's interest is compelling in this case, and the federal government should return to the states the power to protect it.

i. The Right to Life, and the State's Interest in Protecting Life, Arises at Conception.

Roe recognized that the state has an interest in protecting "potential human life." Although this precept begs for clarification, the kernel of truth in the holding is that human life has inherent value and merits protection under the Fourteenth Amendment. A life meets this criterion when it is human, and every human life begins at conception.[2] As Professor Francis

[2] *See, e.g.,* Scott Klusendorf, *The Case for Life* (2009) at 36, 44 (citing numerous embryological experts and texts and noting that even rabid abortion advocates such as Peter Singer admit an embryo is a human being at conception); Dianne N. Irving, *When do human beings begin? Scientific myths and scientific facts*, International Journal of Sociology and Social Policy, Vol. 19 No. 3/4 (1999) at 22-46, *available at* https://doi.org/10.1108/01443339910788730 (last visited 7/24/21); Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*,

Beckwith cogently explains:

> Only artifacts, such as clocks and spaceships, come into existence part by part. Living beings come into existence all at once and then gradually unfold to themselves and to the world what they already *are*, but only incipiently are. Because one can only develop certain functions by nature (i.e., a result of basic, intrinsic capacities) a human being at every stage of development is *never* a potential person, she is *always* a person with potential even if that potential is never actualized due to premature death or the result of the absence or deformity of a physical state necessary to actualize that potential.[3]

What this means as practical matter is that all human life has dignity and is worthy of protection. Even the *Roe* Court recognized that if a pre-born child is acknowledged as a "person" under the Fourteenth Amendment, the putative right to abortion that *Roe* fabricated fails. 410 U.S. at 157. The *Roe* Court did not make any distinction between a human being and a person, and none should be made. Indeed, the Framers of the Fourteenth Amendment made no such distinction.[4] Any putative difference in this context is

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4 GEOJLPP 361, 362, n.2 (2006) (citing a variety of authoritative sources).

[3] Francis J. Beckwith, Defending Life: A Moral and Legal Case Against Abortion Choice (2007) at 34 (emphasis in original; internal citation omitted).

[4] Lugosi, *supra*, 4 GEOJLPP at 395-96.

merely an ideological political contrivance. It is the life and liberty of all human persons that the Fourteenth Amendment protects, not just those with certain qualities.

Significantly, the *Roe* Court claimed it could not know when human life begins and so it would not decide the matter. This reasoning is flawed in at least two major respects. First, by allowing prohibition of abortions after viability, the Court implicitly held that viability is the beginning of a new human life. This is established by the Court's admission that once the pre-born child becomes a person, its right to life and liberty prevails over any assertion of a privacy right to abortion. Second, assuming there are relatively equivalent arguments on both sides of the issue of life beginning at conception, the only moral course is to err on the side of protecting human life, not on the side of destroying it.[5]

Roe's rule that a mother can have her non-viable child killed other than in self-defense was a ruling that the child is not a human being, not a person. The law doesn't permit the wanton killing of human beings. When *Roe* allowed the killing of non-viable fetuses, it tacitly stated that the fetus is not a human being. So, when the *Roe* Court said that it was not making that decision because scientists and philosophers disagreed on the issue, it was unquestionably wrong. The decision was inescapable. And it is just as inescapable now.

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[5] *See, e.g.,* Beckwith, *supra*, at 30-31.

Significantly, scientists no longer disagree on when human life begins. The consensus among scientists is that it begins at conception.[6] Philosophers may still disagree, but that will never change. Disagreeing is pretty much all philosophers do. But this Court *will* adopt a philosophical stance no matter what decision it makes. Any decision about a right to abortion presupposes a decision about when one becomes a person, because a person cannot be killed lawfully—whether by gunshot or exercise of an alleged right to abortion—except in cases of self-defense or a state-administered sentence after a fair trial and exhaustion of all appeals. If the Court decides a fetus at a certain stage of development can, in ordinary circumstances, be killed, it has decided that that fetus is not a person. If it decides that fetus cannot be killed, it has decided that that fetus is a person. What the Court purports to be doing when it makes those decisions is immaterial; it is unquestionably defining our humanity. The only question is how it will do so. Are we to be reduced to mere mechanistic constructions that gain value as qualities are added over time and then lose value upon those qualities diminishing, or are we to be recognized as human beings, whole and equal by nature?

ii. The Viability Standard Is No Longer Workable.

