No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., IN HIS OFFICIAL CAPACITY AS STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,
v.
JACKSON WOMEN'S HEALTH ORGANIZATION, ON BEHALF OF ITSELF AND ITS PATIENTS, *et al.*, *Respondents*.

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

Brief for *Amici Curiae* FOUNDATION FOR MORAL LAW & LUTHERANS FOR LIFE In Support of Petitioners

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae Foundation for Moral Law (the Foundation) is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the liberties guaranteed under the Constitution of the United States. The Foundation promotes a return in the judiciary and other branches of government to the historic and original interpretation of the United States Constitution and promotes education about the Constitution and the moral foundation of this country's laws and justice system.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded, the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, and the views of the Framers. The Foundation believes the Framers valued the unalienable God-given right to life as a self-evident truth articulated in the Declaration of Independence and protected by

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[1] All parties have given blanket consent to all *amicus* briefs. Pursuant to Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amici curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

the Fifth and Fourteenth Amendments to the U.S. Constitution, as the most fundamental right of all, because no other rights can be enjoyed without it. The Foundation believes this right applies to all persons including those not yet born, and that this right should not be compromised by "rights" that are nowhere found in the Constitution.

Amicus Curiae Lutherans for Life (LFL) is a national public interest nonprofit corporation with headquarters in Nevada, Iowa. The purpose of Lutherans for Life is to equip Lutherans to be Gospel-motivated voices for life, helping Lutherans to understand and articulate the sanctity of all human life. Lutherans for Life believes human life begins at conception, and therefore, abortion is contrary to the Christian and Lutheran belief in the sanctity of human life. Lutherans for Life has state federations and local chapters in eleven states.

SUMMARY OF THE ARGUMENT

Amici fully support the contentions of Petitioner Dobbs on behalf of the State of Mississippi that Mississippi's Gestational Age Act is constitutional, that the Constitution does not guarantee a right to abortion, that the regulation of abortion is generally reserved to the states, and that *Roe v. Wade,* 410 U.S. 113 (1973) and *Casey v. Planned Parenthood,* 505 U.S. 833 (1992), should be overruled. neither abortion nor privacy are mentioned in the Constitution, but Justice Blackmun said the right is found in a "penumbra" formed from "emanations" from certain rights in the Bill of Rights. Thomas Jefferson's warning that "The Constitution ... is a

mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please"[2] takes on special significance, because a jurisprudence of "penumbras" and "emanations" is entirely subjective and removes the Constitution from any kind of objective scholarship. It is also dangerous, because the same Court that can read into the Constitution rights that simply are not there, can also read out of the Constitution rights that are there, by reading into the Constitution powers that are not there.

Rather than duplicate the arguments of Petitioner and those of many other *amici*, *amici* will focus on two central points: (1) This Court's jurisprudence since 1973 reflects a move away from *Roe v. Wade;* and (2) The viability test has no foundation in law, science, history, Biblical or church tradition.

ARGUMENT

I. THIS COURT'S JURISPRUDENCE SINCE 1973 REFLECTS A MOVE AWAY FROM *ROE V. WADE.*

Does stare decisis mean *Roe v. Wade* is set in stone? Defenders of abortion would have us believe that. But, in fact, A.J. Willingham notes that this Court has overturned more than 200 of its own

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[2] Thomas Jefferson, Letter to Judge Spencer Roane, 1819; reprinted in *The Writings of Thomas Jefferson.* ed. Albert Ellery Bergh, 20 vols. (Washington: The Thomas Jefferson Memorial Association, 1907) 15:212.

decisions.[3] Often, the Court overrules a previous decision after a series of decisions limiting, modifying, or pulling away from it.

For example, *U.S. v. Darby,* 312 U.S. 100 (1941), this Court overruled the more restrictive interpretation of the Commerce Clause in *Hammer v. Dagenhart,* 247 U.S. 251 (1918), and did so as though this overruling was a course correction rather than a new breakthrough decision. As the Court said at 116-17,

Hammer v. Dagenhart has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property — a distinction which was novel when made and unsupported by any provision of the Constitution — has long since been abandoned.

