Nos. 18-1323 & 18-1460

IN THE
Supreme Court of the United States

JUNE MEDICAL SERVICES, LLC, ET AL.,
Petitioners,
v.
REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Respondent.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Petitioner,
v.
JUNE MEDICAL SERVICES, LLC, ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF REBEKAH GEE

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because it believes the Fourteenth Amendment protects the God-given right to life instead of a supposed right to an abortion. In addition, *Amicus's* counsel of record was conceived in a geriatric pregnancy. The doctors suggested that his mother consider abortion, but she chose life. Since *Amicus's* counsel of record escaped *Roe*'s crosshairs, *Amicus* wishes to help other unborn children escape them as well.

SUMMARY OF ARGUMENT

The question presented in Case No. 18-1323 is whether the Fifth Circuit's judgment conflicts with *Whole Woman's Health v. Hellerstedt*. *Whole Woman's Health* rests on the validity of *Planned Parenthood v. Casey* and *Roe v. Wade*, which supposedly rest on the Fourteenth Amendment's Due Process Clause.

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

Neither the text nor the history of the Fourteenth Amendment supports the right to an abortion. The Court's decision in *Roe* rests on the legal fiction of substantive due process that was invented in *Dred Scott v. Sandford* to protect a right that was not in the Constitution. Substantive due process was abused badly again in *Lochner v. New York*, allowing judges to read their personal philosophies of liberty into the Fourteenth Amendment. The Court did so yet again in a line of decisions beginning in *Griswold v. Connecticut*, resulting in this Court's deadliest application of substantive due process: *Roe v. Wade*. Just as the Court eventually did away with *Lochner*, so now it must do away with *Roe*.

The Constitution does not require this Court to continue affirming *Roe* just because this Court affirmed its *Roe's* core in *Planned Parenthood v. Casey*. *Casey*'s view of precedent does not comport with the common-law view of precedent that the Constitution adopted and expected this Court to follow.

If the Fourteenth Amendment has any application to abortion at all, it protects the unborn child's right to life, even from state laws legalizing abortion. The Framers of the Fourteenth Amendment believed that God gave every person the natural right to life and considered unborn children to be "people" entitled to the Amendment's protection. Consequently, any state law that protects every person from murder except unborn children violates the Equal Protection Clause. Furthermore, any effort by the state or federal governments to deprive an unborn child of life

without due process of law violates the Due Process Clauses of the Fifth and Fourteenth Amendments.

Finally, in Case No. 18-1460, *Amicus* agrees that the Petitioners failed to satisfy the third-party standing doctrine, because the relationship between abortion doctors and the women seeking abortions are not as close as previously believed. This conclusion does not deprive the Court of jurisdiction to consider whether *Roe* should be overruled because the third party standing doctrine is a prudentially imposed limit on this Court's authority rather than one that is constitutionally required. The Court may, and should, proceed to overrule *Roe*.

ARGUMENT

I. This Court Should Hold That the Constitution Protects the Right to Life Instead of a Right to Abortion

The first question presented in this case is whether the Fifth Circuit's decision below conflicts with *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016). In that case, this Court held that each of the Texas laws at issue "constitutes an undue burden on abortion access." 136 S.Ct. at 2300. *Whole Woman's Health* was based on *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878-79 (1992), which established the "undue burden standard." *Casey*, in turn, was based on *Roe v. Wade*, which recognized for the first time a constitutional right to an abortion. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973). The constitutional basis for *Roe* was

supposedly the Fourteenth Amendment's Due Process Clause. *Id.* at 164.

The threshold issue, therefore, is whether the Constitution actually protects the right to an abortion. If the answer is clearly no, then this Court should say so, rather than wasting its time arguing over the particularities of *Whole Woman's Health*. The Supreme Court of the United States should not embarrass itself by debating the color of the emperor's new clothes if even a child can see that the emperor is wearing no clothes at all.[2]

A. *Roe* and Its Progeny Do Not Comport with the Due Process Clause.

1. The Due Process Clause's Original Meaning

The Due Process Clause of the Fourteenth Amendment states, "No State shall ... deprive any person of life, liberty, or property without due process of law." U.S. Const., amend. XIV, § 1. Grammatically, this Clause does not prohibit the government from abridging *substantive* rights. Instead, it guarantees the people of the states the right to due *process* of law before the states deprive them of life, liberty, or property. It is procedural, not substantive; therefore it cannot be construed to recognize rights that are not in the Constitution. "Substantive due process," after all, is an oxymoron. *See Timbs v. Indiana*, 139 S.Ct. 682, 692 (2019) (Thomas, J., concurring in judgment)

[2] Hans Christian Andersen, *The Emperor's New Clothes*, in *Andersen's Fairy Tales* (1837).

(explaining that "due process" meant "by the law of the land"); *id.* at 691 (Gorsuch, J., concurring); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2632-34 (2015) (Thomas, J., dissenting) (explaining that "liberty" meant "freedom from physical restraint"). That alone should end the matter.

