No. 18-1323

In The

Supreme Court of the United States

JUNE MEDICAL SERVICES, INC., ET AL.,

Petitioners,

vs.

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

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND AMICUS CURIAE BRIEF OF THE FOUNDATION FOR LIFE IN SUPPORT OF THE RESPONDENT

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MOTION BY FOUNDATION FOR LIFE ("FFL"), a pro-life and pro-family Texas Corporation with a tax-exempt status under 26 U.S.C. 501(c)(3), FOR LEAVE OF COURT TO LATE FILE AN AMICUS BRIEF IN SUPPORT OF THE RESPONDENT IN THE ABOVE CAPTIONED CAUSE

TO: THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW, FFL, a non-profit pro-life and pro-family Texas Corporation with a tax-exempt status under 26 U.S.C. 501(c)(3) of the Internal Revenue Code, and acting by and through its undersigned attorney, moves the Court for leave to late file in the captioned cause an Amicus Curiae Brief in support of the Respondent, showing respectfully the following:

1. FFL's Legal Counsel was unaware of the Court's grant of certiorari in the captioned cause until after the time allowed for the filing of an Amicus Curiae Brief therein. Subsequently, he heard of such review from a newscast pointing out that a large number of members of the United States Congress had joined in the filing of an Amicus Brief, which indicated that *Roe v. Wade* was not workable and that they were seeking the re-visiting of that decision.

2. FFL believes that *Roe v. Wade* and its companion, *Doe v. Bolton*, should be re-visited on a constitutional level, and, to this end, its proposed Amicus Brief sets out numerous areas of unconstitutionality in the *Roe* decision.

This Brief should be helpful to the Court in any such re-examination of *Roe v. Wade*.

3. WHEREFORE, the premises considered, FFL requests respectfully that the Court grant this Motion for Leave of Court to Late File an Amicus Brief in support of Respondent.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

Foundation for Life ("FFL") is a non-profit pro-life and pro-family educational and service corporation organized in 1974 under the laws of Texas and has a tax-exempt status under 26 U.S.C. 501(c)(3) of the Internal Revenue Code. It offers free pro-life literature and counseling to interested persons and has a maternal assistance program for expectant mothers, including free classes related to childbirth, etc. It provides to its female clients free pregnancy tests, pro-life counseling and ultrasound screenings (which are read by a licensed physician).

The instant Cause – which involves application of certain of this Court's abortion decisions – furnishes the Court with the opportunity to re-examine and overrule *Roe v. Wade*, 410 U.S. 113 (1973), and its Companion, *Doe v. Bolton*, 410 U.S. 179 (1973), as decided wrongly, a result in which FFL is interested greatly.[1]

SUMMARY OF THE ARGUMENT

Since the Decision and Judgment of the Court of Appeals applies the Decisions in *Roe v. Wade*, etc., to the constitutionality of the Louisiana Unsafe Abortion Protection Act, FFL (1) submits that this Court has the

[1] This Brief was not authored in whole or in part by any counsel for a party in this Cause, and no outside person or entity made any monetary contribution toward the preparation or submission of this Brief. See this Court's Rule 37.6. All parties to this cause have consented to the filing of this Brief.

opportunity to re-examine and overrule *Roe* and Companion *Doe v. Bolton* as decided wrongly on grounds of unconstitutionality, failure to apply its own standards for the discovery or creation of a "fundamental" U.S. Constitutional right, and the occurrence of unintended, deleterious consequences therefrom, and (2) requests respectfully that this Court do just that.

A. General Construction.

While there is nothing in the Constitution that deals with abortion, the Constitution does provide against deprivation of a person's life, liberty or property without due process of law per the 5th and 14th Amendments thereto. Since the "life" value is preeminent over all other values of a person, the Court should have construed the Constitution to protect that value present in Unborn Children who, of course, are the same individuals as those that are born, only at a different developmental time. In short, any doubt on the matter should have been resolved in favor of Unborn life which predates for a relatively short period that *same value* recognized in the *same* Unborn Child at his or her live birth.

B. Biological Construction.

Since Unborn Children have legal recognition and various rights, vested and contingent (e.g., duty of care owed to such a Child under prenatal tort law), the Court should have applied the "live," "human" and "having a being," or biological, test of personhood under

14th Amendment Due Process per *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968), and erred when it did not do so.

C. Construction per Established Standards for a Fundamental Unenumerated Constitutional Right.

The *Roe* Court erred egregiously when it failed to apply the Court's own standards for discovery or determination of an unenumerated fundamental constitutional right, and, had it done so, there would have been no establishment of the abortion liberty here at issue.