As is now well known, *Roe* and some subsequent cases have held that the state's interest in protecting human life predominates at "viability." The viability standard for protecting an unborn child is an arbitrary

[6] *See* fn. 2, *supra.*

one, which is to say it is not a true standard at all, but a fig leaf for judicial fiat.[7]

To get this issue right, it is important to delve more deeply into it. Why, exactly, does the state have an interest in the lives of pre-born human beings? It is because they are human beings – not only as a matter of morality, but of biological science as well.[8] They are not "potential human beings;" there is no such thing.[9]

Next, we must ask why that state interest should begin at "viability"? Where is that in the Constitution? The answer, of course, is nowhere. It is pure judicial legislation (*i.e.*, policymaking constitutionally reserved for the legislature) without qualification, authority, or accountability. If the state has an interest in human life (which it does), then it has an interest in human life; and that interest begins when human life begins. Any other artificial judicial limits placed on that interest are completely invalid.

Our humanity is a constant. It does not vary over time under different circumstances. It is our nature, not a feature of our environment or our accomplishment. It does not vacillate based on the state of our technology, including the technology that lets a fetus live outside the mother's womb. Just a few centuries ago, a child typically couldn't live outside the

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[7] *See, e.g.,* Beckwith, *supra*, at 34-37 (compellingly deconstructing the fallacy of the viability standard); Hollowell, K. J., *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 Regent UL Rev. 67, 83-86 (2001).

[8] *See* fn. 2, supra.

[9] *See* text at fn. 3, *supra*.

womb before it reached near full gestation, which is thirty-seven to forty weeks. You and your baby at 37 weeks pregnant, *available at* https://www.nhs.uk/pregnancy/week-by-week/28-to-40-plus/37-weeks/ (last visited July 27, 2021). When *Roe* was decided, just fifty years ago, viability—and hence personhood in the *Roe* Court's eyes—was gained at about twenty-eight weeks.[10] Now it is about twenty-three weeks.[11] Did human nature really change to that extent in such a short period of time? It did if you adhere to the viability standard. Indeed, one can imagine a time when our technology advances to the point that an embryo at conception could be placed into a technological or bionic "mother" of some sort and be viable. *Roe's* conception of our humanity as a technologically determined variable of "viability" is utterly dehumanizing.

iii. Mississippi's Fifteenth-Week Regulation is a More Superior Standard for Measuring the State's Interest in Protecting Human Life Than the Viability Standard.

Advances in science now reveal the remarkable development of a pre-born child from the moment of fertilization and even more evident between the

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[10] Hollowell, *supra*, 14 Regent UL Rev. at 83; *see also* Bonnie Rochman, *A 21-Week-Old Baby Survives and Doctors Ask, How Young is Too Young to Save?*, Time Magazine (May 27, 2011), available at https://healthland.time.com/2011/05/27/baby-born-at-21-weeks-survives-how-young-is-too-young-to-save/ (last visited July 27, 2021).

[11] *Id.* at 84.

gestational ages of fifteen to twenty weeks. Gone are the days when society can question whether such a pre-born child is merely a "clump of cells."[12] Actual video of children in the womb reveals the completeness of development of a fetus, especially in the period from sixteen to twenty weeks. *See* https://www.ehd.org/your-life-before-birth-video/ (last visited July 15, 2020) (displaying pieces of actual video footage of a child's development in utero).

[13]

Mississippi's law is partially based on legislative findings pertaining to the advanced development and obvious humanity of pre-born children at the gestational age of fifteen to twenty weeks. Pet. at 7-9.

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[12] *See* Klusendorf, *supra*, at 38-39 (dispelling "clump of cells" argument).