2. Substantive Due Process from *Dred Scott* to *Lochner* to *Roe*

As Justice Thomas has explained, "substantive due process" is a "dangerous fiction" that "distorts the constitutional text" and invites judges to "roam at large in the constitutional field guided only by their personal views...." *Obergefell*, 135 U.S. at 2631 (Thomas, J., dissenting) (quotations, citations, and alterations omitted). "And because the Court's substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court's most notoriously incorrect decisions." *Timbs,* 139 S.Ct. at 692 (Thomas, J., concurring in judgment) (citing *Dred Scott* and *Roe*).

As Justice Gorsuch has recognized, the doctrine of substantive due process was born in *Dred Scott*. Relying on the Fifth Amendment's Due Process Clause, this Court held,

> [A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the

> United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

Dred Scott v. Sandford, 60 U.S. 393, 450 (1857). In his dissent, Justice Curtis demonstrated that this understanding of due process was unheard of from the time of the Magna Charta until then, and would by its terms prohibit Congress from eliminating the slave trade or even the States from banning slavery. *Id.* at 624-27 (Curtis, J., dissenting).

For the first time, the Court interpreted the Due Process Clause to confer a *substantive* right to keep human beings as slaves, not a *procedural* right against arbitrary government power. Thus, Justice Gorsuch concludes that, in *Dred Scott*,

> the Court went out of its way to bend the Constitution's terms in an effort to try to quell unrest in the country over the question of slavery. The Court invented the legal doctrine of substantive due process, and then proceeded to use it to hold that Congress had no power to regulate slavery in the territories.

Neil Gorsuch, *A Republic, If You Can Keep It* (2019) (audiobook 6:58:10-6:58:32).

The Court's new invention of substantive due process did not accomplish the result it intended. It set America on a course for Civil War, which cost

over three million lives.[3] The similar invocation of substantive due process 116 years later resulted has resulted in over sixty million deaths,[4] making *Roe* nearly twenty times as deadly as *Dred Scott*.

In 2010, the Court declined an opportunity to reconsider the doctrine of substantive due process but continued to hold that the Due Process Clause protects rights that are "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010) (emphasis deleted). If the Court were willing to limit the recognition of substantive due process rights to only those deeply rooted in our history, then as Justice Scalia said, the harm to our Constitution might be "narrowly limited." *Id.* at 791 (Scalia, J., concurring). But as Justice Thomas observed, "the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights." *Id.* at 811 (Thomas, J., concurring in part and concurring in judgment).

One such example was this Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905). In that case, this Court concluded that the Due Process

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[3] *America's Wars*, U.S. Department of Veterans Affairs, https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (last visited Dec. 11, 2019).

[4] *Abortion Statistics*, National Right to Life Committee, https://nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf (last visited Dec. 11, 2019).

Clause prohibited state interference with freedom of contract. 198 U.S. at 64. Justice Holmes famously dissented, arguing that the Court's decision was based on economic theory instead of the Constitution of the United States. *Id.* at 75 (Holmes, J., dissenting). Holmes's position eventually prevailed. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (signaling the end of the *Lochner* era). After the Thirteenth Amendment invalidated *Dred Scott* and the Court repudiated *Lochner*, one would think the Court would have ceased from creating new rights under the substantive due process doctrine.

But think again. For the third time, the Court embarked on a new era of inventing substantive due process rights. The third round had nothing to do with slavery or economics, but (supposedly) on personal autonomy. As Justice Kennedy put it in *Casey*, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 833. This line of cases began in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which recognized a right of privacy. *Griswold*, in turn, begat *Roe.*

Judge Henry Friendly of the Second Circuit, echoing Justice Holmes's dissent in *Lochner*, recognized that abortion had nothing to do with the Constitution. In a draft opinion that was prepared two years before *Roe* was decided, Judge Friendly first rejected the argument that abortion had anything to do with the right of privacy, because the abortion procedure was incredibly invasive of a person's body and anything but private. *See* A.

Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion* 6 (Apple Books 2006) (republishing 29 Harv. J. L. & Pub. Pol. 1035 (2006)).[5] He then addressed the heart of the plaintiffs' argument: "that a person has a constitutionally protected right to do as he pleases with his—in this instance, her—own body so long as no harm is done to others." *Id.* at 7. Judge Friendly wrote,

> Plaintiffs' position is quite reminiscent of the famous statement of J[ohn] S[tuart] Mill.... Years ago, when courts with considerable freedom struck down statutes that they strongly disapproved, Mr. Justice Holmes declared in a celebrated dissent that the Fourteenth Amendment did not enact Herbert Spencer's Social Statistics. No more did it enact J.S. Mill's views on the proper limits of law-making.

Id. at 7-8.

As Justice Holmes recognized in *Lochner*, and as Judge Friendly recognized in his abortion case, the Due Process Clause of the Fourteenth Amendment does not give federal judges the right to read their own philosophies of the limits of law-making into Constitution. However, that is exactly what the Court did in *Roe*.