D. *Roe*'s Judgment Violated 5th Amendment Due Process.

Roe is violative of 5th Amendment due process since (1) Unborn Children, (2) U.S. Citizen Abortion "Survivor" Children (who survive abortions only to die as a result of prematurity, neglect or criminal act) and (3) affected Fathers and Husbands of the aborting women were not parties before the underlying U.S. District Court and this Court in *Roe*. They were entitled to be before such Courts since their substantial rights and interests were affected by what those Courts did adversely to them. See, e.g., *McArthur v. Scott*, 113 U.S. 340, 391-392, 404 (1885) (representation of future Unborn Children). As a result, *Roe* is void since it lacked personal jurisdiction over all such human beings.

E. *Roe*'s Judgment Has Produced Unintended and Deleterious Consequences.

Finally, *Roe* and *Doe* should be overruled because of the occurrence of unintended consequences in the form of (1) "abortion on demand" which has resulted in well over 50,000,000 abortion deaths of Unborn Children in this Nation, and the outright murder of some abortion "survivors," (2) substantial and long-continuing divisiveness among the People of this Nation for and against those Decisions and the *Roe* Court itself, (3) harmful psychological and other effects upon substantial numbers of women or minors who have undergone elective abortions; and (4) relegation of this Court to that of a Super Legislature over the States concerning abortion where the Court lacks applicable disciplines in medicine, etc. for judging.

Roe is unique in two respects, each of which augurs for corrective action by this Court: First, it is the only Decision where the exercise of a U.S. Constitutional "liberty" – the abortion "liberty" at issue herein – can and does result in unintended psychological and other harmful effects on many of those who have exercised such "liberty"; and Second, it is the only Decision which, in effect, allowed for the wholesale destruction of the legal rights and interests not only of the infant victims of such exercises but those of affected Fathers and Husbands.

ARGUMENT

THIS COURT SHOULD OVERRULE *ROE V. WADE* AND *DOE V. BOLTON* AS DECIDED WRONGLY AND REMAND THE INSTANT JUDGMENT AND CAUSE TO THE COURT OF APPEALS FOR DISPOSITION IN LIGHT OF SUCH OVERRULING ACTIONS.

A. Introduction.

FFL, as Amicus Curiae herein, submits respectfully that the Judgment and Opinion of the Court of Appeals at bar furnishes this Court with the opportunity to reexamine and overrule *Roe v. Wade*, 410 U.S. 113 (1973), and Companion *Doe v. Bolton* 410 U.S. 179 (1973), as decided wrongly, with the result of returning the overall subject of induced human abortion to the People of the States or Possessions of this Nation, through their democratic institutions for consideration, control and handling.

A century and a half ago, this Court, in *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) ("*Dred Scott* Court"), rendered a divided Judgment and Opinions which gave its imprimatur to the institution of Slavery in this Nation and denigrated an entire race of fellow human beings therein. In so doing, it wrought among the people of this Nation, North and South, a state of severe and long-standing divisiveness toward that Decision and the *Dred Scott* Court itself never seen again until 1973 when the *Roe* Court, during the "Women's Liberation Movement" and the quest for an Equal Rights Amendment to the U.S. Constitution, issued its Judgments and Opinions in *Roe v. Wade* and *Doe v.*

Bolton. This divisiveness continues to this day and doubtless will continue well into the future. Unfortunately, the *Dred Scott* Court never had a meaningful chance to reexamine and correct that Decision since a long and costly Civil war and resultant Amendments to the U.S. Constitution nullified the operative negative holdings in it.

B. The Decisions in *Roe v. Wade* and *Doe v. Bolton* Are Unconstitutional.

1. The U.S. Constitution Does Not Provide any Liberty in a Pregnant Woman To Destroy the Life of her Unborn Child by Elective (Non-therapeutic) Induced Abortion.

At the threshold, there is nothing in the Constitution which addresses abortion or any liberty or right in anyone to destroy Unborn Human Life. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 883, 112 S. Ct. 2791 (1992), Justice Scalia, in a separate Opinion joined by the Chief Justice and two other Justices, said, in part (505 U.S. at 980), that a woman's power to abort her Unborn Child was not a constitutionally protected liberty – in like vein to any such liberty of bigamy – "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the long-standing traditions of American society have permitted it to be proscribed. *Akron II*, *supra*, at 520 (Scalia, J., concurring)." Scalia, J., joined by Rehnquist, C.J., White, J., and Thomas, J., concurring in the Judgment in part and dissenting in part. (Footnote omitted.)