The conclusion is inescapable that *Hammer* v. *Dagenhart* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause, both before

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[3] A.J. Willingham, "The Supreme Court Has Overturned More Than 200 of Its Own Decisions," May 29, 2019, https://edition.cnn.com/2019/05/29/politics/supreme-court-cases-overturned-history-constitution-trnd/index.html 2019/05/29 politics supreme-court. A Wikipedia entry says the number of overruled cases is actually more than 300; "List of Overruled United States Supreme Court Decisions," https://en.wikipedia.org/wiki/List_of_overruled_United_States_Supreme_Court_decisions#:~:text=As%20of%2018%2C%20the%20Supreme,58%20U.S.%20(17%20How.)

and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Except for the reference to interstate commerce, almost the exact same words could be used about *Roe v. Wade.*

No decision since *Dred Scott v. Sandford*, 60 U.S. 393 (1857), has drawn as much criticism as *Roe v. Wade.* And, while some decisions are unpopular at first but are eventually accepted or forgotten, the criticism of *Roe* has continued unabated for nearly half a century. The criticism has come from all parts of the country, from legal scholars, judges, congresspersons, the clergy, the medical profession, state legislatures, and the general public, and from many Justices of this Court.

A. *Akron*

Less than a decade after the decision was announced, the Court began to pull away from *Roe v. Wade.* In *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1982), Justice O'Connor wrote in her dissenting opinion at 458 that the *Roe* trimester framework "is clearly on a collision course with itself," because of advancing medical technology. She explained that the age of viability (considered in *Roe* to be at the beginning of the third trimester) was already in 1982 earlier than the third trimester and due to medical technology is being pushed closer and closer to conception, while the age at which abortions can be performed safely (for the mother, not for the child) is being pushed closer and

closer to actual childbirth.

B. *Thornburgh*

The move away from *Roe v. Wade* continued in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986). The Court struck down Pennsylvania's restrictions on abortion, but four Justices (Burger, CJ, and White, Rehnquist, and O'Connor, JJ) dissented. Chief Justice Burger, who had joined the majority in *Roe v. Wade,* wrote at 782,

In my concurrence in the companion case to *Roe v. Wade*, 410 U.S. 113, in 1973, I noted:

I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand. *Doe v. Bolton*, 410 U.S. 179, 208 (1973).

He went on to say, "In my view, the time has come to recognize that *Roe v. Wade,* no less than the cases overruled by the Court in the decisions I have just cited, 'departs from a proper understanding' of the Constitution and to overrule it."[4] *Thornburgh* at

[4] CJ Burger also stated in his *Thornburgh* dissent at 786-87 "The rule of *stare decisis* is essential if case-by-case judicial decision-making is to be reconciled with the principle of the

rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results. But *stare decisis* is not the only constraint upon judicial decision-making. Cases—like this one—that involve our assumed power to set aside on grounds of unconstitutionality a state or federal statute representing the democratically expressed will of the people call other considerations into play. Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing. But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken."

CJ Burger continued at 787-88: "The Court has therefore adhered to the rule that *stare decisis* is not rigidly applied in cases involving constitutional issues, see *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (opinion of Harlan, J.), and has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution. *Stare decisis* did not stand in the way of the Justices who, in the late 1930's, swept away constitutional doctrines that had placed unwarranted restrictions on the power of the State and Federal Governments to enact social and economic legislation, see *United States v. Darby*, 312 U.S. 100 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Nor did *stare decisis* deter a different set of Justices, some 15 years later, from rejecting the theretofore prevailing view that the Fourteenth Amendment permitted the States to maintain the system of racial segregation. *Brown v. Board of Education*, 347 U.S. 483 (1954). In both instances, history has been far kinder to those

788.

C. *Webster*

The departure from *Roe* became even more pronounced in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). The State of Missouri had adopted a statute which, among other provisions, stated legislative finding that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being," §§ 1.205.1; that before an abortion may be performed, if a doctor reasonably believes a woman is beyond the twentieth week of pregnancy, he must perform tests to determine whether the child is viable; that no public facilities may be used to perform or assist with abortions; and that no public funds may be used to encourage or counsel women to undergo abortions. The Court declined to overrule *Roe v. Wade* but upheld the legislative finding that life begins at conception, upheld the provisions prohibiting public funding and the use of public facilities, and upheld the requirement that doctors test for viability. The Court struck down the provision limiting abortion during the second trimester of pregnancy. Four

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who departed from precedent than to those who would have blindly followed the rule of *stare decisis*. And only last Term, the author of today's majority opinion reminded us once again that 'when it has become apparent that a prior decision has departed from a proper understanding' of the Constitution, that decision must be overruled." *Quoting Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985).