[13] Actual photograph of a human fetus at eighteen weeks of gestational development. Lennart Nilsson, Foetus 18 weeks, http://100photos.time.com/photos/lennart-nilsson-fetus (last visited July 14, 2020).

At twenty-two days, the child's heart begins to beat. https://www.ehd.org/your-life-before-birth-video/ (last visited July 15, 2020). At six weeks, the child begins moving. *Id.* At seven weeks, scientists can detect a child's brainwaves, and the child can move his or her own head and hands. *Id.* The child also displays leg movements and the startle response by that time. *Id.* At eight weeks, the child's brain exhibits complex development. *Id.* The child also then begins breathing movements and shows preference for either his or her left or right hand. *Id.* At nine weeks, the child sucks his or her thumb, swallows, and responds to light touch. *Id.* At ten weeks, the child's unique fingerprints are formed on his or her fingers. *Id.* At twelve weeks, the child opens and closes his or her mouth and moves his or her tongue. *Id.* The child's fingers and hands are also fully formed by twelve weeks' gestation. *Id.*; *see also* https://www.ehd.org/movies/231/Responds-to-Touch (last visited July 15, 2020) (displaying video of fetus at fifteen weeks responding to touch). By sixteen weeks, the child's gender is easily detectable, and the child looks undeniably human:

https://www.ehd.org/gallery/436/Hiding-the-Face#content (last visited July 15, 2020) (showing photographic still of sixteen-week ultrasound video of a male fetus hiding his head away from the touch of the ultrasound transducer). By nineteen weeks, the child hears and responds to noises, even making different facial expressions when listening to music. *See, e.g.*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4616906/ (last visited July 15, 2020) (finding that neural pathways participating in the auditory–motor system may be developed as early as the gestational age of sixteen weeks).

The humanity of the pre-born child in the second trimester is even more apparent today than when *Roe* was decided.[14]

B. Mississippi's Law Rightly Protects Women from the Adverse Effects of Late-Term Abortion.

In addition to killing healthy developed children, extending elective and unnecessary abortion late into the second trimester actually increases negative health consequences for women. Unlike abortions performed in the first trimester, where the fetal bones are soft enough to collapse into a large bore suction catheter, unborn children at the gestational ages of fifteen to

[14] Moreover, although Justice Blackmun opined that nineteenth century abortion laws were primarily designed to protect the mother (*Roe*, 410 U.S. at 149), that theory has been thoroughly debunked; they were primarily protecting the life of the child. Beckwith, *supra*, at 23 (citing James S. Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, St. Mary's LJ 17 (1985)).

twenty weeks cannot fit into a catheter because they are too large and "their bones have calcified, making them too firm to remove [from the womb] by suction alone." https://aaplog.org/wp-content/uploads/2019/08/CO-3-Post-Viability-Abortion-Bans.pdf (last visited July 16, 2020). Therefore, dilation and evacuation (D & E) procedures are required. *Id*. In *Gonzales*, this Court detailed how abortion in the second trimester is performed:

> Although individual techniques for performing D & E differ, the general steps are the same. A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. The steps taken to cause dilation differ by physician and gestational age of the fetus. A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond. In general, the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix for two days, while others use dilators for a day or less. After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through

> the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. . . . Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. . . . Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit.

Gonzales, 550 U.S. at 135–36 (internal citations omitted).

The procedures required in a second trimester abortion are even more gruesome than those in the first trimester. https://aaplog.org/wp-content/uploads/2019/08/CO-3-Post-Viability-Abortion-Bans.pdf (last visited July 16, 2020). Unsurprisingly, abortions obtained in the second trimester carry substantially greater health

risks. *Id.*; *see also* https://pubmed.ncbi.nlm.nih.gov/15051566/ (last visited July 16, 2020).