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[5]https://itunes.apple.com/WebObjects/MZStore.woa/wa/viewBook?id=512716719.

As Chief Justice Roberts might have said to pro-abortion advocates if he were on the Court in *Roe*: "by all means celebrate today's decision.... But do not celebrate for the Constitution. It had nothing to do with it." *Obergefell*, 135 S.Ct. at 2626 (Roberts, C.J., dissenting).

3. Conclusion: The Due Process Clause Does Not Protect the Right to an Abortion

With this analysis in mind, Justice Scalia was correct when he said that a right to an abortion cannot "be logically deduced from the text of the Constitution." *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring). If this Court continues to maintain that the Due Process Clause protects the right to an abortion, then "[w]ords no longer have meaning." *King v. Burwell*, 135 S.Ct. 2480, 2497 (2015) (Scalia, J., dissenting).

Even if substantive due process comported with the Fourteenth Amendment, it would not support the right to an abortion because it is not "found in the longstanding traditions of our society[.]" *Akron*, 497 U.S. at 520 (Scalia, J., concurring); *see also Washington v. Glucksberg*, 521 U.S. 720-21 (1997). As Justice Rehnquist noted in his dissent in *Roe*,

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong

> indication, it seems to me, that the asserted right to an abortion is not so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Roe, 410 U.S. at 174 (Rehnquist, J., dissenting) (citations and quotation marks omitted).

Justice White agreed, stating, "I find nothing in the language or history of the Constitution to support the Court's judgments.... [I]n my view its judgment is an improvident and extravagant exercise of the power of judicial review...." *Doe v. Bolton*, 410 U.S. 179, 221-22 (1973) (White, J., dissenting).

Roe has no basis in the text of the Constitution or in our nation's history and traditions. It was a bare power grab by judges who read their own philosophies of liberty into the Constitution. It was judicial activism at its worst and must be overruled.

B. This Court Should Not Continue to Affirm *Roe* Based on *Casey*'s Incorrect View of Precedent

In *Casey*, a plurality of this Court affirmed *Roe*'s central holding, reasoning that overruling *Roe* "would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." 505 U.S. at 865. *Casey*'s erroneous application of *stare decisis* should

not prevent this Court from correcting its error in *Roe*.

Casey's view of *stare decisis* is not the view that the Constitution presupposes. The doctrine of precedent is rooted in the English common law. According to Blackstone, the common law was, in short, the customs of the kingdom. 1 Blackstone, *Commentaries* *62. The rules of the common law "receive[d] their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom." *Id.* at *64. Because the common law was not written like a civil code but derived its authority from customs, it was necessary for someone to record these customs. The English judges recorded their decisions in reporters for that reason. *Id.* at *69. Consequently, recorded judicial opinions were considered "the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law." *Id.*

Based on these principles, Blackstone acknowledged that the general rule "to abide by former precedents, where the same points come again in litigation[.]" *Id.* at *69. But Blackstone then explained why this rule was not absolute:

> Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from

> misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was *bad law*, but that it was *not law*, that is that it is not the established custom of the realm, as has been erroneously determined….
>
> The doctrine of the law then is this: that precedents and rules must be followed, *unless flatly absurd or unjust* ….

Id. at *69-*70 (last emphasis added). Blackstone went on to explain that such an exception is needed because "*the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing, since it sometimes may happen that the judge may *mistake* the law." *Id.* at *71. Opinions of the court were not law itself, but the "general rule" was that "the decisions of the courts of justice are the *evidence* of what is common law." *Id.* at *71 (emphasis added, quotation marks omitted). But if such a decision was contrary to reason or divine law, or flatly absurd or unjust, then such a precedent would not be followed. *Id.* at *69-*71.

The only difference between the common-law system and the American system is the presence of a written Constitution. As Justice Thomas has observed, because the American Constitution is written, there is even less of a need for *stare decisis* than in Blackstone's day. *Gamble v. United States*, 139 S.Ct. 1960, 1984 (2019) (Thomas, J., concurring).

Immediately before their appointment to this Court, Justices Gorsuch and Kavanaugh coauthored a treatise with 10 other federal judges acknowledging the traditional view that "judicial precedents were merely *evidence* of the law, as opposed to a source itself." Bryan Garner et al., *The Law of Judicial Precedent* 2 (2016). But in the very next sentence, the treatise continues, "No serious legal thinker now believes this. Today, precedents are understood to make up part of the law ...." *Id.* *Amicus* recognizes that Justices Gorsuch and Kavanaugh themselves may not have agreed with that statement, since there were many authors and they acknowledged that they did not all agree on everything. *Id.* at xiv.

Nevertheless, *Amicus* respectfully submits that the treatise's proposition is incorrect. Perhaps part of the problem comes from the treatise's premise that the common law was considered unwritten law "because long ago judges simply read or announced their decisions from the bench, without writing them down." *Id.* at 1. But as Blackstone demonstrates, the common law was not considered law *because a judge said it*. Instead, it derived its authority from *custom and usage*. The common law judges never presumed that they had the power to *make* law.