Justices, including Chief Justice Rehnquist, Justice White, Justice Kennedy, and Justice Scalia, in separate opinions, urged that *Roe* be overruled.

Justice O'Connor declined to overrule *Roe* because the statute could be upheld without overruling *Roe.* She stated at 526, "When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade,* there will be time enough to reexamine *Roe.* And to do so carefully."

But Justice Blackmun, the author of the *Roe v Wade* opinion, warned in dissent at 538 that "The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly ... The simple truth is that Roe would not survive the plurality's analysis..." He concluded ominously at 560, "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows." What Justice Blackmun called a chill wind, others might call a refreshing breeze.

D. *Casey*

Planned Parenthood v. Casey, 505 U.S. 833 (1992), involved a Pennsylvania law that required notification of the husband for a married woman's abortion and the consent of one parent for a minor (with a judicial bypass exception), as well as informed consent and a 24-hour waiting period. The Court upheld all provisions of the law except for the

husband's consent. Four Justices (Rehnquist, CJ, White, Scalia, and Thomas, JJ) voted to overrule *Roe v. Wade.* Two Justices (Blackmun and Stevens, JJ) dissented. Three Justices (O'Connor, Kennedy, and Souter, JJ) signed the plurality opinion which essentially eliminated the strict scrutiny/compelling interest requirement of *Roe v. Wade* and replaced it with a new standard that asks whether a state abortion regulation has the purpose or effect of imposing an "undue burden," which is defined at 877 as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[5]

The plurality wrote at 852, "Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted." Recognizing that the state had valid interests which earlier decisions had ignored, the plurality was willing to accept state restrictions on abortion that earlier decisions would not have permitted.

The plurality also said, "We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*," (even though Justice

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[5] Many consider this "undue burden" test to be middle tier rather than upper tier.

Blackmun, in his *Webster* dissent at 546, referred to the "trimester framework" as "*Roe's* analytical core") because "it misconceives the nature of the pregnant woman's interest; and in practice, it undervalues the State's interest in potential life. . . ." *Id.* at 873.

As Chief Justice Rehnquist said in his *Casey* concurrence and dissent, "The joint opinion of Justices O'Connor, Kennedy, and Souter cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view that 'the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.'" *Casey*, 505 U.S. at 953. And the plurality acknowledged, "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability. . . ." *Id.* at 871.

Partly concurring and partly dissenting, Justice Blackmun expressed relief that the four Justices (Rehnquist, White, Scalia, and Thomas) who wanted to overrule *Roe* did not prevail; but he emphasized, "the joint opinion [of Justices O'Connor, Kennedy, and Souter] and I disagree on the appropriate standard of review for abortion regulations," *Id.* at 925, n.1. This is a clear recognition that the plurality had departed from the strict scrutiny test he (Blackmun) fashioned in *Roe.* If the Court had followed the strict scrutiny standard, he said, all of the provisions of the Pennsylvania law would have been invalidated. *Id.* at 926.

Despite the plurality's eloquent opening statement at 844, "Liberty finds no refuge in a jurisprudence of doubt," *Casey* left abortion jurisprudence more in doubt than ever. *Amici* agree with Petitioner that *Casey* needs to be overruled. However, we write to emphasize that *Casey* represents a sharp departure from *Roe.*

E. *Carhart*

Gonzales v. Carhart, 550 U.S. 124 (2007), further eroded *Roe v. Wade by* upholding a federal partial-birth abortion prohibition. The majority (Roberts, CJ, Scalia, Kennedy, Thomas, and Alito, JJ) stated, "we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child." *Id.* at 146. The majority also noted that *"Casey* rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted," *id.*, and that the Act "does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Id.* at 147.

Further, the Court said, "A central premise of *[Casey]* was that the Court's precedents after *Roe* had 'undervalue[d] the State's interest in potential life.'" *Id.* at 157. And so, the Court said at 158, "Where [the State] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and

substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including the life of the unborn." The majority's references to "legitimate interest" and "rational basis" have led some to suggest that *Gonzales* lowers the abortion right to lower-tier rational basis.

