No. 18-1323

In the

Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., *ET AL.*,
Petitioners,

v.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Respondent.

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

BRIEF *AMICI CURIAE* OF BILLY GRAHAM EVANGELISTIC ASSOCIATION AND PACIFIC JUSTICE INSTITUTE

in support of the Respondent

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Interests of the *Amici Curiae*[1]

The **Billy Graham Evangelistic Association** ("BGEA") was founded by Billy Graham in 1950 and, continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all we can by every effective means available to us and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square, to cultivate prayer, and to proclaim the Gospel. BGEA believes that human life is a gift from God and is sacred from conception to its natural end. Accordingly, BGEA is active in communicating about and supporting the sanctity of life.

The **Pacific Justice Institute** ("PJI") is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious

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[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

institutions, particularly in the realm of First Amendment rights. Such includes those who, as a matter of conscience, hold the view that each individual is of great value. To this end, PJI has engaged in extensive litigation involving the sanctity of life, including high profile cases involving end of life issues.

Summary of Argument

It is now well known that a unique human being, a *person*, begins life at conception. That has been indisputably established scientifically since the early 1800's.[2] It was well known when the Fourteenth Amendment was ratified in 1868, the text of which provides, in part, "nor shall *any* State deprive *any* person of life . . . without due process of law . . . nor deny *any* person . . . the equal protection of the laws . . . ."[3] The question of relevance here is whether the Fourteenth Amendment (as well as the Fifth, which has the identical prohibition applicable to the federal government) extends protection to *unborn* persons or, to the contrary, assumes that the unborn are not persons at all for constitutional purposes.

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[2] *See, e.g.,* Horatio Storer, On Criminal Abortion in Am. (1860); C. Morrill, The Physiology of Women 318-19 (1868). In this respect, the "life cycle" of metamorphosizing insects and humans is analogous. An insect's "life cycle," as entomologists describe it, moves from egg to larva to pupa to adults; its life does not start with "adult." "The human life cycle begins at fertilization, when an egg cell inside a woman and a sperm from a man fuse to form a one-celled zygote." http://www.biologyreference.com/La-Ma/Life-Cycle-Human.html (last visited Apr. 3, 2019).

[3] U.S. Const. amend. XIV § 1 (emphasis added).

The Constitution uses the term *person* in many provisions. It defines the relevant class of persons in several different ways in these various provisions. The Fourteenth Amendment itself identifies the class of persons who will be citizens as those who are "born or naturalized in the United States and subject to the jurisdiction thereof . . . ."[4] The amendment continues that no State shall make or enforce any law which abridges the privileges or immunities of the class of citizens as just defined, but then, in the words most relevant, states as follows:

> 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.[5]

These latter guarantees of due process and equal protection are not limited to citizens, but expressly extend to "*any* person."[6]

This brief first observes that *unborn* persons would generally be understood to be in the broader class of "*any* person[s]," and so, on a literal reading, are encompassed by that phrase. The question next addressed is whether Congress and the States, when they passed the amendment into law, intended, *sub silentio*, to exclude *unborn* persons from the class of persons covered by the Due Process and Equal Protection Clauses because the unborn were at that time not considered persons. The historical record

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[4] *Id.*
[5] *Id.* (emphasis added).
[6] *Id.* (emphasis added).

conclusively shows the opposite. Finally, this brief outlines the effect on this Court's abortion jurisprudence should it confirm that the unborn are included in the class of "all persons" under the Due Process and Equal Protection Clauses of the Constitution.

Argument

I. The Text of the Fourteenth Amendment Includes the Subclass of Unborn Persons in Its Due Process and Equal Protection Provisions Applicable to "*Any* Person"

The text of the Fourteenth Amendment itself provides ample evidence that the unborn are intended to be included in its coverage. This is substantiated by the broader context of the full Constitution and by its use of the term *person*.

A. The Amendment's Use of *Any* Shows That *Person* Includes the Unborn

This Court in *Roe v. Wade* held that unborn persons are not covered by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[7] It based this conclusion, in the main,[8] on other references to *person* in the Constitution, including the text of the Fourteenth Amendment

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[7] 410 U.S. 113, 156-59 (1973).

[8] The *Roe* majority also relied on its conclusion that "throughout the major portion of the 19th Century prevailing legal abortion practices were far freer than they are today . . . ." *Id.* at 158. While the relevance of this historical conclusion, even if true, would be highly debatable, it has been thoroughly debunked, as discussed further *infra*, and it has not subsequently been relied upon by the Court in its abortion jurisprudence.

itself. Section 1 of the amendment begins by defining citizens as being "persons born or naturalized in the United States"; § 2 specifies that congressional representation will be by "counting the whole number of persons in each State, excluding Indians not taxed"; and § 3 disqualifies a "person" who engaged in insurrection or rebellion from holding high office. The Court concluded in *Roe* that, "in *nearly* all these instances . . . [the term *person*] has application only postnatally. None indicates, with any assurance, that it has any pre-natal application."[9]

That the Fourteenth Amendment identifies different classes of persons for different purposes does not support *Roe*'s conclusion that the phrase *any person* excludes prenatal humans. That other clauses define the term *person* more restrictively than the amendment's Due Process and Equal Protection Clauses does not mean the uses of *person* in the latter clauses absorbs by implication the restrictive modifiers appearing elsewhere. The opposite is the normal rule of construction—if authors sometimes limit a word and sometimes do not, it is assumed they intend the distinction.[10]

Even more to the point, the term *person* in the Due Process and Equal Protection Clauses does *not* stand unmodified—the clauses expressly protect "*any* person."[11] Thus, by reading *any* out of the phrase *any person* in the Due Process and Equal Protection

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[9] *Id.* at 157 (emphasis added).
[10] *See Lopez v. Gonzales*, 549 U.S. 47, 55 (2006); *Russello v. United States*, 464 U.S. 16, 23 (1983).
[11] U.S. Const. amend. XIV § 1 (emphasis added).

Clauses of the Fourteenth (and Fifth) Amendment, the *Roe* Court violated the most foundational of interpretation principles—that the courts must look first to the language under consideration; not make any word superfluous; and, if the language is plain, enforce it according to its terms.[12]

This Court has repeatedly observed that the term *any* is, indeed, "plain and unambiguous"; *any* is "expansive, unqualified language" with a "wide reach" and a "sweeping" meaning.[13] This Court's observations in *Harrison v. PPG Indus., Inc.*,[14] about the term *any* are equally applicable here: there is

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[12] *See Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997); *Sullivan v. Everhart*, 494 U.S. 83, 88-89 (1990); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879); *see generally* Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 69-77 ("Ordinary Meaning Canon"), 174-79 ("Surplusage Canon") (hereinafter, "Scalia & Garner").