While the Constitution does not address the subject of abortion, it *does protect* the life right of a "person" in this Nation from federal and state deprivations of life, liberty or property without due process of law per the Due Process Clauses of the 5th and 14th Amendments, respectively, thereto. And any doubt on the subject of human life *vis-a-vis* its destruction by abortion should have been resolved in favor of the expressed *life right* of a "person" in the two Due Process Clauses, above, *and* the Judeo-Christian Heritage or Culture to which this Nation's founding Declaration of Independence implicated.

This is fortified by the Preamble to the Constitution of this Nation which was subscribed by its Framers on September 17, "*in the Year of our Lord* one thousand seven hundred and eighty seven," and has, as one of its purposes, "to secure the Blessings of Liberty" not just to the People therein in whose name it was made but to their "*Posterity.*" (Emphasis added.).

While the Preamble does not grant power to the Government, it does constitute evidence of the origin, scope and purpose of the Constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). And, as this Court put it long ago: "[I]t is always safe to read the letter of the Constitution *in the spirit of the Declaration of Independence.*" *Gulf, Colo. and Santa Fe R. Co. v. Ellis*, 165 U.S. 150, 160 (1897). (Emphasis added.).

One such Blessing to their Posterity inheres in the protective reach of applicable anti-abortion law in this Nation, beginning with adopted English Common Law and extending to Federal and State statutory law. The earliest legislative protection against abortion in English Colonial America appears to have occurred in New York City when, on July 27, 1715, the New York City Common Council enacted an ordinance which, *inter alia*, prohibited midwives – under penalty of fines or jail terms in default of payment – from giving counsel or administering any "Herb, Medicine or Potion, or any other thing to any Woman being with Child whereby *She Should Destroy or Miscarry that she goeth withall before her, time*." *New Perspectives on Human Abortion* (ed. by Hilgers, Horan and Mall) (Frederick, Md. 1981), ch. 15, p. 199, citing "Minutes of the Common Council of New York" (1712-1729): 121, at fn. 2, p. 203 (Emphasis added).

In short, the *Roe* Court should have considered these matters of purpose, value and right before creating an unknown abortion "liberty" in a pregnant woman from a construed "right of privacy" from a Constitution silent on abortion, especially where, in the Judeo-Christian Culture of this Nation, induced abortion – which is an unnatural act – was criminalized under U.S. and State law at that time (and earlier).

2. The Traditions of this Nation Concerning Unborn Children Do Not Support any Liberty of Abortion.

Prior to the *Roe* and *Doe* Decisions, the traditions of this Nation (1) protected Unborn Children from abortion initially by the English Common Law and later by U.S. and State statutory law [e.g., I Blackstone, *Commentaries on the Laws of England* (c. 1765), 129-130,[2] *Roe*, 410 U.S. at 174-177 (Rehnquist, C.J., dissenting)]; and (2) recognized, the legal status and. rights posture of Unborn Children, e.g., *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 201 A.2d 537, 538 (S.C.N.J. 1964), *cert. denied*, 337 U.S. 985 (1965); III Chitty, *A Practical Treatise on the Crim. Law* (London, 1816), pp. 798-801.

There were three crimes involving abortion under the English Common Law, namely (1) *murder* if the pregnant woman died as a result of the abortion [*Margaret Tinkler's Case* (Durham, 1781), in I East, *A Treatise of the Pleas of the Crown* (Phil., 1806), pp. 230, 354-356]; (2) *murder* if the Child was born alive after the abortion but died as a result of it [*Sim's Case*, 75 Eng. Repts. 1075 (Q.B. 1601)]; and (3) *heinous misdemeanor* if a live Unborn Child, i.e., when the Mother felt movement of the Unborn Child (or was "quick with child"). [I and IV Blackstone, *op. cit.* (c. 1765 and c. 1770), pp.

[2] "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick v. United States*, 195 U.S. 65, 69 (1904).

129-130 and 198, respectively was killed by an abortion.