As in *Webster* and *Casey,* the dissents clearly recognized the direction the Court was taking. As Justice Ginsburg wrote, "Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices." *Id.* at 170. And she further denounced the majority for their anti-*Roe* sentiments:

> The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." *Ante*, at 14, 24, 25, 31, 33. A fetus is described as an "unborn child," and as a "baby," *ante,* at 3, 8; second-trimester, previability abortions are referred to as "late-term," *ante,* at 26; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience," *ante,* at 3, 37. Instead of the heightened scrutiny we have previously

> applied, the Court determines that a "rational" ground is enough to uphold the Act, *ante*, at 28, 37. And, most troubling, *Casey*'s principles, confirming the continuing vitality of "the essential holding of *Roe,*" are merely "assume[d]" for the moment, *ante*, at 15, 31, rather than "retained" or "reaffirmed." *Casey* 505 U.S. at 846.

The two most recent Supreme Court decisions on abortion, *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016), and *June Medical Services, LLC v. Russo,* 140 S. Ct. 2103 (2020), are both 5-4 decisions as to whether restrictions on abortion clinics constitute an "undue burden."

F. *Stenehjem*

On July 10, 2014, *Amici* Foundation for Moral Law and Lutherans for Life filed an amicus brief in the case of *Stenehjem v. MKB Management Corp.,* 795 F.3d 768 (8th Cir. 2015), involving a constitutional challenge to North Dakota's law prohibiting abortions after a fetal heartbeat can be detected. In this brief, *Amici* argued that "the connection between the state's interest and the child's viability is, at most, tenuous" and urged the Eighth Circuit to reject the viability test.

The Eighth Circuit ruled that it was bound by this Court's viability test, but in an unusual action the Eighth Circuit urged this Court to reevaluate the test, stating at 773: "Although controlling Supreme Court precedent dictates the outcome, in this case, good reasons exist for the Court to reevaluate its

jurisprudence." The Eighth Circuit noted that "the Court's viability standard has proven unsatisfactory because it gives too little consideration to the 'substantial state interest in potential life throughout pregnancy,'" *Id.* at 774, *quoting Casey,* 505 U.S. at 876. Viability, the Court said, has "tied a state interest in unborn children to developments in obstetrics, not to developments in the unborn," *Id.,* noting that in the 1970s the state could not protect a 24-week-old fetus because it did not satisfy the viability standard of the time, but because of advanced technology, it would satisfy the viability standard of today. The Eighth Circuit also noted evidence that women who have had abortions have suffered adverse consequences, and that both the "Jane Roe" of *Roe v. Wade* and "Mary Doe" of *Doe v. Bolton* also later renounced their positions in later court documents. *Id.* at 775-76.

It is unusual for a lower court to urge a higher court to reconsider its jurisprudence. This Court should give the plea from the Eighth Circuit serious consideration. For understandable reasons, the Eighth Circuit believed it did not have power to change this Court's viability standard. But this Court unquestionably has the authority to do so, and this case provides the opportunity to take that long-overdue step.

Roe . . . Akron . . . Thornburgh . . . Webster . . . Casey . . . Carhart. The move away from *Roe v. Wade* has been steady over the last forty-eight years. With *Dobbs v. Jackson Women's Health,* the stage has been set for this Court to take the final step of overruling *Roe v. Wade.*

II. THE VIABILITY TEST HAS NO FOUNDATION IN LAW, SCIENCE, HISTORY, BIBLICAL, OR CHURCH TRADITION.

When Justice Blackmun used the viability test in *Roe,* he presented very little historical, legal, or medical support for that position, because very little support for that position exists. Viability is a very subjective and speculative test. The point of viability may vary with the individual child, with the state of technology at the time, and from one society with another. When *Roe* was decided viability was usually around six months; now it is at least a month earlier. But, in reality, there is no way of knowing for certain, so sometimes we set an arbitrary point like six months, or sometimes we leave it to a doctor's speculative opinion.

But why should viability be the point at which the State's interest becomes sufficient to justify restricting abortion? Viability would be significant only in those extremely rare instances in which a child is born prematurely or is removed from the womb by a C-section or other medical procedure. Otherwise, it is simply one more step toward childbirth.

As the South Dakota Supreme Court noted in *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787, 792 (S.D. 1996), "'[v]iability' as a developmental turning point was embraced in abortion cases to balance the privacy rights of a mother against her unborn child. For any other purpose, viability is purely an arbitrary milestone from which to reckon a child's

legal existence."