Further proof of this proposition can be found in the writings of Sir Matthew Hale, who said,

> The decisions of the court of justice ... do not make a law properly so called (for that only the King and Parliament can do); yet they have a great weight and authority in

> expounding, declaring, and publishing what the law of this kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whatsoever.

Matthew Hale, *History of English Law* 67 (1739), *reprinted in* 2 Harold Berman, *Law and Revolution* 274 (2003). Former Harvard Law Dean Harold Berman explained that under Hale's view, which really created the doctrine of precedent (even though reports existed under Bracton and Coke), precedent should be respected because it tested principles over time that were linked to the law itself. 2 Berman, *supra*, at 274-75. But because precedent always had to be based on the law, judges could always overrule bad precedents. *Id.*

The Founders intended for this view of precedent to continue under the new Constitution. *See Anastasoff v. United States*, 223 F.3d 898, 901-04 (8th Cir. 2000) (quoting founding-era writings applying the common-law view of precedent to the Constitution). Thus, the Supreme Court's precedents are supposed to be highly authoritative evidence of what the Constitution means, but they are always subject to the exception of being overruled if plainly contrary to the law.

Casey declined to overrule *Roe* supposedly because of the doctrine of *stare decisis*. *Casey*, 505

U.S. at 854-61. But in light of the common law view of precedent that the Founders adopted, Chief Justice Roberts and Justice Alito have accurately said that *stare decisis* is not an "inexorable command" but rather a "principle of policy" that should not be followed when doing so would undermine the rule of law instead of promoting it. *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring). In contrast, *Casey* seemed to view *Roe* as a "superprecedent"[6] that cannot be changed. This resembles more of the laws of the Medes and the Persians[7] than the Anglo-American view of precedent.

As Chief Justice Roberts observed, if the Court never revisited precedents that were supposedly "well settled," then "segregation would still be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants." *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring). Over the last year, a majority of Justices declared that they were willing to reconsider the Court's approach to the nondelegation doctrine, which has been in effect since the New Deal Era—long before *Roe*. *Gundy v. United States*, 139 S.Ct. 2116, 2131

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[6] Judge Amy Barrett of the Seventh Circuit has noted that scholars do not consider *Roe* a superprecedent because "the public controversy about *Roe* has never abated." Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1735 n.141 (2013). Even if it were, Judge Barrett argues it would not inhibit the Court's ability to overrule it. *Id.* at 1734-35.

[7] *See Daniel* 6:12 (noting that "the law of the Medes and the Persians ... may not be revoked.").

(2018) (Gorsuch, J., dissenting); *id.* at 2130-31 (Alito, J., concurring in judgment); *Paul v. United States*, No. 17-8830 (U.S. Nov. 25, 2019) (statement of Kavanaugh, J.). If the Court was willing to overrule such weighty and supposedly settled precedents as these, then it should be willing to do the same to *Roe* as well.

The Court has sometimes stated that a "special justification" is required to overrule precedent. If there was ever a case that had special justification, it is this one. Sixty million people have been murdered since 1973. It is time to end the bloodshed and overrule *Roe* and its progeny once and for all.

C. The Court Should Not Only Overrule *Roe* but Also Hold That the Constitution Protects the Child's Right to Life.

Roe itself conceded that if an unborn child is a person, the case for abortion collapses, because the child's right to life would be specifically guaranteed by the Amendment. *Roe*, 410 U.S. at 156-57. The Court was correct in that regard. The Fourteenth Amendment states, in relevant part: "nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws." The Fifth Amendment's Due Process Clause is identical to the Fourteenth's in all material aspects.

Thus, the Fifth Amendment prohibits the federal government from taking a person's life without due process. The Fourteenth Amendment forbids the

States to the same, but it also prohibits them from denying to any person the equal protection of the law. Consequently, if a State protects every person from murder but not the unborn, then an equal protection violation exists. The State must either protect every person from murder or no person from murder. Likewise, the Due Process Clauses of the Fifth and Fourteenth Amendments would prohibit state sponsorships of abortions (say through taxpayer funds) if there were no due process for the child before his or her execution.

Because of the Constitution's requirements, *Amicus* must respectfully disagree with the proposition that the Constitution says nothing about abortion and leaves the matter entirely to the States. The Constitution does not mention the word "abortion," but it does address the taking of life without due process or equal protection. With that in mind, the question then becomes whether an unborn child is a "person" within the meaning of the Fourteenth Amendment.

Blackstone said, "Natural persons are such as the God of nature formed us." 1 Blackstone, *Commentaries* *123. "The principle of Blackstone's rule was that 'where life can be shown to exist, legal personhood exists.'" Joshua Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?* 40 Harv. J. L. & Pub. Pol. 539, 554-55 (2017) (quoting Michael Stokes

Paulsen, *The Plausibility of Personhood*, 74 Ohio St. L. J. 14, 28 (2012)).[8]

As our Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *The Declaration of Independence*, para. 2 (U.S. 1776). People do not exist because government created them; governments exist because people created them. Personhood therefore precedes the State and is determined not by government but by God.