The apparent first recorded English case dealing with abortion was in the Year 1200 during the reign of King John. See I *Select Pleas of the Crown A.D. 1200-1225* (Selden Society, 1887), Case No. 82, p. 39 (assault abortion). For early books on English law that dealt with abortion, see, e.g., the four editions of the *Boke of Justyces of Peas* (1506?, 1515, 1521 and 1544) (which contain an indictment which charged, *inter alia*, the felonious slaying of an unborn child); Coke, 3 *Inst.* (covering pleas of the English Crown) (pub. 1626) at 50-52; I Hawkins, *A Treatise of the Pleas of the Crown* (c. 1716) (Curwood, London, 1824), ch. 13, pp. 94-95; I Wood, *An Institute of the Laws of England* (3d ed., Holborn, Eng.) (1724), ch. 1, p. 11; I Blackstone, *op. cit.* at 129-130.[3]

The "Twin Slayer's Case" (in the 14th century) trumpeted by Means, "The Phoenix of Abortional Freedom," etc., 17 *N.Y.L.F.* 335 (1971), to which this Court adverted approvingly many times in *Roe*, did *not* implicate any abortion liberty when the Judges involved said that the killing of the twins was "no felonia," and handled the matter by mainprise, i.e., delivery of the

[3] Fertilization was not understood until the discovery, in 1827, of the ovum of a dog. Flanagan, *The First Nine Months of Life* (N.Y. 1962), Preface, p. 9. Ten years after such discovery, the English anti-abortion law of 1828 was replaced by a statute which made abortion a crime without regard to whether the woman was "quick with child." 7 Wm. IV and I Vict. c. 85 (1837).

Accused to another person(s) [mainpurnor(s)] as surety for his appearance into court.

A "felonia" was an "act or offense [under the Feudal Law of England] by which a vassal forfeited his fee [to his lord]." *Black's L.D.* (4th ed., 1951), "felonia," p. 743; see also, "Felony" at *id*., p. 744, in the explanations under "English Law" and "Feudal Law." In Radin, *Handbook of Anglo-American Legal History* (Hornbook Series) (West Pub. 1936), the term, "felony," was discussed as follows (pp. 148-149):

> The breach of the feudal engagement was "felony," *felonia*, a new term created to describe a new offense. It had no necessary implication of crime or immorality. An unlawful alienation was felony as much as rebellion or hostile attack on the superior, But a breach of the superior's duty was equally felony. If the inferior was guilty of felony, the feud reverted to the grantor. If the superior did so, the *proprietus* fell to the inferior owner. (Italics in original.) (Footnote omitted.)

Abortion was a common law offense in various States of this Nation prior to their enactment of specific antiabortion statutory laws. E.g., *Commonwealth v. Bangs*, 9 Mass. 386 (O.T. 1812); *Mills v. The Commonwealth*, 13 Pa. St. 630, 632 (S.C. Pa. 1850). Abortion was always an offense in Texas, beginning in 1836 with the Constitution of the Republic of Texas which adopted the English Common Law as the "rule of decision" for application "in all criminal cases." Const. Rep. of Texas

(1836), Art. IV. § 13; see *Grinder v. The State*, 2 Tex. 339 (S.C. Tex., Dec. Term, 1847).

These traditions – while discussed, but not accorded proper deference by the *Roe* Court – do not support what the Court did. *Roe*, departed radically from them and, in so doing, (1) created, a liberty in a pregnant woman to destroy or have another destroy the life of her Unborn Child by the unnatural act of induced abortion, (2) sanctioned thereby the destruction of all legally cognizable rights and interests, vested and contingent of all such affected Unborn Children, and (3) in subsequent Decisions, destroyed the rights and interests of Fathers and Husbands in their Unborn Offspring.

In short, the *Roe* Court created a hitherto unknown "fundamental" abortion liberty – an unnatural act – out of an implied "right of privacy" asserted to be broad enough to be within the reach of 14th Amendment Due Process even though in 1868 when the 14th Amendment was adopted, elective abortion was a criminal act federally and in every State in the Nation.

Prior to *Roe*, nowhere in the Laws of England, or this Nation has a court of justice authorized the destruction of the legal rights of an entire category of human beings as well as the rights of affected Fathers and Husbands *vis-a-vis* their offspring.

3. The Liberty Reach of the 14th Amendment Does Not Support any Liberty of Abortion.

The *Roe* Court erred when, after discovering a personal "right of privacy" in the Constitution, it ruled that such right was broad enough to encompass a "fundamental" abortion "liberty" in 14th Amendment Due Process. While "substantive due process" under the 14th Amendment is a broad concept, "reasoned judgment" is required, *Casey*, 112 S. Ct. at 2875, for ruling that the abortion liberty was a substantive due process right.