In fact, throughout history viability has seldom if ever been considered the beginning of human life. Much of our Western legal tradition has been shaped by the Bible. On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible," and the President signed the bill into law. The opening clause of the bill is:

"Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States; . . ."

Joshua Berman, Senior Editor at Bar-Ilan University, in his 2008 book *Created Equal: How the Bible Broke with Ancient Political Thought,* contends that the Pentateuch is the world's first model of a society in which politics and economics embrace egalitarian ideals. Berman states flatly:

If there was one truth the ancients held to be self-evident it was that all men were not created equal. If we maintain today that, in fact, they are endowed by their Creator with certain inalienable rights, then it is because we have inherited as part of our cultural heritage notions of equality that were deeply entrenched in the ancient passages of the Pentateuch.[6]

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[6] Joshua Berman, *Created Equal: How the Bible Broke with Ancient Political Thought* (Oxford 2008) 175, *See also* John Marshall Gest, *The Influence of Biblical Texts Upon English Law,* an address delivered before the Phi Beta Kappa and Sigma xi Societies of the University of Pennsylvania June 14,

A. The Bible on Pre-born Children

The Bible treats the preborn child as a living human being. When Elizabeth, the mother of John the Baptist, came into the presence of Mary who was carrying Jesus in her womb, Elizabeth declared that "the babe leaped in my womb for joy" (Luke 1:44). That doesn't sound like a fetus or fertilized egg; that sounds like a child! It reminds us of Rebekah, of whom we read, "And the children struggled within her . . . ." (Genesis 25:21-26). These preborn children displayed traits that would follow them most of their lives.

The original languages used in these accounts make no distinction between born and preborn children. Of all of the Greek words used for child, *brephos* connotes a baby or very small child. That's the word attributed to Elizabeth: "The *brephos* leaped in my womb for joy." We see the same word in the next chapter: "Ye shall find the *brephos* wrapped in swaddling clothes, lying in a manger." And in II Timothy 3:15 Paul uses the same word: "From a *brephos* thou hast known the holy Scriptures . . . ." The same word is used for a child in the womb, a child newly born, and a child sometime after birth.

Another Greek word used for "son" is *huios.* In Luke 1:36 the angel tells Mary, "And, behold, thy

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1910, https://scholarship.law.upenn.edu quoting Sir Francis Bacon: "The law of England is not taken out of Amadis de Gaul, nor the Book of Palmerin, but out of the Scripture, of the laws of the Romans and the Grecians."

cousin, Elizabeth, she hath also conceived a *huios."* And the angel tells Mary in Luke 1:31, "Thou shat conceive in thy womb, and bring forth a *huios."* Two verbs, "conceive" and "bring forth," with the same direct object, a "son" or *huios.* And years later, when Jesus is a young man, God the Father says to Him, "Thou art my beloved *huios"* (Luke 5:22). Again, the same Greek word used for a preborn child, a newborn child, and a young man.

The same is true of the Old Testament Hebrew. The same word used for the preborn children in Rebekah's womb, *bne,* is also used for Ishmael when he is 13 years old (Genesis 17:25) and for Noah's adult sons (Genesis 9:19). And Job says in his anguish, "Let the day perish wherein I was born, and the night in which it was said, There is a man child *(gehver)* conceived" (Job 3:3). The Old Testament uses *gehver* 65 times, and usually it is simply translated "man." Job 3:3 could be accurately translated, "There is a man conceived."

The biblical authors identify themselves with the preborn child. In Psalm 139:13 David says, "Thou hast covered *me* in my mother's womb." Isaiah says, "The Lord hath called *me* from the womb" (49:1), and in Jeremiah 1:5 we read, "before *thou* camest forth out of the womb I sanctified *thee*, and I ordained *thee* a prophet unto the nations." They don't say "the fetus that became me;" that person in the womb is "me."

Job wishes he could have died before he was born: "Wherefore then hast thou brought me forth out of the womb? Oh that I had given up the ghost, and no

eye had seen me!" (10:18) How can the preborn child die if he or she is not alive?

And David says, "Behold, I was shapen in iniquity, and in sin did my mother conceive me." (Psalm 51:5) There was nothing sinful about the act of David's conception; this passage establishes that the preborn child has a sinful nature. How can a non-person have a sinful nature? And while other verses establish the child's personhood before birth, this passage shows his or her humanity all the way back to conception!