[13] *Salinas v. United States*, 522 U.S. 52, 56-57 (1997) ("expansive, unqualified"); *Mass. v. EPA*, 549 U.S. 497, 528-29 (2007) ("sweeping"; "of whatever stripe"); *Boyle v. United States*, 556 U.S. 938, 943-44 (2009) ("obviously broad"; "ensures . . . a wide reach"); *accord Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1332 (2011) ("broad interpretation"); *Iraq v. Beaty*, 556 U.S. 848, 856 (2009) ("Of course the word 'any' . . . has an expansive meaning, giving us no warrant to limit the class" *any* modifies (internal quotation marks and citation omitted)); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-20 (2008) ("broad meaning"; "expansive language"); *HUD v. Rucker*, 535 U.S. 125, 131 (2002) ("expansive"); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'") (quoting Webster's Third New Int'l Dict. 97 (1976)); *Collector v. Hubbard*, 79 U.S. (12 Wall.) 1, 15 (1871) ("any" is "quite clear" and includes all types).

[14] 446 U.S. 568 (1980).

"no uncertainty" in the word, and this "expansive language" offers no indication whatsoever that Congress intended to limit the class of *person* in any respect when it modified the word by *any*.[15]

"Without some indication to the contrary, general words . . . are to be accorded their full and fair scope."[16] This Court has consistently done that for the term *any* in multiple other cases, and there is no indication that *any* has anything other than its normal scope when used in the Fourteenth Amendment. The full sentence of the Fourteenth Amendment most directly under consideration makes that abundantly clear, as it repeatedly uses *any* in its usual sense: "No State shall make or enforce *any* law which shall abridge the privileges and immunities of citizens of the United States; 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."[17] There are no exceptions to "any law"—it includes all of them. There is no "out" for "any State"—none may act to deprive life, liberty, or property without due process. Identically, there are no exclusions from the amendment's two uses of "any person"—all humans are included. That the framers and adopters of the amendment intended all four of its uses of *any* in the operative sentence of the

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[15] *Id.* at 588-89; *see also United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631-32 (1818) (ruling that the term "any person or persons" naturally includes "every human being" and "the whole human race, but was limited in the statute at hand to crimes involving United States vessels).

[16] Scalia & Garner, *supra* note 12, at 101.

[17] U.S. Const. amend XIV § 1 (emphasis added).

amendment mean the same is a virtual certitude and consistent with familiar canons of construction.[18]

Thus, the logical reading of the text of the Fourteenth Amendment's Due Process and Equal Protection Clauses is that *any person* includes the *entire* universe of persons, including *unborn* persons. If the authors and adopters had wanted to limit those clauses to *born* persons, they should have said so explicitly, as they did when defining *citizen* in the same section. Congress knew how to limit the class of persons to born persons when it intended to do so, but instead used the most expansive language available when defining those entitled to due process and equal protection.

B. The Constitutional Context Shows That the Amendments Include the Entire Class of Persons, Including the Unborn, Who Are in the Class of Persons Who Have Life

The context of the Due Process and Equal Protection Clauses also dictates that *person* includes the *entire* class of persons—black and white, male and female, young and old. Indeed, shortly after the enactment of the Fourteenth Amendment, this Court resisted the attempt to limit "any person" to those whose plight most directly motivated the enactment of the Civil War Amendments.[19]

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[18] *See* Scalia & Garner, *supra* note 12, at 170-73 ("Presumption of Consistent Usage Canon").

[19] *See Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 72 (1872): "We do not say that no one else but the negro can share in this protection [of the Civil War Amendments]." While, admittedly, the *Slaughter-House Cases* majority later stated in dicta,

Obviously, context dictates that almost all of the Constitution's references to *persons* refer to those already born, because only an adult can, for example, run for office or commit a crime. But no one has ever suggested that, because a seven-year-old girl may not be President, she is not covered by the Constitution's protection of her life or cannot insist upon the equal protection of the law. Like a seven-year-old, the unborn person has *life*, and that is what is expressly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.[20] The context of those clauses, together with the lack of any limiting language defining a subclass of persons as appears elsewhere in the Constitution—not to mention its explicit text specifying "*any* person"—dictates that *all* persons, born and unborn, are included. As Scalia and Garner observed, the fact that those who adopted the Fourteenth Amendment had in mind a

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inconsistently with this quotation and basic rules of interpretation, that it would be difficult to show that the equal protection clause was intended to be enforced by any but negroes, *id.* at 81, that dicta has long since been repudiated by the Court. *See*, *e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion"); *United States v. Price,* 383 U.S. 787, 789 (1966) (there is "no doubt of the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment" (internal quotation marks and citation omitted)).

[20] Similarly, no one would suggest that "Indians not taxed" are not part of the set of "all persons" protected by the Due Process and Equal Protection Clauses because the Apportionment Clause of § 2 of the Fourteenth Amendment excludes them. *See* Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harv. J. of L. & Pub. Policy 539, 551 (2018).

particular, narrow objective (equal protection for blacks), though they expressed a more general one (equal protection for "any person"), is irrelevant: "statutory [and constitutional] prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[21]

The framers throughout the Constitution used the word *person* in its natural sense of a human being, while they defined a more limited class of person as appropriate in the particular circumstances of specific provisions. For example, to be elected president, they specified that a person must be a natural-born citizen and at least thirty-five;[22] on the more negative side of the spectrum, the Constitution speaks of persons accused of treason[23] and that no person may be subjected to double jeopardy.[24] In such situations, the context clarifies that only born persons are contemplated. Not specifying redundantly, for example, that persons accused of treason must be "born" in no way limits the meaning of a different modifier, "any," used in another context. Similarly, because the framers used *persons* without a modifier in § 2 of the amendment when dealing with apportioning electors and representatives cannot be used to read a restriction into "*any* person" as used in § 1 in different clauses with different purposes. It is entirely reasonable to

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[21] Scalia & Garner, *supra* note 12, at 103-04 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)); *see Slaughter-House Cases*, 83 U.S. at 72.
[22] U.S. Const. art. II § 1.
[23] *Id.* art. III § 3.
[24] *Id.* amend. V.

construe persons counted for representation purposes to be only those who have been born alive, especially as pregnancy is often difficult to confirm. For the same reasons, it made obvious sense to define *citizen* in § 1 as a "person born" in the country,[25] rather than a "person conceived" on native soil. But *life* writ large is at stake when an abortion is contemplated, and that is what the Due Process and Equal Protection Clauses address. In *Levy v. Louisiana*, the Court held that illegitimate children are "persons" under the Equal Protection Clause because the clause covers all who "are humans, live, and have their being." [26] This definition applies equally to the unborn. Indeed, the Fourteenth Amendment itself, by defining *citizen* as a "person born," recognizes that some persons are not yet born, but prenatal.