Later term abortions also cause an increased risk of preterm birth in subsequent pregnancies as well as an increased risk of serious psychological damage, such as depression, substance abuse, and suicide. https://aaplog.org/wp-content/uploads/2019/08/CO-3-Post-Viability-Abortion-Bans.pdf (last visited July 16, 2020). Empirical data show that abortions performed in the second trimester pose serious health risks to women that can be about ten times greater than abortions performed only a few weeks earlier. *See*, *e.g.*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3066627/ (last visited July 16, 2020) ("The abortion complication rate is 3%–6% at 12-13 weeks gestation and increases to 50% or higher as abortions are performed in the 2nd trimester."); https://pubmed.ncbi.nlm.nih.gov/15051566/ (last visited July 16, 2020) ("Compared with women whose abortions were performed at or before 8 weeks of gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes.").

Roe significantly underestimated these risks. New data suggests this is a far greater concern than *Roe* and even later decisions recognized.[15] Later-term abortions pose a significant health risk to women, and Mississippi has legitimate reasons for limiting them.

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[15] *See, e.g.*, Clark Forsythe, *The Medical Assumption at the Foundation of Roe v. Wade & Its Implications for Women's Health*, 29 Issues in Law and Medicine 183 (2014).

C. Mississippi's Regulation Preserves the Integrity of the Medical Profession.

The Hippocratic Oath written during the fifth to fourth centuries B.C. declares, "… I will not give to a woman an abortive remedy. In purity and holiness I will guard my life and my art." Hippocratic Oath, *available at* https://biotech.law.lsu.edu/cases/research/hippocratic-oath.htm (last visited July 27, 2021). This standard should be a cornerstone of medical ethics.

Abortion of preborn children is, and always has been, fundamentally incompatible with the physician's role as healer. Cf. Brief of the American Medical Assn., American Nurses Assn., American Psychiatric Assn., et al., as Amicus Curiae in Support of Petitioners at 5, *Glucksberg* (No. 96-110), available in 1996 WL 656263.

II. THE FOURTEENTH AMENDMENT DOES NOT INCLUDE A LIBERTY INTEREST THWARTING ALL STATE REGULATION OF PRE-VIABILITY ABORTION.

The Fourteenth Amendment to the United States Constitution requires that no "State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

In the matter now before this Court, the Fifth Circuit, relying on *Roe*, held that Mississippi's law interferes with an alleged Fourteenth Amendment liberty interest. The Fifth Circuit held that this interest precluded a state from placing limits on pre-viability abortion, even when those limits are based upon women's health, the development of the preborn

child, and the integrity of the medical profession. The Fifth Circuit's reliance on *Roe* presupposes the existence of a Fourteenth Amendment liberty interest in abortion. If *Roe* was wrongly decided, though, that presupposition is incorrect. Because no liberty interest to abortion conferred by the Fourteenth Amendment exists, this Court must revisit *Roe*.

A. Historical Evidence Unequivocally Confirms the Constitution Does Not Require a Ban Against All State Regulation of Pre-viability Abortion.

This Court honors its duty of determining, rather than altering, constitutional meaning by understanding such meaning in its historical context. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (explaining how historical evidence shows not just what the draftsmen intended a constitutional provision to mean, but also how they thought it applied). It is past time for this Court to revise *Roe's* revisionist history.

There was no "tradition" of virtually unfettered abortion rights that the Fourteenth Amendment protected. Professor Joseph W. Dellapenna's herculean research has conclusively demonstrated this truth.[16] If the congressional record and the state civil and criminal codes of the time demonstrate anything about the Fourteenth Amendment's meaning, it is that there was no intent to sanction abortion rights.

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[16] Joseph W. Dellapenna, Dispelling the Myths of Abortion History (2006).

The debates of Congress and documents of the state legislatures that ratified the Fourteenth Amendment, provide "the most direct and unimpeachable indication of original purpose." Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 7 (1955). Most of the discussion in the first session of the 39th Congress related to the subject matter of the Fourteenth Amendment. Cong. Globe, 39th Cong., 1st Sess. (1866). This discussion included governance of the South, readmission of Southern states, Union loyalty, issues concerning the newly freed Black race, and the distribution of powers between the states and the federal government. *Id.* The bulk of the session-long debate concerned the following measures: the Freedman's Bureau Bill (vetoed by the president), the Civil Rights Act of 1866, (enacted over a veto), and the Fourteenth Amendment itself. *Id.* The first two of these measures were statutes, passed in response to the Black Codes. *Id.* Their premise was the protection of the newly freed black race. *Id.;* Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality at 46 (1976).