Clearly the Bible, especially in its original languages, treats the preborn child the same as a child already born. The Bible knows nothing about "potential human beings;" to the authors of Scripture, there are only human beings with potential.

Some will argue that, because Genesis 2:7 says, "God breathed into his nostrils the breath of life; and man became a living soul," man doesn't really become human until he takes that first breath. *Amici* believe this is a mistaken interpretation of Scripture.

(1) Genesis 2:7 is not normative about how and when human life begins. Adam was never a preborn child; he was formed out of the dust of the ground as a mature adult human being. No one else was formed out of the dust of the ground; even Eve was formed out of Adam's rib, and we never read that God breathed the breath of life into her nostrils or those of anyone else.

(2) Even if we were to conclude that without the

"breath of life" we are not fully human, the preborn child takes in oxygen through a placenta. Birth constitutes a dramatic change of environment coupled with the ability to breathe for oneself; other than that birth is simply one more step on the road to maturity.

So the Bible, taken as a whole, teaches that the preborn child is a living human being. Viability does not even enter the picture in determining the beginning of personhood.

B. Church Tradition on Pre-Born Children

Church tradition has also been instrumental in the formation of Western law.[7] For this reason, and because Justice Blackmun in *Roe*, 410 U.S. at 130, and Justice Stevens in his *Webster* dissent, 492 U.S. at 567-69, cited Catholic Church teaching to justify *Roe v. Wade, Amici* will briefly survey church history and its effect on Western law.

The *Didache*, or *Teaching of the Twelve Apostles*, a manual of instruction dating possibly as early as 50 A.D. or possibly in the second or third centuries,[8] commanded, "You shall not murder a child by abortion nor kill that which is born."[9] The Church Father Tertullian, writing around 197 A.D., cited

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[7] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA, 1983); John Eidsmoe, *Historical and Theological Foundations of Law, 3 Vols.* (Nordskog 2017)

[8] *Early Christian Writings*, "Didache," www.earlychristianwritings. com/ didache.html.

[9] *Id.*, Roberts-Donaldson English Translation.

extensively from Old Testament and New Testament Scriptures.[10] He also noted that Hippocrates, Asciepiades, Erasistratus, Herophius, and Soranos, "all of them certain that a living being had been conceived and so deploring the most unhappy infancy of one of this kind who had first to be killed list a live woman being rent apart."[11] St. Hippolytus, writing around 228 A.D., condemned those who resorted to drugs " so to expel what was being conceived on account of their not wishing to have a child," declaring them guilty of "adultery and murder at the same time."[12] And St. Basil wrote in his *First Canonical Letter*,

The woman who purposely destroys her unborn child is guilty of murder. With us there is no nice enquiry as to its being formed or unformed. In this case it is not only the being about to be born who is vindicated, but the woman in her attack upon herself, because in most cases women who make such attempts die. the destruction of the embryo is an additional crime, a second murder, at all events, if we regard it as done with intent.[13]

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[10] Scriptures cited by Tertullian include Jeremiah 1:5; Psalm 139:15; Luke 1:41-42.

[11] He declared firmly, "It is not permissible for us to destroy the seed by means of illicit manslaughter once it has been conceived in the womb, so long as blood remains in the person."

[12] Hyppolytus, circa 228. A.D.; quoted in *The Ante-Nicene Fathers: The Writings of the Fathers Down to A.D. 325,* ed. Alexander Roberts, Sir James Donaldson, (New York: Charles Scribner's Sons, 1903) V:131.

[13] 10 Basil (c. 330-379 A.D.), reprinted in *A Select Library of Post-Nicene Fathers of the Christian Church, Second Series,* ed. Philip Schaff and Henry Wace (New York: The Christian Literature Company, 1895) VIII:225.

The Canon Law of the Roman Catholic Church provides , "A person who procures a completed abortion incurs a latae sententiae [automatic] excommunication."[14] The Canon Law developed in the early centuries of the Christian Church out of early Church documents such as the *Didache* and was based on and interacted with the Scriptures, Roman and Greek Law, Byzantine Law, the Justinian Code, the decrees of emperors, and other sacred and secular legal documents.[15] The above citation from the *Didache* is evidence that the prohibition against abortion was part of the Canon Law from the beginning and consistently thereafter.