The ratifiers of the Constitution did not limit the term *person* in the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to "persons born" or "persons thirty-five or older" or "persons capable of committing a crime" or "citizens," as they did in other provisions, including in the Fourteenth Amendment itself. They expressly protected *any* person, including the unborn, in those clauses. The Court in the *Slaughter-House Cases* applied the correct rule of interpretation to section 1 of the Fourteenth Amendment: "It is too clear for argument that the change in phraseology [from one clause to another in § 1] was adopted understandingly and with a purpose."[27] *Roe*'s

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[25] *See* U.S. Const. amend. XIV § 1.
[26] 391 U.S. 68, 70 (1968).
[27] 83 U.S. at 74.

contrary reading violates logic and reverses normal principles of construction.

II. The Common Understanding at the Time of the Adoption of the Fourteenth Amendment Was that *Person* Included a Human Being at All Stages of Development, and the States and Territories Uniformly Criminalized Abortion and Repeatedly Referred to the Unborn as a *Person*

The straightforward textual analysis that "*any* person" includes *unborn* persons could perhaps be defeated on a showing that, when the Fourteenth Amendment was drafted and adopted, it was universally understood (however inaccurately) that fetuses were not persons until they were born. This is the type of analysis that Chief Justice Taney used in *Dred Scott v. Sandford*[28] when he ruled that the original framers of the Constitution did not include persons of the African race as "citizens" principally because of his historical analysis that the framers considered them inferior to Caucasians.[29] Such an analysis cannot be applied here, though, both because common and legal usage at the time the Fifth and the Fourteenth Amendment were adopted considered the unborn as persons and because it was universally understood in the mid-1800's that human life began at conception and that fetuses were human children—persons.[30]

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[28] 60 U.S. 393 (1857).

[29] *Id.* at 406-22.

[30] *See generally* Scalia & Garner, *supra* note 12, at 78-92 ("Fixed-Meaning Canon").

A. In Both Common and Legal Parlance, *Person* Included the Unborn When the States Adopted the Constitution

That the unborn were considered persons by the common man when the Constitution, including the Fifth Amendment, was adopted is perhaps best seen from the most widely read book of that day, the Bible, and by one of its most read passages. In the Christmas story as told in the Gospel of Luke, the most famous pregnant mother in Western history was described as being "great with child" as she approached term.[31] The text expressly identified the pre-born Jesus as a *child*. And, of course, this usage continues to the present day, as mothers (and fathers) commonly refer to their unborn as their *babies* and understand that they are nurturing an independent member of the human race. Indeed, fetal delivery has been called *childbirth* for many centuries, continuing to the present day.[32]

At the time of the adoption of the Fourteenth Amendment, the dictionaries of the time reflect that the term *person* included all human beings, without distinction between the born and the unborn. Webster's dictionary of American usage in its original, 1828 edition defined *person* as an

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[31] *Luke* 2:5 (KJV). The King James Version was the translation almost universally used among Protestants in the Eighteenth and Nineteenth Centuries in the English-speaking world. The translation most used by Roman Catholics during that period, the Douay-Rheims version, translates it as Mary was "with child."

[32] *See* Oxford English Dict., www.oed.com (last visited Oct. 8, 2013) (giving example of usage reaching back to 1549 in the *Book of Common Prayer*).

"individual human being" and stated that the word applies "alike to a man, woman or child."[33] The 1864 edition elaborated that *person* related "especially [to] a living human being; a man, woman, or child; an individual of the human race."[34] The key was whether there was life; in no dictionary did the meaning of *person* turn on whether or not the individual had been born.[35]

Legal dictionaries and treatises were even more explicit that the unborn, as part of the human race, were persons. Blackstone's *Commentaries on the Laws of England* has been described by this Court as being widely read and consulted by those who authored and adopted the Constitution.[36] In that treatise, Blackstone, in his discussion of "The Rights of Persons," wrote, "Natural persons are such as the God of nature formed us,"[37] evoking the passage of

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[33] *Person*, 2 Noah Webster *et al.*, An American Dict. of the English Language (1828).

[34] 1 *id.* 974 (1864). Similarly, *man* is defined thusly: "An individual of the human race; a human being; a person." *Id.* at 806.

[35] *See* John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement*, 4 S. Ill. U.L.J. 1, 23 (1979).

[36] The Court stated in *Schick v. United States*, 195 U.S. 65, 69 (1904), "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the Framers of the Constitution were familiar with it."

[37] 1 Wm. Blackstone, Commentaries on the Laws of England *123, found at https://oll.libertyfund.org/titles /blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-

the psalmist that God "formed my inward parts; he knitted me together in my mother's womb."[38] Blackstone continued, "Life is . . . a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."[39] This was echoed by James Wilson, a principal drafter of the Constitution. He summarized, "With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb."[40] Because, when Blackstone and Wilson wrote, science had not confirmed that the life of the unborn began before the "stirring in the mother's womb," it is clear that they meant that legal personhood began as soon as biological life began for the unborn.[41]

Legal dictionaries of the early Nineteenth Century carried forward these definitions of *person* to include expansively all in the human race. One such dictionary contrasted the living and the inanimate in its definition: "A human being, considered as the subject of rights, as distinguished from a *thing*."[42] Another simply said that a *person*

1/simple#lf1387-01_label_885 (last visited Feb. 26, 2019) (hereinafter, "Blackstone").

[38] *Psalm* 139:13 (ESV).

[39] Blackstone, *supra* note 37, at *129.

[40] 2 James Wilson, Collected Works 1068 (Kernst L. Hall & Mark David Hall eds., 2007).