Not a single word uttered or written in the promulgation of the Fourteenth Amendment suggests that the Amendment included a liberty interest in the right to end the life of a pre-born child. Cong. Globe, 39th Cong., 1st Sess. (1866). The historical discussion of the authors of the Amendment never contemplated including such a provision. *Id.* Thus, from the extensive historical record of the authors' intent and meaning of the Fourteenth Amendment, no credible

evidence exists to validate *Roe's* recognition of a right to abort a preborn child.

Similarly, the actions of the states that ratified the Amendment testify conclusively against the theory that they were thereby condoning abortion. For the *Roe* Court to reach the result it did, it "had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Roe,* 410 U.S. at 174 (Rehnquist, C.J., dissenting). To illustrate, Connecticut proscribed abortion as early as 1821. *Id.* By the time adoption of the Fourteenth Amendment occurred in 1868, state and territorial legislatures had enacted at least 36 laws proscribing abortion. *Id.* at 174-175. Many other jurists and scholars have noted the plethora of state laws banning or severely restricting abortion at and even shortly after the time of the Amendment's passage. By way of example:

> In 1867, at the same time it ratified the Fourteenth Amendment, Ohio made abortion at any stage of pregnancy illegal. The same year, Illinois also ratified the Fourteenth Amendment and passed laws stiffening penalties for committing abortion. In 1869, in the same session that Florida ratified the Fourteenth Amendment, Florida also passed laws prohibiting abortion at any stage of gestation. Vermont and New York each passed laws that increased protection of unborn human beings after they ratified the Fourteenth Amendment. By 1875, sixteen of the twenty-eight ratifying states had in place tough laws against abortion

> at any stage of gestation, allowing for abortion only when the life of the mother was in real danger. Congress complemented the action of the various states by enacting the Comstock Laws in 1873 to prevent the dissemination of literature that promoted abortion. The legal protection of unborn human beings at the time the Fourteenth Amendment was ratified was consistent with the guarantee of equal protection and the right to life to every "person," whether born or unborn.[17]

Indeed, the most comprehensive scholarly work to date on the history of abortion shows that although the *Roe* Court understood its search for the Fourteenth Amendment's meaning was circumscribed by its historical context, the Court failed to accurately discern that context:

> Justice Harry Blackmun devoted fully half of the majority opinion in *Roe* to the history of abortion, using that history to inform his interpretation of the 'values' involved in the case and ultimately whether the statutory prohibition of abortion was constitutional. Blackmun relied heavily and uncritically on Means' history, citing Means (and no other historian) no less than seven times. Like Means' Blackmun's conclusions were wrong on all points.[18]

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[17] Lugosi, *supra*, 4 GEOJLPP at 395 (footnotes omitted).

[18] *Id*. at 14-15; *see also* accord Beckwith, *supra* at 23 (Justice Blackmun's history … is so flawed that it has inspired the production of scores of scholarly works, over the last quarter of the

Such mishandling of history to reach a preferred objective is not unprecedented. Prior to the Fourteenth Amendment, the *Dred Scott* Court said that it was protecting a property interest. *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding unconstitutional a Federal law prohibiting slavery in the federal territories). Eventually, everyone saw through that false front and realized that the Court was really stopping the state from protecting human life. This led to the passage of the Fourteenth Amendment, overturning the Court's precedent, and finally founding personhood on our common human nature, rather than an accidental characteristic thereof, like skin color or ethnic origin.

The *Roe* Court said it was protecting a Fourteenth Amendment liberty interest. But it is clear that the *Roe* Court was actually, as in *Dred Scott*, stopping the state from protecting human life. Only this time it conditioned human life worthy of government protection on the arbitrary characteristic of a certain level of development rather than the color of one's skin.