No wonder Orthodox scholar Fr. Alexander F.C. Webster wrote that abortion "is one of only several moral issues on which not one dissenting opinion has ever been expressed by the Church Fathers."[16]

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[14] Code of Canon Law, Title VI, Delicts Against Human Life and Freedom, Canon 1398, www.vatican.va/archive/ENG1104/_P57.HTM.

[15] Kenneth Pennington, *A Short History of the Canon Law from Apostolic Times to 1917,* http://faculty.cua.edu/pennington /Canon%20Law/ ShortHistoryCanonLaw.htm, pp. 2, 3, 7, 10, 16, 19, 21, 25-26, 32, 33-37, 41, 44, 59, 61. Although, as Pennington notes at 74, Martin Luther initially rejected the Canon Law, as his thinking developed he came to appreciate the value of Roman Catholic Canon Law legal scholarship and concluded that that scholarship should be applied to the civil law and the common law; *see* John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* 55-85 (Cambridge University Press, 2002); John Eidsmoe, *Historical & Theological Foundations of Law* (American Vision 2012) III:983-84.

[16] Dr. James Lamb, *Abortion and the Message of the Church: Sin or Salvation?* June 30, 2004,

Nor was this view limited to the Church Fathers or to the Roman Catholic Tradition. Martin Luther stated his position forcefully: "For those who have no regard for pregnant women and who do not spare the tender fruit are murderers and infanticides."[17] John Calvin was just as clear: "If it seems more horrible to kill a man in his own house than in a field, because a man's house is his most secure refuge, it ought surely to be deemed more atrocious to destroy the unborn in the womb before it has come to light."[18] And Pennington notes that when King Henry VIII (1491 - 1547 A.D.) separated the Church of England from the Roman Catholic Church, he proclaimed that "he, not the pope, was the source of all canon law henceforward."[19] Pennington adds, "Consequently, the Anglican Church preserved the entire body of medieval canon law and converted it into a national legal system."[20]

C. Common Law on Preborn Children

As the common law developed, "quickening" became the test for homicide prosecutions.

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http://www.lutheransforlife.org/article/ abortion-and-the-message-of-the-church-sin-or-salvation/ (quoting "An Orthodox Word on Abortion" at 8-9 (Paper delivered at the Consultation on The Church and Abortion, Princeton, 1992)).

[17] Lamb, *supra* note 11 (quoting What Luther Says: An anthology, compiled by Ewald M. Plass (St. Louis: Concordia Publishing House, 1959), Vol. 2, NO. 2826 at 905).

[18] Lamb, *supra* note 11 (quoting Commentaries on the Four Last Books of Moses at 41-42 (Grand Rapids: Eerdmans Publishing Company, 1950)).

[19] Pennington, *supra* note 12, at 64.

[20] *Id.*

Quickening is different from viability; quickening is the time when the mother first feels the child move within her. One could be convicted of homicide for the killing of an unborn child, only if quickening had already taken place.

But this common law rule did not mean that the child became a person only at quickening or that there was a right to abortion before quickening. Rather, it was a procedural matter of proof. One can be guilty of homicide only if the homicide victim was alive at the time of the alleged killing, and at that stage in the development of the common law, medical science had no way of proving the child was alive until the mother had felt the child move within her.[21]

D. Medical Advances on Preborn Children

As medical science advanced, so did protection for unborn children. In the 1800s, when medical science was able to determine that the unborn child was in fact alive from the time of conception, laws were enacted in England and in the United States to prohibit abortion prior to quickening, in fact, to prohibit abortion at any time after conception. For example, Lord Ellenborough's Act of 1803 prohibited abortion after quickening as a capital offense and punished abortion prior to quickening with fines, imprisonment, pillory, whipping, or banishment for

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[21] 1 William Blackstone, *Commentaries* at 125-26; *see also* Hicks v. State, No. 1110620, 2014 WL 1508698 (Ala. April 18, 2014) (C.J. Moore, concurring specially); see also John Eidsmoe, *Historical & Theological Foundations of Law* (American Vision 2012) III:1197 fn. 110.

up to fourteen years.[22] In 1837 Lord Ellenborough's Act of 1803 was amended to abolish the distinction between pre-quickening and post-quickening and make abortion a crime regardless of when performed.[23]

In 1857 the American Medical Association issued a report stating, "The independent and actual existence of the child before birth as a living being is a matter of objective science."[24] In the 1860s American medical doctors led a movement to criminalize abortion at all stages of pregnancy, and this movement led to the passage of laws prohibiting abortion in all 50 states.[25] Since that time, medical science has advanced further in its understanding of the unborn child, from the discovery of chromosomes (1879-83),[26] the location of genetic material within chromosomes of a cell (1902),[27] the components of DNA (1929)[28], and much more.