In an effort to show such rationality, the *Casey* and *Roe* Courts placed *Roe* in succession to a line of cases dealing with procreation, marriage, etc. cited therein. This, however, was inapposite since *none* of the cited cases dealt with the destruction of the right of human life which, of course, is preeminent among individual rights since without it all other rights are meaningless. See *Casey*, 505 U.S. at 951-952 (Rehnquist, C.J., joined by White, J., Scalia, J., and Thomas, J., concurring in the judgment in part and dissenting in part).

In short, the liberty to abort lacks rationality for qualification as a "substantive" due process right. As a result, it should be viewed for what it is – *sui generis* – standing alone as but fiat. See *id.* at 952. As Justice Scalia, joined by the Chief Justice and by 2 other Justices, put it in similar vein in *Casey*, "It is not reasoned judgment that supports the Court's decision [in *Casey*]; only personal predilection." (112 S. Ct. at 2876).

4. The Standards of this Court for the Recognition of Unenumerated Fundamental Liberties in the Constitution Do Not Support any Liberty of Abortion.

The abortion liberty created by *Roe* and amplified in *Doe* contravened the standards established by this Court for the recognition of unenumerated "fundamental" liberties in other contexts.

In this regard, "One approach has been to limit the class of fundamental liberties to those interests that are '*implicit in the concept of ordered liberty*' such that '*neither liberty nor justice would exist if* [they] were *sacrificed*' [citations]"; or, "[a]nother, broader approach is to define fundamental liberties as those that are 'deeply rooted in this Nation's history and tradition [citations].'" *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 790-791 (1986) (White, J., joined by Rehnquist, C.J., dissenting). (Emphasis added.).[4] See also, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977).

In *Moore*, decided after *Roe* and *Doe*, this Court said that "[o]ur decisions establish that the *Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this*

[4] Certain of the quotations specified in the above Paragraph are from *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). *Palko* was overruled in *Benton v. Maryland*, 395 U.S. 784, 793-796 (1969), to the extent that it conflicted with it. The standard, however, still is viable.

Nation's history and tradition," 431 U.S. at 503. (Emphasis added. Footnote omitted.)

The abortion liberty created by *Roe* was *not* "implicit in the concept of ordered liberty" wherein there would be neither "liberty" nor "justice" if it were sacrificed since an act long recognized as unnatural, immoral and criminal could not even begin to so qualify; *nor* was it, as shown *infra*, ever rooted, in the history and tradition of this Nation because it was a recognized evil and criminalized throughout this Nation.

In short, if such standards for the recognition of an unenumerated constitutional right were applied by the *Roe* Court there would have been no such abortion liberty; and the *Roe* Court erred egregiously when it would not even look to and apply the Court's *own criteria* for the discovery (or creation) of an unenumerated fundamental constitutional "liberty."

5. *Roe v. Wade* Is Void as Violative of 5th Amendment Due Process.

The Decisions in *Roe* and in the underlying Texas District Court Judgment therein violated 5th Amendment Due Process as to the affected Unborn Children, U.S. Citizen Abortion "Survivor" Children and affected Fathers and Husbands because none of these human categories were before such Courts through appropriate representatives as they were entitled. Their vital rights and interests were affected by those proceedings and the destructive reach of *Roe* to them.

Insofar as Unborn Children are concerned, it is clear that they, whether in gestation or not, were entitled to be represented in court where their substantial rights, vested or contingent, were affected. See *McArthur v. Scott*, *supra*, 113 U.S. at 391-392, 396-397, 404-405. It is well understood that notice and opportunity to be heard *pro se* or by representation is required under 5th and 14th Amendment Procedural Due Process before any Court in this Nation is authorized to rule on any matter of substance involving the rights of an affected person or personalized entity – especially where the death of such person or entity is involved. Unborn Children are covered clearly by such principle. *Ibid.*

Abortion "Survivor" Children – Children born alive after abortions but destined to die due to prematurity, neglect or overt act – were entitled to be represented and heard because their life and other substantial rights and interests were affected by what the *Roe* Court did or failed to do as to them. These "Survivor" Children were U.S. Citizens resulting from their live births in this Nation. See Section 1, Citizenship Clause, of the 14th Amendment. Yet their lives and all of their other rights, vested and contingent, were endangered because of the "complication" of their live births – a situation which the *Roe* Court apparently did not even consider, let alone mandate or even counsel for their protection in environments markedly hostile to their continued lives. See, e.g., *Showery v. State*, 690 S.W.2d 689, 694, 695-696 (Tex. App. – El Paso 1995, pet. ref.), where a Baby Girl brought forth alive after a

hysterotomy (C-Section) abortion was murdered when the physician who performed the abortion placed her Mother's placenta over her face and immersed her in a bucket of water where she drowned.