Not only did the Ratifiers have no intent to permit abortion, their *primary purpose* in adopting the Fourteenth Amendment was to *correct* the notion expressed in *Dred Scott* that some human beings were "less equal" than others. Yet *Roe* unfortunately reinstated that deadly doctrine. It held that less-developed human beings do not deserve the law's protection.

20th century, that are nearly unanimous in concluding that Justice Blackmun's "history" is untrustworthy and essentially worthless."); *id.* at 24 (citing voluminous scholarly critiques of *Roe's* "history").

If we are defined by our nature, "equality" is a meaningful fundamental principle. If we are defined by our development, it is not. It is only because each one of us is a human being by nature that we are all equally worthy of governmental protection. The development or maturation of human faculties does not make one human. If it did, young children would not be considered human, for many of their faculties do not mature for decades. This "constructivist" view of human nature is a great rationale for infanticide, but it is a horrible rationale for equality or any other human right.

This Court's abortion decisions incorrectly declare the meaning of the Fourteenth Amendment to include a right to abortion. This Court should correct that error by acknowledging the invalidity of *Roe's* historical analysis and jurisprudence. Correctly understood, the Fourteenth Amendment does not include a liberty interest to abort a pre-born child, including the younger unborn children covered by the state law here. The Mississippi statute at issue, therefore, does not violate the Fourteenth Amendment.

An accurate and honest understanding of the true meaning of the Fourteenth Amendment does not include a liberty interest to abort one's preborn child. *Roe's* understanding is wrong and should be corrected. *Roe's* only possible remaining claim to legitimacy, therefore, is that it is a precedent of this Honorable Court. We turn our attention now, therefore, to *Roe*'s status as a precedent and the doctrine of *stare decisis*.

B. Stare Decisis Does Not Control Where a Precedent is Incorrectly Decided and Unconstitutional.[19]

Stare decisis cannot apply in cases like *Dred Scott* or *Roe* when the decision in question was not only incorrect but unconstitutional. The doctrine of *stare decisis* must not be used to immortalize a decision that is contrary to a true and correct reading of the Constitution.

Respondents assert that simply because the decisions in *Roe* and its progeny occurred, they must stand. But incorrect decisions require correction, not preservation. This Court should not adhere to *Roe's* error for the sake of "predictability" or "consistency". Being consistently and predictably unconstitutionally wrong is no virtue. "No interest which could be served by so rigid an adherence to *stare decisis* is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution." *Graves v. Schmidlapp*, 315 U.S. 657, 665 (1942). In essence, applying *stare decisis* is an unconstitutional act where application of the doctrine

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[19] There are, of course, other reasons *stare decisis* does not counsel upholding a decision as notorious as *Roe*. *See, e.g.*, Clarke D. Forsythe, *A Draft Opinion Overruling Roe v. Wad*e, 16 GEOJLPP 445, 450 (2018) (outlining inconsistency of application as one reason *Roe* is not valuable precedent); David F. Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform*, 74 Ohio St. L.J. 121, 124 (2013) ("Yet for all his hubris, Blackmun's attempt to base his opinion on medical evidence was a failure, leaving *Roe* likely the most pilloried opinion in Supreme Court history from all sides of the abortion debate.").

results in this Court following a precedent contrary to the true meaning of the Constitution.

i. Roe's Erroneous Abortion Jurisprudence Exceeds the Scope of its Article III Judicial Power, Disregards the Supremacy Clause, and Usurps the People's Authority Contrary to Article V's Explicit Amending Process

In *Roe*, the Fourteenth Amendment served as the applicable constitutional Rule of Law. The *Roe* Court, venturing far beyond the scope of its Article III powers, improperly expanded the Fourteenth Amendment from something designed to protect the inherent value of human life, to instead add a liberty interest in the right to abortion. In doing so, a politically unaccountable Court created *ex nihilo* an entitlement to kill an unborn child.

The words and structure of the American Constitution contemplate a judicial branch with no power to make or enforce laws.[20] No enumerated judicial power exists for the judiciary to amend the Constitution or evolve the meaning of its provisions. It is undisputed that

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[20] Article III provides: "The 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... The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party." U.S. Const, art. III, §§ 1 and 2.