The Framers of the Fourteenth Amendment shared this view. As one scholar says,

> The framers' jurisprudence tended to lump together rights flowing from citizenship and personhood under the rubric of 'civil rights,' and to speak of them in religious or natural law and natural rights terms. In Section 1 of the Fourteenth Amendment, the framers attempted to create a legal bridge between their understanding of the Declaration of Independence, with its grand declarations of

[8] Due to lack of scientific evidence, the common law held that one could be convicted of homicide for killing a preborn child only after "quickening," because only then could the court ascertain that the child was alive, and it is legally impossible to kill a person who is already dead and not alive. *Id.* But when the Fourteenth Amendment was ratified, many courts had repudiated the quickening standard because of the discovery that life begins at fertilization. Craddock, *supra*, at 554-55.

> equality and rights endowed by a Creator God, and constitutional jurisprudence.
>
> ...
>
> [F]rom an originalist constitutional perspective, application of the Equal Protection Clause to rights or issues beyond the scope of the 1866 Civil Rights Act can rest upon the broader principle enacted by the framers—their jurisprudence of equality linking the Declaration of Independence to the Constitution.
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> ...
>
> The general language of the Fourteenth Amendment reflects the framers' commitment to constitutionalizing their natural-law understanding that all human beings are created equal as to their fundamental rights of life, liberty, and property.

David Smolin, *Equal Protection*, in *The Heritage Guide to the Constitution* 400-01 (2005).

Let us not forget that the central point of the Fourteenth Amendment was to recognize a group of people as persons who were not recognized as persons before. *Dred Scott* held that African-Americans were property, not people, but the Fourteenth Amendment affirmed that everyone born in the United States was a citizen thereof. U.S. Const. amend. XIV, § 1. As Justice Harlan noted, the Fourteenth Amendment

eradicated *Dred Scott's* premise that a group of people were "a subordinate and inferior class of beings." *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting). That was true for African-Americans, and it is true for the unborn as well.[9]

Personhood and the right to life ultimately derive from the fact that "God created man in his own image." *Genesis* 1:27. Because of this, He gave the command, "You shall not murder." *Exodus* 20:13 (NASB). As Blackstone said, "Life is the immediate gift of God, a right inherent by nature in every individual." 1 Blackstone, *Commentaries* *129.

Unborn children are people, made in the image of God and vested with the right to life from the moment of fertilization.[10] The male and female gametes that combine to form a zygote are

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[9] To further underscore the inherent equal protection violation in abortion, the Court should note that abortion in the United States arose from the eugenics movement. *See Box v. Planned Parenthood of Indiana and Kentucky*, 139 S.Ct. 1780, 1782 (2019) (Thomas, J., concurring). After World War II, the Allies prosecuted the Nazis at Nuremburg for pressuring disfavored races under their control into getting abortions. *See* Jeffrey C. Tuomala, *Nuremburg and the Crime of Abortion*, 42 U. Tol. L. Rev. 283 (2011).

[10] "Fertilization" means "the process of union of two gametes whereby the somatic chromosome number is restored and the development of a new individual is initiated." *Fertilization*, Merriam-Webster Online, goo.gl/Be6Jd7 (last visited Dec. 18, 2019). *Amici* prefers the term "fertilization" to "conception" because the latter can mean either fertilization or implantation. *See Conception*, Merriam-Webster Online, goo.gl/46Yok6 (last visited Dec. 18, 2019).

scientifically alive even before they come together to form a zygote, and a zygote is as much alive as any other living cell. The difference is that the zygote – which is completely genetically human – has the DNA of a unique human being that did not exist the moment before fertilization.[11]

This fact is so obvious that even abortionists admit it. Oregon abortion clinic owner Aileen Klass admitted, "*Of course* human life begins at conception." Calvin Freiburger, *Bill Nye: Embryology Science Denier*, Live Action, goo.gl/r9uv4j (Jan. 18, 2015) (emphasis added). Ron Fitzsimmons, who was the Executive Director of the National Coalition of Abortion Providers, said, "Well, when the woman comes in, *the fetus is alive*. But the doctors that we represent will affect fetal demise in utero. So that means the baby is effectively, you know, dead in the uterus and then the procedure starts." *Id.* (emphasis added). So the question for the abortionists is not whether unborn children are *alive*, but whether they are *persons*. Fortunately, when the Fourteenth Amendment was ratified, the People considered the answer to be an unequivocal "yes." *See* Craddock, *supra*, at 552-62.

Scripture confirms what science teaches and the Framers of the Fourteenth Amendment believed.[12]

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[11] For a more detailed discussion of this point, see Randy Alcorn, *Why Pro-Life?* 26-31 (2004).