[41] *See* Michael S. Paulsen, *The Plausibility of Personhood*, 74 Ohio St. L.J 13, 26 (2013).

[42] 2 Alexander M. Burrill, A New Law Dict. and Glossary 794 (1851).

was a "man or woman,"[43] obviously not referring to the maturity of the individual but to his or her biological nature, without distinguishing between stages of human development.

Thus, at the time of adoption of the Fifth and Fourteenth Amendments, the legal, as well as the common, parlance understood the unborn to be part of the human race, human beings, and children. They were encompassed in term *persons* as it was universally then understood.

B. The States and Territories, Consistent with the Advance of Scientific Knowledge, Often Identified the Unborn as Children in Their Abortion Prohibitions Before They Adopted the Fourteenth Amendment

With the scientific breakthroughs in the early 1800's that confirmed that unique persons began their life upon conception, many of the States revised their abortion laws to clarify that, at whatever stage of pregnancy, whether before or after the mother's quickening, abortion was a felony that involved the taking of a human life. This was urged by the American Medical Association, which unanimously adopted in 1859 a committee report that called for protection of the "independent and actual existence of the child before birth, as a living being."[44] Similarly, the Medical Society of New York in 1867 "condemned abortion at every stage of gestation as

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[43] 3 Thos. Edlyne Tomlins & Thos. Colpitts Granger, The Law-Dict. 104 (1st Am. ed. 1836).

[44] 12 Transactions of the AMA 75-76 (1859).

'murder.'"[45] This movement was applauded by, among others, the leading feminists of the day, who variously labeled abortion as "child murder," "ante-natal murder," and "ante-natal infanticide."[46] These new and revised laws tightened common-law and statutory restrictions that had not been informed by this scientific knowledge.

Then-Justice Rehnquist in his dissent in *Roe* greatly understated the situation when he wrote, "By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures *limiting* abortion."[47] *All* states and territories did not just *limit* abortion; they uniformly *criminalized* it (except to save the life of the mother), although the penalties were varying, reflecting the practical problems of proof inherent in abortion prosecutions.[48]

The State and Territorial statutes speak for themselves, and they graphically show that the legislators understood the unborn to be distinct persons. This is most dramatically demonstrated in that the large majority of statutes expressly

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[45] *See* Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 Fordham L. Rev. 807, 836 (1973) (hereinafter, "Byrn").

[46] *See*, *e.g.*, Susan B. Anthony, *Marriage and Maternity*, The Revolution, July 8, 1869, at 4; Elizabeth Cady Stanton, *Child Murder*, The Revolution, Mar. 12, 1868, at 146-47; *see generally* Joseph W. Dellapenna, Dispelling the Myths of Abortion History 374-75 (2006) (hereinafter, "Dellapenna").

[47] 410 U.S. at 175 (Rehnquist, J., dissenting) (emphasis added).

[48] *See generally* Dellapenna, *supra* note 46, chs. 6-9; James S. Witherspoon, *Reexamining* Roe: *Nineteenth-Century Abortion Statutes and the Fourteenth Amendment,* 17 St. Mary's L.J. 29 (1985).

identified the fetus as a *child*. The 1800's statutes that referred to the fetus as a "child" are collected in the statutory appendix. In all, the statues of 30 states did so, as well as those of seven territories and one nation (all of which later became states).[49] Some statutes by 1860 punished abortions whether or not the unborn child was "quickened." Those of California, Connecticut, Maine, New Jersey, and Oregon are examples:

> [E]very person who shall . . . administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then *being with child*, and shall be thereof duly convicted, shall be punished . . . [by two to five years of incarceration] . . . .[50]
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> * * *
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> That any person with intent to procure the miscarriage or abortion of any woman shall give or administer to her, prescribe for her, or advise, or direct, or cause or procure her to take, any medicine, drug or substance whatever, or use or advise the use of any instrument, or other

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[49] The remainder criminalized abortion, but generally referred just to a "pregnant" woman or her "fetus." *E.g.*, Ala. Acts, at 6, § 2 (1840-41) ("pregnant woman").

[50] Cal. Sess. Stats., ch. 99, § 45, at 233 (1849-50) (emphasis added).

> means whatever, with the like intent, unless the same shall have been necessary to preserve the life of such woman, or of her *unborn child*, shall be deemed guilty of felony, and upon due conviction . . . [pay a fine up to $1,000 and suffer imprisonment of one to five years].[51]
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> * * *
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> Every person, who shall administer to any woman *pregnant with child,* whether *such child* be quick or not, any medicine, drug or substance whatever, or shall use or employ any instrument or other means whatever, with intent to destroy *such child*, and shall thereby destroy *such child before its birth*, unless the same shall have been done as necessary to preserve the life of the mother, shall be punished by imprisonment in the state prison, not more than five years, or by fine, not exceeding one thousand dollars, and imprisonment in the county jail, not more than one year.[52]
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> [I]f any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a

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[51] Conn. Pub. Acts, ch. LXXI, §§ 1, 2, at 65 (1860) (emphasis added).

[52] Me. Rev. Stat., ch. 160, § 13 (1840) (emphasis added).

> woman then *pregnant with child*, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing; and if any person or persons maliciously, and without lawful justification, shall use any instrument, or means whatever, with the like intent; and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall, on conviction thereof, be adjudged guilty of a high misdemeanor.[53]
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> * * *
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> [I]f any person shall administer to any woman *pregnant with a child*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy *such child*, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of *such child* or mother be thereby produced, be deemed guilty of manslaughter.[54]

Other states, like Georgia and Missouri, still retained the "quickened" distinction for the crime while also identifying the fetus as a child:

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[53] N.J. Laws at 266 (1849) (emphasis added).

[54] Ore. Gen. Laws, Crim. Code, ch. 43, § 509, at 528 (1845-64) (emphasis added).