As for Fathers and Husbands, the *Roe* Court lacked personal jurisdiction similarly over them. They were entitled to be represented and heard because they had (and have) substantial personal and familial rights and duties in or affecting their offspring. Yet such affected rights and interests were allowed to be destroyed by the *Roe* Decision – a situation at war with the *very functioning* of a Court of Justice.

6. The *Roe* Court Held Unlawfully that the Unborn Were Not Persons under the 14th Amendment to the Constitution.

The *Roe* Court erred when it held "that the word 'person', as used in the Fourteenth Amendment, does not include the unborn" (410 U.S. at 158). (Footnote omitted.)

a. At the threshold, this Ruling violates 5th and 14th Amendment Due Process since it discriminates invidiously against the Unborn as contrasted to the Court's "personhood" treatment of corporations under 14th Amendment Due Process. E.g., *Santa Clara County v. So. Pac. R. Co.*, 118 U.S. 394 (1886). Corporations are artificial entities created by statutory law whereas the affected Unborn Children are actual, living and developing human beings created by the God of the Declaration of Independence of this Nation and

of Human Nature. In short, this discrimination is unconstitutional as invidious or crazy quilt in its lack of rationality. See, e.g., in somewhat similar vein, the Court's "one person, one vote" cases commencing with *Reynolds v. Sims*, 377 U.S. 533 (1964).

It is well established that Unborn Children have substantial legal rights and recognition, some vested, some contingent on live birth, under State and Federal law in this Nation. See, e.g., *McArthur v. Scott*, *supra*, 113 U.S. at 391-392, 395, 404 (right of representation); *Brantley v. Boone*, 34 S.W.2d 409 (Tex. Civ. App. – Eastland 1931, no writ) (vesting of an award on the wrongful death of his father); *Crisfield v. Storr*, 36 Md. 129, 136 (Ct. App. Md. 1872) (vesting of a remainder interest in real property); *Medlock v. Brown*, 136 S.E. 551, 553 (S.C. Ga. 1927) (vesting of a beneficial interest in a trust); *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, *supra*, 201 A.2d at 538 (Pregnant woman may be required to undergo a lifesaving blood transfusion for herself and her Unborn Child); *Yandell v. Delgado*, 471 S.W.2d 569 (Tex. 1971) (cause of action for prenatal tort); *Jefferson v. Griffin Spaulding Co. Hosp. Authority*, 274 S.E.2d 457, 459, 460 (S.C. Ga. 1981) (Pregnant woman may be required to undergo a life saving cesarean section for herself and her Unborn Child); *Tex. Employers' Ins. Co. v. Shea*, 410 F.2d 56, 61, 62 (5th Cir. 1969) (Unborn Child is dependent on his/her Father (and Mother) for support under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*); *Wagner v. Finch*, 413 F.2d 267, 268-269 (5th Cir. 1969) (Unborn Child under the

"living with" provisions of the Social Security Act, Subchapter II, 42 U.S.C. §§ 401 *et seq*., "is sufficiently in being" to be capable of "living with" his or her Father at the time of his Father's death).

Unborn Children were treated in similar vein under the English Common Law applicable in England's Colonies in America and later in most of the States in this Nation. See, e.g., *Reeve v. Long*, 83 Eng. Repts. 754 (House of Lords, 1695) [remainder interest in real property could vest in an Unborn Child, and codified later in 10 & 11 Wm. III, c. 16 (1699)]; *Lutterel's Case* (c. 1660), referred to in *Hale v. Hale*, 24 Eng. Repts. 25 (Ch. 1692) (recognizing the right of an Unborn Child to representation and to an injunction to stay waste of property destined for the Child); Cowel, *The Institutes of the Lawes of England*, First Book, p. 31 (Children born and Unborn entitled to representation by a guardian) and p. 273 (Execution reprieve for a pregnant woman condemned of certain crimes – "Execution of Judgment deferr'd until shee be delivered of her Infant"), referencing *Fleta.*

When most feudal tenures were abolished in England in 1660 (after the Monarchy was restored that year), provision was made for the appointment of a testamentary guardian to represent the Unborn Child and to sue to protect the Child's interests. 12 Ch. II, c. 24, §§ VIII & IX (1660).[5]

[5] Legislation during the reign of Charles II started with the Regnal Year "12" of the restored, King's reign, the 11 plus years