[12] The Founding Era viewed Scripture as the way to interpret what the law of nature required. See 1 Blackstone, *Commentaries* *41-43. As Justice Story said, "Christianity becomes not merely an auxiliary, but a guide to the law of

The Law of Moses proscribed the death penalty for anyone who induced the miscarriage of a pregnant woman and caused the baby's death. *Exodus* 21:22-25. This was the same penalty for intentionally causing the death of a born person. *Exodus* 21:12. Thus, the Scripture gives the same value to the life of a born person as to an unborn person.

The conclusion, then, is this: unborn children are people. As such, the Fifth Amendment forbids the federal government from depriving them of life without due process of law, and the Fourteenth Amendment prohibits the States from depriving them of life without due process or denying them the equal protection of generally applicable homicide laws.

The Constitution of the United States not only forbids this Court from legalizing abortion (as it did in *Roe*), but it forbids the States from doing so as well. This Court must not only overrule *Roe* and its progeny, but it must also forbid the States from denying each child the right to life that they protect for every other person.

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nature, establishing its conclusions, removing its doubts, and elevating its precepts." Joseph Story, *A Discourse Pronounced Upon the Inauguration of the Author as Dane Professor of Law in Harvard University, on the Twenty-Fifth Day of August, 1829*, at 20-21 (1829).

II. The Third-Party Standing Issue in the Cross-Petition, No. 18-1460.

A. Procedural History.

A cross-petition for certiorari filed by Rebekah Gee on May 20, 2019 (*Gee v. June Medical*, No. 18-1460) raised the issue of whether this Court had jurisdiction to hear this case under the doctrine of third-party standing, *jus tertii*. Standing, a prerequisite to the exercise of jurisdiction, presents a threshold issue that precedes the merits. *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019). In a prior case, the Fifth Circuit held that abortion clinics and their hired physicians had third-party standing to invoke the *Roe*/*Casey* precedents that constitutionalize abortion. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014). *See also June Medical Services, LLC v. Gee*, 814 F.3d 319, 322-23 (5th Cir. 2016) (same). Gee's cross-petition challenges that holding.

On October 4, 2019, this Court granted certiorari in the main petition (*June Medical v. Gee*, No. 18-1323) and consolidated it with No. 18-1460 for briefing and oral argument. Thus, the merits of the third-party standing issue are before the Court.

B. The Primary Case Allowing Third-Party Representation of Women Seeking Abortions Rested on a Serious Misconception of the Typical Role of an Abortion Doctor.

The progenitor case for third-party standing for abortion businesses and their hired physicians to raise the constitutional rights, so-called, of their customers is *Singleton v. Wulff*, 428 U.S. 106 (1976). The plurality opinion in that case states that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Id.* at 118. Decided only three years after *Roe*, *Wulff* suffered from the *Roe* presumption that a traditional doctor-patient relationship exists between abortion doctors and their customers. *Roe* made much of the "factors the woman and her responsible physician necessarily will consider in consultation." *Roe*, 410 U.S. at 153. Also mentioned were "reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy," and that prior to viability "*the attending physician, in consultation with his patient*, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." *Id.* at 156, 163. *See also Colautti v. Franklin*, 439 U.S. 379, 387 (1979) (noting "the central role of the physician … in consulting with the woman about whether or not to have an abortion"); *Doe*, 410 U.S. at 197 (describing "[t]he woman's right to receive medical care in

accordance with her licensed physician's best judgment").

The typical abortion-clinic doctor, however, is in no sense an "attending physician," namely "[t]he principal physician supervising a patient's care." *The American Heritage Dictionary of the English Language* (5th ed. 2016).[13] Additionally, "consultation" is nonexistent in assembly-line abortion clinics such as the one operated by petitioner June Medical. The partially anesthetized "patient" mounts the abortion table usually without ever meeting or conversing with the "physician." The suction machine does its work and the patient is wheeled into the recovery room, a process that takes mere minutes. *See* Cross-Pet. at 6 n.2 (quoting Plaintiffs' expert that a suction abortion "typically lasts two to ten minutes").

A mere three months after *Wulff*, an appellate judge noted that "abortion services are highly concentrated among comparatively few large volume providers (mostly non-hospital clinics) in relatively few metropolitan areas." *Hodgson v. Lawson*, 542 F.2d 1350, 1359 n.3 (8th Cir. 1976) (Heaney, J., dissenting). After New York liberalized its abortion laws in 1970, Dr. Bernard Nathanson became director of "the first—and largest—abortion clinic in the western world," where he presided over 60,000 abortions. B. Nathanson, M.D., *Sounding Board—Deeper into Abortion*, 291 N. Engl. J. Med. 1189, 1189

[13] *Doe v. Bolton*, *Roe*'s companion case, also employs the fiction of the "attending physician," employing the term three times. 410 U.S. at 192, 199.