> The willful killing of an *unborn child* so far developed as to be ordinarily called 'quick,' by any injury to the mother of *such child*, which would be murder if it resulted in the death of such mother, shall be punished by death or imprisonment for life, as the jury may recommend.[55]
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> * * *
>
> Every person who shall administer to any woman *pregnant with a quick child*, any medicine, drug, or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy *such child*, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree.[56]

But whether "quickening" was an element of the crime or not,[57] it is obvious that, by the mid-1800's, a

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[55] Ga. Laws No. CXXX, § I, at 113 (1876) (emphasis added).
[56] Mo. Rev. Stat., art. II, § 10, at 168 (1835) (emphasis added).
[57] Some states applying their laws to a "quick child," such as in Arkansas, Florida, and Iowa, may well have intended this to be understood as the fetus having progressed to the point of "quickening," as defined as being felt by the mother in the womb, and statutes including only being "quick with child," such as in Hawaii, as meaning simply, a living child, the same as "pregnant with a child," such as in Oregon and Tennessee. *See* 1 Francis Wharton, The Criminal Law of the United States § 1227 (5th rev. ed. 1861) (noting English common law case making this distinction). Virginia's 1848 statute, like that of some other states, varied the penalties for abortion of a "quick

fetus, at all stages of gestation, was universally considered a *child*, i.e., a human being, a living *person*.[58]

C. The Common Understanding of an Unborn Child as a Person Is Not Undercut by the Lack of Discussion of the Unborn in the Legislative History of the Fourteenth Amendment

The State abortion statutes in effect at the time of ratification of the Fourteenth Amendment also dispose of the argument sometimes heard that there would have been some mention in the legislative history of the passage of the amendment about abortion if the protections of due process and equal protection were to be applied to the unborn as well as the born. Even assuming the relevance of this line of argument to interpretation of the plain text, there was nothing inconsistent between the text of these clauses and the State laws protecting unborn life.

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child" and a "child, not quick." Va. Acts, tit. II, ch. 3, § 9, at 96 (1848). The Pennsylvania Supreme Court in *Mills v. Cmwlth.*, 13 Pa. 631, 632-33 (1850), held that the common law supported an action for abortion at any stage of gestation: "the moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated."

[58] In Great Britain, to account for the new scientific verity that the unborn's life began upon fertilization, the courts instructed that "quick [i.e., alive] with child," which had previously meant "formed and animated," *see* Edward Coke, 3 Institutes 819-20 (1644), now meant "from the moment of conception." *See* Byrn, *supra* note 45, at 824-25; *cf. Regina v. Wycherley*, 173 Eng. Rep. 486 (1838) (interpreting "quick with child" to be from the moment of conception for purposes of considering reprieve from execution for a pregnant woman—i.e. to protect the innocent child she was carrying).

The Fourteenth Amendment was not changing any State abortion laws, as they uniformly criminalized the act and its procurement. No constitutional amendment was needed to change the legal landscape with regard to abortion, as it was with race relations. The social revolution that was being legislated was to declare that men and women of any race were to be treated as persons under our Constitution, and so it is no surprise that the debates dealt with the topic of race, rather than with what was being left unchanged and was taken for granted—*i.*e, that unborn children needed protection from those who would end their lives.

Still, the authors of the amendment fully understood that the sweep of their text protected *any* human, not just those of African descent.[59] The principal author of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, Representative John Bingham, stated that "before that great law the only question to be asked of a creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal."[60] And Senator Lyman Trumball stated that the amendment would have the "great object of securing to every human being within the jurisdiction of the Republic equal rights before the law . . . ."[61] Are the unborn of the race of man? Are they human beings? All now know they are. And all knew they were when the Fourteenth Amendment was drafted and adopted. The

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[59] *See generally Slaughter-House Cases*, 83 U.S. at 71-72.
[60] Cong. Globe, 40th Cong, 1st Sess. 542 (1867).
[61] *Id.*, 39th Cong., 1st Sess. 322 (1866).

Fourteenth Amendment provides due process and equal protection rights to every person, born and unborn.

As is obvious from both Representative Bingham's remarks and the text of the amendment itself, the authors of the Fourteenth Amendment tracked the immortal words of the Declaration of Independence, words that have framed the most important issues about personhood that this country has faced—in the 1800's, those concerning that of the African American race and, now, of the unborn:

> 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. That to secure these rights, Governments are instituted among Men . . . .[62]

Chief Justice Taney in *Dred Scott* conceded that "all men" "would seem to embrace the whole human family, and if they were used in a similar instrument at this day would so be understood."[63] But he found it "too clear for dispute, that the enslaved African race were not intended to be included," otherwise the great men who signed the declaration would have been hypocrites.[64] Soon-to-be President Lincoln argued, on the contrary, that "*all* men" meant what it plainly said—it included *all* men, including those

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[62] U.S. Decl. of Independence, found at http://www.ushistory.org/declaration/ document (last visited Feb. 14, 2019).
[63] 60 U.S. at 410.
[64] *Id.*

of the African race: "This they said, and this meant."[65]

That the "all men" of the Declaration of Independence includes the unborn cannot be doubted. The Declaration speaks of all men who are "created": men are created, not when they are born, but at conception. It speaks of "unalienable Rights," including "Life": life, too, begins at conception. It speaks of the proper function of governments to be to secure these rights: sponsoring a "right" to destroy innocent life cannot be reconciled with this purpose.

The framers of the Fourteenth Amendment, in echoing the words of the Declaration by prohibiting "any State [to] deprive *any* person of life, liberty, or property, without due process of law" and by guaranteeing "*any* person . . . the equal protection of the laws" obviously repudiated Chief Justice Taney's reading of these provisions that excluded those of the African race from its protections. Those same framers were not ignorant of the fact that the unborn are also persons and that each unborn child has life. They did not limit the reach of the Due Process and Equal Protection Clauses to a *born* person, as they did the Citizenship Clause, but extended it to *any* who has *life*, consistent with the text and the purpose of our nation's founding instrument.