As early as the 14th century in England, a gift may be made to a guardian of an unborn child. *Fleta* (Anno.), Vol. III, Ch. 4, p. 8 (edited and translated by H.G. Richardson and G.O. Sayles, London, the Selden Society, 1972).

b. In addition, such Ruling is invidiously discriminatory as contrasted, to non-aborted prematurely born Children. A prematurely born Child of 7 gestational months has 14th Amendment "personhood," while an older and more developed Unborn Child of 8 gestational months does not. This indicates that an individual's "personhood" thereunder commences not at the beginning of his or her life but at the point of his or her birth. There is, however, no basis in the Constitution for such an arbitrary formulation, particularly where it was common biological knowledge in 1973 and earlier that the life of an individual human being commences at the beginning of his or her life – at fertilization of the egg cell.

c. Moreover, the Unborn should have been recognized as persons within the ambit of 14th Amendment Due Process since they meet the "live, human and having a being" test described in *Levy v. Louisiana*, *supra*, 391 U.S. at 70 (Footnote omitted), dealing with "illegitimate" Children, one of whom was born posthumously. See also, *Glona v. Am. Guarantee & Liab. Ins. Co.*, *supra*, 391 U.S. at 75-76.

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under the "Commonwealth" (ruled by Oliver Cromwell and after his death ruled by his Son) not recognized.

d. Finally, logic has it that an individual becomes a person at the beginning of his or her life – at fertilization. This personhood posture is rooted in (1) the U.S. Declaration of Independence (unalienable right to life exists at creation);[6] (2) the Preamble to the Constitution, including a purpose to extend the "Blessings of Liberty" not just to the "People" in whose name and stead the Constitution was created, but to their "Posterity;" and (3) the traditions, legal recognition and rights posture in laws of this Nation dealing with Unborn Children, *infra.* As this Court put it in the year before *Roe* and *Doe*, "Property does not have rights. *People* have rights." *Lynch v. H.F.C.*, 405 U.S. 538, 552 (1972). (Emphasis added.).

C. The Decisions in *Roe v. Wade and Doe v. Bolton* Have Produced Unintended Consequences.

These Seminal Cases not only were decided wrongly, but have wrought to this Nation at least three deleterious, unintended consequences, discussed below, any one of which augurs for corrective overruling action. See, e.g., Justice Harlan's Dissenting Opinion on jurisdictional grounds in *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (in substantive due process analysis, stressing the role of the *traditions* from which this

[6] See, however, the view of Blackstone about 60 years before the concept of fertilization was discovered. I Blackstone, *op. cit*. at 123 (Life, as the Gift of God, beginning as soon as an infant is "able to stir" in the womb).

Nation developed and the *traditions* from which it broke), quoted with approval in *Casey*, 505 U.S. at 849-850.

1. Abortion on Demand.

In *Roe* and *Doe*, the Court said that the abortion liberty did not mean abortion on demand (*Roe*, 410 U.S. at 153; *Doe*, 410 U.S. at 189). Yet those Decisions have brought about just that; and the deaths of well over 50 million Unborn Children and some Abortion "Survivors" in the 40 plus years since *Roe* and *Doe* provide proof positive to what those Decisions have wrought to this Nation – a very culture of selfishness, violence and death. Even in the "hard cases" of incest or rape, it is never "just" to kill the Child for the crime of the Father.

2. Long-standing Divisiveness Among the Population.

Those Decisions have produced a state of overarching and long-standing divisiveness among the People of this Nation toward the formulation and execution of the abortion liberty and the *Roe* Court itself for its establishment of such liberty – a divisiveness which exists now and doubtless will extend well into the future until corrective action is taken.

3. Harmful Effects of Abortion on Many Affected Women.

The exercises of the abortion liberty has produced, and can be expected reasonably to produce in the present and future, psychological disorders, conditions or problems to large numbers of women who have undergone elective abortions. See the 1-page summary of a survey and study of 240 postabortion females who contacted "WEBA, Victims of Choice, or Last Harvest Ministries" in "PSYCHOLOGICAL REACTIONS REPORTED AFTER ABORTIONS," by David C. Reardon, Ph. D., Elliot Institute, June 5, 2013, contained in the Appendix to this Brief. A portion of such work reads as follows (Appendix):

> Using chi-square tests for significance, women who had at least one abortion as a teen were significantly more likely to report: nightmares; flash-backs to the abortion; hysterical outbreaks; unforgiveness of those involved; feelings of guilt; fear of punishment from God; fear of harm coming upon their other children; a worsening of negative feelings about the abortion on the anniversary date of the abortion, during a later pregnancy, or when exposed to pro-choice propaganda; preoccupation with thoughts of the child they could have had; excessive interest in pregnant women; excessive interest in babies; experiencing false pregnancies; a dramatic personality change for the worse; a waking or sleeping "visitation" from the aborted child; having talked to the aborted child prior to the abortion.