(1974). In regard to physician counseling of the abortion decision, he stated: "The phrase 'between a woman and her physician' is an empty one since the physician is only the instrument of her decision, and has no special knowledge of the moral dilemma or the ethical agony involved in the decision." *Id.* A gynecologist commented: "The physician [who abdicates his responsibility for arriving at the decision for abortion] is, then, no physician at all, but only an abortion technician." Hanna Klaus, *A Medical Cop-Out?*, 133 America 68 (1975).

Decided in the immediate aftermath of *Roe*, *Wulff* noted incorrectly that "the constitutionally protected abortion decision is one in which the physician is intimately involved." 428 U.S. at 117. Extrapolating from that erroneous premise, the *Wulff* plurality concluded that the abortion doctor is "uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against" the abortion decision. *Id.* Thus, the romanticisation of the doctor-patient relationship in *Roe* laid the groundwork for the *Wullf* plurality to endorse third-party standing for abortion providers. The reality of a dedicated abortion business, however, is that it more resembles a car wash than the individualized attention associated with a traditional medical practice. The patients roll through on a conveyor belt. Instead of soap suds, the blood of the innocent goes down the drain.

> *Roe*'s assumption that the decision to abort a baby will be made in close consultation with a woman's private

> physician is called into question by affidavits from workers at abortion clinics, where most abortions are now performed. According to the affidavits, women are often herded through their procedures with little or no medical or emotional counseling.

McCorvey v. Hill, 385 F.3d 846, 851 (5th Cir. 2004) (Jones, J., concurring).

Although *Roe* anticipated that abortion doctors would be "family physicians with long-standing relationships with families .... it quickly became clear that the relationship that *Roe* anticipated between doctor and patient did not exist for many, and that abortions would occur often in clinics in which physician-patient contact was not part of an ongoing relationship." Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 Wm. & Mary Bill Rts. J. 787, 809-10 & n.60 (1996). As Justice Powell observed, the "'confidential' relationship, is analytically empty (especially when one recognizes that, realistically, the 'confidential' relationship in a case of this kind often is set in an assembly-line type abortion clinic)." *Wulff*, 428 U.S. at 130 n.7 (Powell, J., concurring in part and dissenting in part). As one clinic operator explained: "The doctor walks in, sees the patient for the very first time, pats her on the leg, says, Hi, baby, how are you? You call them 'baby' so you don't have to remember their name." *Testimony of Carol Everett, former Abortion Provider*, Priests for Life.org.[14]

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[14] https://www.priestsforlife.org/testimonies/1122-testimony-of-carol-everett-former-abortion-provider.

Businesses whose income is dependent on the performance of abortions inevitably favor that choice. The "counseling" is largely a sham. *See* Mary Anne Wood & W. Cole Durham, Jr., *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 BYU L. Rev. 783, 808 (1978) (noting the "predictable pro-abortion bias ... in a clinic whose *raison d'etre* is the performance of abortions"). One clinic operator candidly stated: "In my facilities, I always gave option counseling.... I would give them an option and then shoot it down. The only option you didn't shoot down, obviously, was abortion." Life Issues Institute, *Abortion Clinic Chain Operator Now Pro-Life and Speaking Out*, LifeIssues.org (July 1998).[15] A former clinic operator agreed: "Let's remember, they sell abortions. They don't sell keeping the baby. They don't sell giving the baby up for adoption. They don't sell delivering that baby in any form. They only sell abortions." *Testimony of Carol Everett*, *supra*.

In fact, in the vast majority of cases, no prior relationship at all exists between the abortion doctor and the woman getting the abortion. *See* Wood & Durham, *Counseling*, 1978 BYU L. Rev. at 786 (noting "the doctor patient mythology on which *Roe* and its progeny have been premised"); *Hodgson*, 542 F.2d at 1359 (Heaney, J., dissenting) (noting that "the doctor performing the operation often sees the patient once and then only for a brief period"). The abortion practitioner is often no more than a

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[15] https://www.lifeissues.org/1998/07/abortion-clinic-chain-operator-now-pro-life-speaking.

mechanical semi-anonymous executioner of a succession of unwanted children. A once-repentant abortionist stated that the clinics "are set up like cattle slaughtering centers. You get 'em in and you get 'em out." Life Issues Institute, *Abortion Clinic Chain Operator*. *See also* Soumya Karlamangla, *60 Hours, 50 Abortions: A California Doctor's Monthly Commute to a Texas Clinic*, L.A. Times (Jan. 24, 2019) (profiling fly-in abortionist who executes 50 children in one day's work at a single clinic).[16]

Wullf's incorrect premise that the abortion doctor is "intimately involved" with the patient's abortion decision, an error it adopted from *Roe*, is sufficient to vitiate it as a precedent. This Court has emphasized the necessity of a "'close' relationship with the party who possess the right" as a prerequisite for third-party standing. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Like the attorneys in *Tesmer* who were denied third-party standing to represent future hypothetical clients, abortion doctors commonly "have no relationship at all … with their alleged 'clients.'" *Id.* at 131.[17]

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[16] https://www.latimes.com/local/great-reads/la-me-col1-abortion-doctor-20190124-htmlstory.html.