It is, of course, even more widely understood now than in the 1800's that a new human life begins at conception and that a fetal stage is one that every human experiences. This Court recognizes this in its

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[65] Abraham Lincoln, Speeches and Writings, 1832-1857, 395-99 (The Library of Am. 1989) (hereinafter, "Lincoln").

abortion decisions, even as it tries to temper the force of that truism by referring to the unborn (who are obviously alive) as "potential life" and similar circumlocutions. For example, in *Gonzales v. Carhart*,[66] while the majority in some instances tracked the *Casey/Roe* semantic sidesteps that "the fetus . . . may become a child"[67] and that a fetus only has "potential life,"[68] it also referred to abortion as implicating "the bond of love the mother has for her child" and noted that "some women come to regret their choice to abort the infant life they once created and sustained."[69] The *Gonzales* majority refers to the D&E procedure at issue there as crushing the skull and sucking out the brain "of her unborn child,"[70] although then adding the non-sequitur, "a child *assuming* the human form."[71]

This varying language in the Court's own abortion decisions only demonstrates the cognitive dissonance engendered when attempting to sidestep what everyone has always known—a fetus is an unborn child, a human being in its own right; it has *exactly* the human form for a person at that stage of development. Indeed, the *Gonzales* majority in the very next sentence to that just quoted refers to the fetus as an "infant,"[72] and the Court in *Casey*, while it uses the "potential life" terminology, also refers

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[66] 550 U.S. 124 (2007).
[67] *Id.* at 158 (quoting *Planned P'hood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992)).
[68] *Id.* at 157 (quoting *Casey*, 505 U.S. at 873, and *Roe*, 410 U.S. at 150)).
[69] *Id.* at 159.
[70] *Id.*
[71] *Id.* (emphasis added).
[72] *Id.*

accurately to "prenatal life" and "fetal life."[73] No jurisprudence exhibiting such semantic dodging of the obvious has any claim on permanence.[74]

III. Recognizing the Reality That the Unborn Have Life Would Protect Them Under the Due Process and Equal Protection Clauses

This Court should give unambiguous recognition to the obvious—that a person's life begins at conception and that an unborn person is included as "any person" protected by the Constitution's Due Process and Equal Protection Clauses. This result not only would reconcile law with science; it would also correct logical inconsistencies in the Court's own abortion jurisprudence.

The Court in *Gonzales* at least implicitly recognized the illogic in making legal distinctions between killing a child one minute before or one minute after it left the womb.[75] But the *Roe* trimester formulation, scuttled to a large degree in

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[73] 505 U.S. at 873, 876.

[74] Less than two decades after adoption of the Fourteenth Amendment, the Court in *McArthur v. Scott*, 113 U.S. 340 (1885), upheld the common-law principle that a child *in utero* counted as a person in being for purposes of the rule against perpetuities and held that the Due Process Clause was violated when the unborn children were not provided representation in a property proceeding. Later-judge John Noonan, when addressing pre-*Roe* arguments that limiting abortion was unconstitutional, commented in respect to *McArthur* that "it would be odd if the fetus had property rights which must be respected but could himself be extinguished." David W. Louisell & John T. Noonan, Jr., *Constitutional Balance*, in The Morality of Abortion: Legal and Historical Perspectives 220, 246 (John T. Noonan, Jr., ed., 1970).

[75] 550 U.S. at 140-41, 157-60.

Casey,[76] relied on the proposition that the State has a compelling interest in protecting the fetus once it is viable outside the womb, but not the day before,[77] a proposition retained in *Casey*.[78] No logic supports this *ipse dixit*—if the state has a compelling interest in preserving fetal life, it is rooted in the fact that such life is *human* life, at *whatever* stage of development and whether or not it could survive if it were untimely birthed. This, of course, was fully understood by the State and territorial legislators in the 1800's, who had criminalized pre-viability abortion practices at the time the Fourteenth Amendment was enacted.[79]

The *Roe* majority recognized that, if an unborn is among the class of "any person" in the Due Process and Equal Protection Clauses, the right to abortion that it went on to announce "collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[80] The purpose of the amendment, of course, was to assure that, whatever the State laws, policies, and practices, certain basic rights would never be abridged. Most basically, that included the right to life and not to be treated discriminatorily due to one's class status.

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[76] 505 U.S. at 872-73.
[77] 410 U.S. at 162-64.
[78] 505 U.S. at 879.
[79] This was true even if those few States that, by the time the Fourteenth Amendment was enacted, still had not removed the "quickening" distinction in their statutes, whether by amendment or judicial interpretation. A baby can be felt in the womb unaided by technology weeks before the child is currently viable outside the womb.
[80] 410 U.S. at 156-57.

Although "[o]ne's right to life . . . depend[s] on the outcome of no elections,"[81] one's life can be taken if adequate process is afforded. Arguably, then, if only the Due Process Clause were considered, States could develop a procedural regimen that could withstand scrutiny and allow the intentional killing of the unborn by their mothers. In any situation putting the unborn's life at jeopardy, it would be necessary to have (a) impartial, judicial review in a proceeding in which (b) there is proof of some sufficient rationale of wrong worthy of death attributable to the child and (c) the unborn child has independent representation.[82] Presumably, to satisfy condition (b), it would be adequate to show that taking an unborn's life was necessary to save the physical life of the mother, as this would establish a self-defense justification. Of course, once it is recognized that the unborn are included in the class of persons given due process protection, it follows that any law or regulation protecting, rather than taking, the life of the unborn is presumptively reasonable, supported by a compelling State interest, and that any law or regulation allowing abortion, except for saving the life of the mother, would be presumptively unconstitutional.

The Equal Protection Clause provides an independent, but complementary, brake on a private right to kill the unborn. While, as a general proposition, a State's failure to protect an individual against private violence does not implicate the Due

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[81] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

[82] *See McArthur*, 113 U.S. at 392-400 (holding that children *in utero* have a right to independent representation in a property action in which they are interested parties).

Process Clause,[83] "the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."[84] The disfavored minority in the abortion context is human beings *in utero*, by definition the weakest of classes, as the unborn are without the ability yet to speak for themselves and are hidden from sight. To fail to enforce the homicide laws when they are killed denies them equal protection.

Conclusion

This Court's precedent concerning the discretion of States to enact abortion restrictions should be reexamined and put on a firm legal and historical footing. That task begins with the recognition that an unborn child, a fetus, qualifies as "*any* person" under the Due Process and Equal Protection Clauses of the Constitution. "This they said, and this meant."[85]

Respectfully submitted

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[83] *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989).

[84] *Id.* at 197 n.3 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *see also* Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 Issues L. & Med. 185, 186 (2010) (as the unborn almost universally under State law are "persons under criminal, tort, and property law, the text of the Equal Protection Clause . . . compels federal protection of unborn persons" (footnotes omitted)). In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Court held that statutes permissive of individual discriminatory actions can constitute state action violating the Equal Protection Clause. Of course, State statutes that allow abortion are state action for purposes of the Fourteenth Amendment.

[85] Lincoln, *supra* note 65, at 398.

this 2nd day of January 2020,

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STATUTORY APPENDIX

Compilation of 1800's State and Territorial Laws Referring to an Aborted Fetus as a "Child"*

Arizona (then territory)

[E]very person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to produce the miscarriage of any woman then being with child, and shall be thereof duly convicted . . . [imprisonment in territorial prison 2-5 years] . . . .