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[22] Lord Ellenborough's Act 1803, Act 43 Geo.3 c. 58, Pickering's Statutes at Large (Cambridge University Press 1804 Ed.).

[23] Charles L. Lugosi, *When Abortion Was a Crime: A Historical Perspective*, 83 U. Det. Mercy L. Rev. 51, 60 (2006).

[24] *See* Roe v. Wade, 410 U.S. at 141 (1973).

[25] *Battleground: Women, Gender, and Sexuality,* ed. Amy Lind and Stephanie Brzuzy (Greenwood Publishing Group, 2008) I:3.

[26] *See, e.g.,* Genetic Timeline, http://www.genome.gov/pages/education/ genetictimeline.pdf.

[27] Robert Snedden, *DNA and Genetic Engineering* (Heinemann Library 2002, 2008). p. 44.

[28] *See, e.g.,* Charles H. Calisher, *Sequences vs. viruses: Producer vs. Product, Cause and Effect*, Croatian Medicaournal (2007), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2080495/.

Justice Blackmun concluded in *Roe v. Wade* that preborn children are not "persons" within the meaning of the Fourteenth Amendment, but he presented very little evidence to support that conclusion. Although he mentioned that the American Medical Association had led efforts to suppress abortion in the late 1800s, *Roe*, 410 U.S. at 141, he ignored the AMA's medical findings about the beginning of human life, findings that had been developed and that had come to light during the very time in which the Fourteenth Amendment was adopted. He acknowledged that states during the 1860s were adopting anti-abortion statutes but misses the reason – not because surgery was dangerous (there were no prohibitions on appendectomies and other operations), but because the preborn child is a person. Iowa's abortion statute, adopted 1868, was titled "An Act to Prohibit Foeticide."

He acknowledged at 156-57 that "if this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."[29] Unfortunately, Justice Blackmun ignored the very evidence that the personhood of the preborn child was becoming a

[29] Strangely, this statement of Justice Blackmun is virtually forgotten, while his statement at 159 that "We need not resolve the difficult question of when life begins" is common knowledge. The possibility of personhood under the law at least partly answers why the majority did not broach the "difficult question," for life would implicate personhood, and personhood and the correlative right to life, by Justice Blackmun's own words, would foreclose any right to abortion.

consensus at the time the Fourteenth Amendment was adopted. *Amici* invite the Court's attention to the excellent law review article by James S. Witherspoon which thoroughly presents this historical evidence Justice Blackmun ignored.[30]

Against this background, one may readily see that viability is not a sacrosanct test either of the beginning of life or of the point at which the State's interest in life becomes sufficient to justify restricting abortion. As John Hart Ely wrote,

The Court's response here is simply not adequate. It agrees, indeed it holds, that after the point of viability (a concept it fails to note will become even less clear than it is now as the technology of birth continues to develop) the interest in protecting the fetus is compelling. Exactly why that is the magic moment is not made clear: Viability, as the Court defines it, is achieved some six to twelve weeks after quickening. (Quickening is the point at which the fetus begins discernibly to move independently of the mother and the point that has historically been deemed crucial—to the extent *any* point between conception and birth has been focused on.) But no, it is *viability* that is constitutionally critical: the Court's defense seems to mistake a definition for a syllogism.[31]

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[30] James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, St. Mary's Law Journal 1985-86 17:29-77.

[31] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 924-25 (1973); quoted in *Hamilton v. Scott*, 97 So.3d 728 (Ala. 2012).

CONCLUSION

For nearly half a century, this nation has been saddled with an abortion jurisprudence that has no foundation in the Constitution, no foundation in medical science, and no foundation in American or Biblical history and tradition, a jurisprudence that has resulted in an estimated 62,994,587 abortions since 1973.[32] It is now time to end this travesty, uphold the Mississippi Gestational Age Act, and overrule *Roe v. Wade.*

Respectfully submitted,

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[32] See www.abortioncounters.com and Steven Ertelt *62,502,904 Babies Have Been Killed by Abortion Since Roe v. Wade in 1973* (2021) available at *https://www.lifenews.com/2021/01/22/62502904.*