> The enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.' The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.'

National Fed'n of Indep Bus v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland,* 17 U.S. 316, 404-05 (1819)); U.S. Const. art. I, § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 9 U.S. (1 Wheat.), 194-95 (1824).

Article III of the Constitution assumes a jurisprudence obligating the judiciary to honestly apply constitutional provisions according to their true meaning. The historical evidence cited above demonstrates that *Roe,* instead, inappropriately read into the Fourteenth Amendment something not there. This Court must uphold the Constitution rather than *Roe's* distortion of it. It is the Constitution that must govern us, not judicial amendments of it.

In this regard, Article VI, section 2 mandates that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. const. art. VI sec. 2. Not included in the list of "the supreme Law of the Land" are the decisions of this Court. Since *Marbury v. Madison* declared "[i]t is emphatically the province and duty of the judicial department to say what the law is," a co-existing constitutional duty demands judges decide

cases in conformity with the Constitution. 5 U.S. 137, 177-78, 180 (1802) (making clear that our Constitution also serves as "a rule for the government of courts"). This Court is obliged, therefore, to accept the Constitution as the "paramount law" when a precedent or other law conflicts with what the Constitution says. *Id*. Because *Roe's* holding contradicts the true meaning of the Fourteenth Amendment, the Supremacy Clause requires this Court to cease following its precedent and instead give effect to the constitutional provision.

There is no real question that *Roe* re-wrote the Constitution rather than enforcing it. As John Hart Ely has famously observed regarding Roe: "It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[21]

Moreover, *Roe's* distortion of the Fourteenth Amendment affirmatively amended the Constitution. In doing so, the *Roe* Court unconstitutionally bypassed Article V's constitutionally required political processes that specifically require involvement of politically accountable state legislatures. U.S. Const., art. V. The Constitution delegates and reserves power to amend the meaning of a constitutional provision only to those politically accountable to the people. *Id.*

To be sure, proponents of evolving judicial preferences claim that by amending the Constitution from the bench, unelected judges can jurisprudentially bestow new meanings and even new rights and

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[21] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L.J. 920, 947 (1973).

understandings for the people.[22] In this jurisprudential wonderland, judges wrongly see the Constitution as an evolving organism, the meaning of which they believe their office empowers them to shape as they see fit. This is the antithesis of constitutional governance. *Roe* supplants our politically accountable system of constitutional governance with an unelected judiciary's own protean preferences. In doing so, this Court's abortion jurisprudence disregards the Supremacy Clause, exceeds the scope of its Article III Judicial Power, and usurps the people's authority contrary to Article V's explicit amending process.[23] *Roe,* with its progenitor precedents and progeny, acted outside this Court's constitutional authority by exercising will instead of judgement, writing new "rights" into the Constitution that the Ratifiers never intended. These decisions dangerously undermine constitutional representative governance under the Rule of Law. They can no longer be relied upon to represent the Constitution's true meaning, which is what must govern this Court.

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[22] Disturbingly, it stands to reason that a democratically unaccountable judiciary capable of giving rights is equally empowered to take them away.

[23] In his farewell address, George Washington stated the core principle that: "If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed." https://www.ourdocuments.gov/doc.php?flash =false& doc=15&page=transcript (last visited 7/23/21). He was not wrong.

Moreover, in *Washington v. Glucksburg*, this Court clarified that only liberty interests deeply rooted in our history and tradition were protected by the Fourteenth Amendment. 521 U.S. 702, 720-21 (1997). To adhere to *that* precedent, this Court should now hold that the Fourteenth Amendment does not protect a right to abortion, because there was no traditional protection of such a right in our true history, as explained above.

ii. Post-Roe Stare Decisis Jurisprudence Justifying Adherence to Roe, is Entirely Unconvincing and Ungrounded to Any Provision of the Constitution.