[17] This Court shares some responsibility for the proliferation of standalone abortion shops. In *Doe v. Bolton*, the Court declared unconstitutional state laws requiring that first-trimester abortions be performed in hospitals. 410 U.S. at 195.

C. The Issue Is Not Academic. Without Third-Party Standing, Petitioners Cannot Succeed in This Case.

The abortion "right," illegitimate as it is, belongs solely to the woman seeking to abort her child. *Casey*, 505 U.S. at 846 (recognizing "the right *of the woman* to choose to have an abortion") (emphasis added). Thus, "the doctor-patient relation … is derivative of the woman's position ....") *Id.* at 884.

Only a potential abortee can invoke the "undue burden" standard to challenge laws that place demands on abortion clinics and their hired doctors. Even though those parties may have their own interests to protect in challenging such laws, such as the economic benefit they enjoy from the practice of abortion, without third-party standing to appropriate the "undue burden" standard, they would be limited to asserting mere economic interests and thus be reduced to a "rational basis" challenge to such laws. "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines ...." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). *See also West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 639 (1943) ("The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting.").

That very distinction has occurred in this case. *See June Medical Services LLC v. Kliebert*, 158 F. Supp. 3d 473, 529-31 (M.D. La. 2016) (finding that Act 620 satisfied rational-basis review but failed the undue-burden test); *June Medical Services*, 814 F.3d at 322 (reciting district court findings). Thus, had the plaintiffs in this case been unable to avail themselves of third-party standing to argue the "undue burden" test, they would have lost the case at the outset, being doomed under rational-basis review.

D. The Court May Still Overrule *Roe* in This Case Even If the Petitioners Lack Standing

This Court has held that the standing doctrine involves two components: a constitutional component and a prudential component. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Allen v. Wright*, 468 U.S. 737, 751-52 (1984). This Court has held that "the general prohibition on a litigant's raising another person's legal rights" is a "judicially self-imposed" limit. *Allen*, 468 U.S. at 751. The Court therefore views this limit a prudential limitation instead of a constitutional limitation.

If the Constitution required this Court to dismiss this case for lack of standing, then perhaps overruling *Roe* and its progeny would have had to wait for another day. In such a case, the Court could severely impeach *Roe* through *dicta*, but the lower courts and the nation would probably still feel bound to follow it until this Court overruled it. In the time it would take to grant certiorari in another abortion

case and render a decision, tens (if not hundreds) of thousands of innocent children would have been murdered.

Fortunately, this Court is not dealing with Article III limitations but rather its self-imposed limitations. Consequently, the Court is not duty-bound to dismiss the case after finding that the Petitioners failed to satisfy the third-party standing doctrine. It may instead acknowledge that the Petitioners did not meet the third-party standing doctrine in this case and proceed to overrule *Roe* and its progeny anyway.

Because of this Court's decision in *Roe*, over 60 million innocent people are dead. This Court must take this opportunity to hold that the Constitution of the United States does not protect the murder of innocent children. In Chief Justice Roberts's words, "[S]ometimes it is necessary to decide more. There is a difference between judicial restraint and judicial abdication." *Citizens United*, 558 U.S. at 375 (Roberts, C.J., concurring). It *is* necessary in this case to decide more, because the lives of countless innocent people rest in this Court's hands.

CONCLUSION

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court granted certiorari to consider "a facial challenge to Department of Health and Human Services ... regulations which limit the ability of Title X fund recipients to engage in abortion-related activities." 500 U.S. at 177-78. In his brief to the Court, then-

Deputy Solicitor General John Roberts wrote the following:

> Petitioners argue that the Secretary's regulations impermissibly burden the qualified right discerned in *Roe v. Wade*, 410 U.S. 113 (1973), to choose to have an abortion.... We continue to believe that *Roe* was wrongly decided and should be overruled.... [T]he Court's conclusions in *Roe* that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure, or history of the Constitution. If *Roe* is overturned, petitioners' contention that the Title X regulations burden the right announced in *Roe* falls with it. But even under *Roe's* strictures, the Title X regulations at issue do not violate due process.

Brief for Respondent Louis W. Sullivan, *available at* https://www.justice.gov/sites/default/files/osg/briefs/1990/01/01/sg900805.txt (last visited Dec. 18, 2019).

Chief Justice Roberts urged the Court to address the issue that was "antecedent to ... and ultimately dispositive of" the dispute before the Court. *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). By all means, the Court may address whether the Fifth Circuit's judgment conflicted with *Whole Woman's Health* and whether the Petitioners have third-party standing. But the Court should also address the more

fundamental point, as Chief Justice Roberts urged the Court to do in *Rust*, that *Roe* should be overruled.

Perhaps the greatest moment in the Supreme Court's history was when it ended segregation. *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court should likewise take this opportunity to correct the gravest injustice in American history once and for all. *Roe* must be overruled.

Respectfully submitted,

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