Howell Code, ch. 10, § 45 (1865).

Arkansas

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall employ any instrument or other means with intent thereby to destroy such child, and thereby shall cause its death, unless the same shall be necessary to preserve the life of the mother, or shall have been advised by a regular physician to be necessary for such purpose, shall be deemed guilty of manslaughter.

Ark. Rev. Stat., ch. 44, div. III, art. II, § 6 (1838).

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* This compilation is taken from Eugene Quay, *Justifiable Abortion–Medical and Legal Foundations (Pt. II)*, 49 Geo. L.J. 395 (1961).

California

[E]very person who shall . . . administer or cause to be administered or taken, any medicinal substances, or shall use or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished . . . [by 2 to 5 years of incarceration] . . . .

Cal. Sess. Stats., ch. 99, § 45, at 233 (1849-50).

Colorado (then territory)

Every person . . . who shall administer substance or liquid, or who shall use or cause to be used any instrument, of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and fined in a sum not exceeding one thousand dollars . . . .

Colo. Gen. Laws, Joint Res., Mem., and Priv. Acts of the Terr. of Colo. Legis. Asm., 1st. Sess., § 42, at 296-97 (1861).

Connecticut

Every person who shall willfully and maliciously administer to, or cause to be administered to, or taken by, any woman, then being quick with child, any medicine, drug, noxious substance, or other thing, with an intention thereby to procure the miscarriage of any such woman, or to destroy the child of which she is pregnant; or shall

willfully and maliciously use and employ any instrument, or other means to produce such miscarriage, or to destroy such child, and shall be thereof duly convicted, shall suffer imprisonment in the Connecticut State Prison, for a term not less than seven, nor more than ten years.

Conn. Laws, ch. 1, § 16, at 255 (1830).

That any person with intent to procure the miscarriage or abortion of any woman shall give or administer to her, prescribe for her, or advise, or direct, or cause or procure her to take, any medicine, drug or substance whatever, or use or advise the use of any instrument, or other means whatever, with the like intent, unless the same shall have been necessary to preserve the life of such woman, or of her unborn child, shall be deemed guilty of felony, and upon due conviction . . . [fine to $1,000, imprisonment 1 to 5 years].

Conn. Pub. Acts, ch. LXXI, §§ 1, 2, at 65 (1860).

Delaware

And if any person or persons shall counsel, advise or direct such woman to kill the child she goes with, and, after she is delivered, of such child, she kills it, every such person so advising or directing, shall be deemed accessory to such murder, and shall have the same punishment as the principal shall have.

Del. Laws, ch. 22, § 6, at 67 (1797).

Florida

The willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

Every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

Acts, 1st. Sess. 1868, ch. 1637, III, §§ 10, 11.

Georgia

[I]f any person or persons advise or counsel another to kill a child before its birth, and the child be killed after its birth, in pursuance of such advice, such adviser or advisers is or are declared accessory to the murder.

Ga. Pen. Code § 17 (1811).

The willful killing of an unborn child so far developed as to be ordinarily called 'quick,' by any injury to the mother of such child, which would be murder if it resulted in the death of such mother,

shall be punished by death or imprisonment for life, as the jury may recommend.
Ga. Laws No. CXXX, § I, at 113 (1876).

Hawaii (then territory)

Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing to a woman then with child, in order to produce her mis-carriage, or maliciously uses any instrument or other means with like intent, shall, if such woman be then quick with child, be punished by fine not exceeding one thousand dollars and imprisonment at hard labor not more than five years. And if she be then not quick with child, shall be punished by a fine not exceeding five hundred dollars, and imprisonment at hard labor not more than two years.

Hawaii Pen. Code § 1 (1850).

Idaho (then territory)

[E]very person who shall administer or cause to be administered, or taken, any medicinal substance, or shall use or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the territorial prison for a term not less than two years, nor more than five years . . . .

Idaho (Terr.) Laws § 42, at 435 (1863-64).

Illinois

And every person who shall administer, or cause to be administered, or taken, any such poison, substance, or liquid, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary, and fined in a sum not exceeding one thousand dollars.

Ill. Rev. Code § 46, at 179 (1833).

Iowa

The willful killing of an unborn quick child, by any injury to the mother of the child, which would be murder if it resulted in the death of such mother, shall be adjudged manslaughter, and every person who shall administer to any woman, pregnant with a child, any medicine, drug, or substance whatever, or shall employ any other means with intent thereby to destroy such child, and thereby cause its death, unless the same shall be necessary to preserve the life of the mother, shall be deemed guilty of manslaughter.

Iowa (Terr.) Rev. Stat. § 10 (1843).

Kansas

The willful killing, of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such

mother, shall be deemed manslaughter in the first degree.

Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree.

Kan. Gen. Laws, ch. 28, §§ 9, 10 (1859).

Louisiana

Whoever shall feloniously administer or cause to be administered any drug, potion, or any other thing to any woman, for the purpose of procuring a premature delivery, and whoever shall administer or cause to be administered to any woman pregnant with child, any drug, potion, or any other thing, for the purpose of procuring abortion, or a premature delivery, shall be imprisoned at hard labor, for not less than one, nor more than ten years.

La. Rev. Stat. § 24, at 138 (1856).

Maine

Every person, who shall administer to any woman pregnant with child, whether such child be quick or not, any medicine, drug or substance whatever, or shall use or employ any instrument or

other means whatever, with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done as necessary to preserve the life of the mother, shall be punished by imprisonment in the state prison, not more than five years, or by fine, not exceeding one thousand dollars, and imprisonment in the county jail, not more than one year.

Every person, who shall administer to any woman, pregnant with child, whether such child be quick or not, any medicine, drug or substance whatever . . . with intent thereby to procure the miscarriage of such woman, unless the same shall have been done, as necessary to preserve her life, shall be punished by imprisonment in the county jail, not more than one year, or by fine, not exceeding one thousand dollars.

Me. Rev. Stat., ch. 160, §§ 13, 14 (1840).