In short, the abortion liberty is the only U.S. Constitutional "right" which, when exercised, can and does result in (1) psychological and other harm to the affected aborting females, and (2) the destruction of rights in affected Unborn Children, Fathers and Husbands. This, of course, demonstrates that something is wrong radically since exercise of a right, particularly a fundamental U.S. Constitutional one, should result in a positive value or effect, not one of a negativity to those involved, or affected by such exercise.

The core problem with the abortion "liberty" or right is that it is unnatural in that it pits the Mother against her own Unborn Child; it destroys legally cognizable rights and interests in the Unborn, Fathers and Husbands; and it strikes at the history and traditions of this Nation and its Judeo-Christian Heritage or Culture which considered induced abortion for what it is: An unnatural evil act.

4. Relegation of this Court to the Status of a Super Legislature Over the States Concerning Abortion Without Having Appropriate Qualifications in Affected Disciplines.

The advent of federal and state abortion regulatory law which has been contested constitutionally has resulted in this Court becoming a "Super Legislature" to the States, calling them down time and again to what the Court considers proper legislation in the area of induced elective abortion. The problem is that the Court lacks disciplines in such areas as medicine, the

practice of medicine or midwifery, medical and psychological disorders or complications, drugs and medicines, familial relationships and even structural engineering *vis-a-vis* physical and other requirements mandated for abortion clinics in Texas.

D. The Reasons Advanced in *Casey* Against any Overrule of *Roe* Lack Meaningful Legal Merit.

In *Casey*, the Court did not consider whether *Roe* was decided wrongly, "if error there was" (505 U.S. at 869), and, instead, assumed that it was decided correctly, and launched into a spirited defense of it (*id*. at 855-861, 868-869). This approach reveals more by omission – see Subsections A-E of the ARGUMENT, above, adopted herein – than it does by commission.

In any event, the Court also advanced three reasons why *Roe* should not be overruled (*id*. at 854-869), none of which has any meaningful legal merit. Two of them – reasonable reliance by people upon the continuation of the abortion liberty and possible loss of institutional respect or legitimacy should *Roe* be overruled (*id*. at 855-856, 864-869) – have more to do with policy or public relations than of constitutional justification or doing what is correct and just.

Moreover, had those criteria been followed by the Court in the area of racial segregation in the public schools, the Nation might well have continued – to its detriment – with such segregation, thanks to the then sway of the Court's now discredited "separate

but equal" mantra. See *Brown v. Bd. of Education of Topeka*, 347 U.S. 483 (1974).

Its final reason – *stare decisis* – has diminished force where a decision interprets or applies the Constitution since this Court has the final say on interpreting the Constitution, and any substantive change of such workings cannot come through the legislative processes. See *Burnet v. Coronado Oil & Gas Co*., 285 U.S. 393, 406-407 (1932) (Brandeis, J., joined by Stone, J., and Roberts, J., dissenting).

This diminished force is especially true where, as here, (1) *Roe* and *Doe* have generated considerable long-standing and continuous opposition by People in this Nation to the abortion "liberty" and its exercises, together with continued criticism of the *Roe* Court which created it; and (2) the inability of the *Roe* Decision to "teach" positively of such "liberty" when ordinary people cannot fathom how performance of an unnatural, immoral and long-criminalized act in every State in the Nation could be turned – somehow – into the exercise of a "fundamental" or basic U.S. constitutional "liberty" not even mentioned in the Constitution.

E. Concluding Argument.

In the past, this Court has overruled prior decisions interpreting the Constitution where its interpretation was determined later to be erroneous. See, e.g., *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), overruling, *Swift v. Tyson*, 16 Pet. 1 (1842), where the Court recognized that the Decision in that case – which was viable

for about a century – was unconstitutional. FFL submits respectfully that this Court should do likewise herein.

CONCLUSION

For the reasons and authorities presented above, Amicus Curiae FFL requests respectfully that the Court (A) reexamine and render Judgment overruling *Roe v. Wade* and *Doe v. Bolton* as decided wrongly; (B) remand the underlying Judgment and Cause to the Court of Appeals for its disposition in accordance with such overruling action; and (C) grant such other, and further, relief to which the Court determines just or appropriate in the circumstances.

Respectfully submitted,

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