Casey recognized that "the rule of *stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case," 505 U.S. at 854 citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting); *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (SOUTER, J., joined by KENNEDY, J., concurring); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Nonetheless, *Casey* then upheld *Roe* as a constitutional precedent completely ungrounded and unconnected to any provision of the Constitution. The reasons for that decision are completely unconvincing.

Casey essentially said that *Roe* could not be overturned because of the passage of time and an alleged but specious "reliance" interest that had accrued during its tenure.[24] Anyone who relies on an

[24] *Casey* cited "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their

unconstitutional ruling deserves no deference. *Brown v. Board of Education* could not have been decided as it was if it took into account the reliance of segregationists on *Plessy v. Ferguson*.[25] And in this case, it is not any reliance on the morally hazardous convenience of a "right" to kill your offspring that serves as the proper measure. The Court actually cited as its main "reliance" concern "the certain cost of overruling *Roe* for the people who have ordered their thinking and living around that case." 505 U.S. at 856. What sort of human beings order their thinking and life around the ability to kill children before they are born? The very concept is appalling.

From a "reliance" perspective, it is the number of lives sacrificed on the altar of judicial supremacy that should be weighed when judging whether *Roe* requires reversal – a number that only grows with the passage of time. For the pre-born rely on this Court to reject *Roe's* unconstitutional creation of a "right" to mercilessly end their young lives.

Stare decisis does not constrain this Court when a precedent violates the Constitution. By ignoring the true meaning of a constitutional provision, and

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ability to control their reproductive lives" as the primary reliance interest supporting *Roe's* preservation. 505 U.S. 833, 856 (1992). The irony of the Court's reference to "control" in this context of the nexus between voluntary sexual activity and career planning was apparently lost on the Court. In any event, no question that other methods of control over reproductive lives exist—beyond the self-control that has been available in voluntary situations since the beginning of time – have greatly expanded since *Roe*.

[25] *See* Lugosi, *supra*, at 400.

changing it to mean something else, *Roe* disregarded the Supremacy Clause, exceeded the scope of its Article III Judicial Power, and usurped the people's authority, contrary to Article V's explicit amending process. In doing so, *Roe* undermined republican governance and the Rule of Law. This Court should, therefore, reject *Roe's* unconstitutional precedent.

C. The *Roe* Decision Has Caused a Hyper-Politicization of the Judiciary that Undermines the Court's Institutional Legitimacy.

The people entrust the nation's judiciary to independently resolve disputes arising under the Constitution and laws of the United States. This trust exists only to the extent the people continue to perceive the exercise of judicial power as legitimate. The judiciary's duty to apply the Rule of Law, as understood and expressed by the people's representatives, preserves this legitimacy. To facilitate this calling, the Constitution inoculates the judiciary against political interference from the Congress and President by giving lifetime tenure to Federal Judges. U.S. Const., art. III. Federal Judges hold lifetime appointments so that they may apply existing law to resolve disputes without fear of political consequences.

And it is critical that they do so apolitically. With constitutionally instituted independence comes responsibility. Every Justice taking the oath of office swears to uphold the Constitution as it was written. The principle of independence only preserves institutional legitimacy of the judiciary if the judiciary exercises judgment based on what a constitutional

provision says, not based on what the judiciary wills it to say.

The judiciary's duty to adhere to the Constitution requires it to resist the temptation to use its independence, as it did in *Roe*, to impose its will over that of the people. The Constitution guarantees politically accountable representative governance. Unconstitutional usurpation of that authority by the judiciary undermines the judiciary's institutional legitimacy.

This case is the most significant case in the Supreme Court's history—in our nation's history. It is at least as significant as *Marbury* or *Dred Scott*, and almost certainly more so because many millions of lives hang in the balance. Yet for all its gravitas, it is a simple case. Not easy, of course, but simple. To preserve its institutional legitimacy, the Court must just apply the Constitution as written.

CONCLUSION

For the foregoing reasons, *Amici Curiae* urge this Court to revisit *Roe*, reverse the decision of the Fifth Circuit, and permit states to regulate pre-viability elective abortions.

Respectfully submitted,

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