Maryland

[A]ny person . . . who shall knowingly sell, or cause to be sold any such poison, drug, mixture, preparation medicine or noxious thing or instrument of any kind whatever; or where any advice, direction, information or knowledge may be obtained for the purpose of causing the miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy, or shall knowingly sell or cause to be sold any medicine, or who shall knowingly use or cause to be used any means whatsoever for that purpose, shall be punished by imprisonment in the penitentiary for not less than three years, or by a

fine of not less than five hundred nor more than one thousand dollars, or by both, in the discretion of the Court . . . .

Md. Laws, ch. 179, § 2, at 315 (1868).

Massachusetts

Whoever maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow, any poison, drug, medicine or noxious thing . . . and whoever maliciously and without lawful justification, shall use any instrument or means whatever with the like intent, and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned not more than twenty years, nor less than five years in the State Prison; and if the woman does not die in consequence thereof, such offender shall be guilty of a misdemeanor, and shall be punished by imprisonment not exceeding seven years, nor less than one year, in the state prison or house of correction, or common jail, and by fine not exceeding two thousand dollars.

Mass. Acts & Resolves, ch. 27 (1845).

Michigan

The willful killing of an unborn quick child by any injury to the mother of such child, which would

be murder if it resulted in the death of such mother, shall be deemed manslaughter.

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter.

Mich. Rev. Stat., ch. 153, §§ 32, 33, at 662 (1846).

Minnesota

The willful killing of an unborn infant child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

Minn. (Terr.) Rev. Stat., ch. 100, §§ 10, 11, at 493 (1851).

Mississippi

The willful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of the mother, shall be deemed manslaughter in the first degree.

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall be deemed guilty of manslaughter in the second degree.

Miss. Code §§ 8, 9 (1848).

Missouri

The willful killing of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such

mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree.

Mo. Rev. Stat., art. II, §§ 9, 10, at 168 (1835).

Montana (then territory)

And every person who shall administer, or cause to be administered, or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention to produce the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years.

Mont. (Terr.) Laws § 41, at 184 (1864).

Nevada (then territory)

And every person who shall administer, or cause to be administered or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison, for a term not less than two years . . . .

Nev. (Terr.) Laws, ch. 28, § 42, at 63 (1861).

New Hampshire

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or means whatever, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for such purpose, shall, upon conviction, be punished by fine not exceeding one thousand dollars, and by confinement to hard labor not less than one year, nor more than ten years.

N.H. Laws, ch. 743, § 2, at 708 (1848).

New Jersey

[I]f any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing; and if any person or persons maliciously, and without lawful justification, shall use any instrument, or means whatever, with the like intent; and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall, on conviction thereof, be adjudged guilty of a high misdemeanor.

N.J. Laws at 266 (1849).

New York

Every person who shall administer to any woman pregnant with a quick child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall in case the death of such child, or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

N.Y. Laws, ch. 22, § 1, at 19 (1846).

The willful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

N.Y. Rev. Stat., pt. IV, ch. I, tit. II, § 8, at 550 (1828-35).

Ohio

[A]ny physician, or other person, who shall administer to any woman, pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such child or mother, in

consequence thereof, be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than seven years, nor less than one year.

Ohio Gen. Stat. § 112(2), at 252 (1841).

Oregon

[I]f any person shall administer to any woman pregnant with a child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter.

Ore. Gen. Laws, Crim. Code, ch. 43, § 509, at 528 (1845-64).

Pennsylvania

If any person shall unlawfully administer to any woman, pregnant or quick with child, or supposed and believed to be pregnant and quick with child, any drug, poison, or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony, and shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an

imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

Pa. Laws No. 374, § 87 (1860).

South Carolina

[A]ny person who shall administer to any woman with child, or prescribe for any such woman, or suggest to or advise or procure her to take, any medicine, substance, drug or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or such woman results in whole or in part therefrom, be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the Penitentiary for a term not more than twenty years nor less than five years.

S.C. Acts, No. 354, § 1, at 547-48 (1883).

Tennessee

[E]very person who shall administer to any woman pregnant with child, whether such child be quick or not, any medicine, drug or substance whatever, or shall use or employ any instrument, or other means whatever with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done with a view to preserve

the life of the mother, shall be punished by imprisonment in the penitentiary not less than one nor more than five years.

Tenn. Acts, ch. CXL, § 1, at 188-89 (1883).

Texas

If any person shall, during parturition of the mother, destroy the vitality or life in a child, in a state of being born, and before actual birth, which child would otherwise have been born alive, he shall be punished, by confinement in the Penitentiary, for life, or any period not less than five years, at the discretion of the jury.

Tex. Gen. Stat. Dig., ch. VII, art. 535, at 524 (Oldham & White 1859).

Vermont

Whoever maliciously, or without lawful justification, with intent to cause and procure the miscarriage of a woman, then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing, or shall cause or procure her, with like intent, to take or swallow any poison, drug, medicine or noxious thing, and whoever maliciously and without lawful justification, shall use any instrument or means whatever, with the like intent, and every person, with the like intent, knowingly aiding and assisting such offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned in the state prison, not more than ten years, nor less than

five years; and if the woman does not die in consequence thereof, such offenders shall be guilty of a misdemeanor; and shall be punished by imprisonment in the state prison not exceeding three years, nor less than one year, and pay a fine not exceeding two hundred dollars.

Vt. Acts, no. 33, § 1 (1846).

Virginia/West Virginia

Any free person who shall administer to any pregnant woman, any medicine, drug or substance whatever, or use or employ any instrument or other means with intent thereby to destroy the child with which such woman may be pregnant, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, unless the same shall have been done to preserve the life of such woman, shall be punished, if the death of a quick child be thereby produced, by confinement in the penitentiary, for not less than one nor more than five years, or if the death of a child, not quick, be thereby produced, by confinement in the jail for not less than one nor more than twelve months.

Va. Acts, tit. II, ch. 3, § 9, at 96 (1848).

Washington (then territory)

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have

been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, on conviction thereof, be imprisoned in the penitentiary not more than twenty years, nor less than one year.
Wash. (Terr.) Stats., ch. II, § 37, at 81 (1854).

Wisconsin

The willful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

Every person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

Wis. Rev. Stat., ch. 164, §§ 10, 11 (1858).

Wyoming (then territory)

Any person . . . who shall administer, or cause to be administered, or taken, any such poison, substance or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall

be imprisoned for a term not exceeding three years, in the penitentiary, and fined in a sum not exceeding one thousand dollars . . . .

Wyo. (Terr.) Laws, 1st Sess., ch. 3, § 25, at 104 (1869).