No. 19-1392

IN THE
Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., IN HIS OFFICIAL CAPACITY AS STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ON BEHALF OF ITSELF AND ITS PATIENTS, *et al.*,
Respondents.

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

BRIEF OF AMICUS CURIAE ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Alabama Center for Law and Liberty is a conservative public-interest organization based in Birmingham, Alabama, dedicated to the defense of limited government, free markets, and strong families. It is also the litigation arm of its parent organization, the Alabama Policy Institute ("API").

ACLL has an interest in this case for several reasons. First, API's co-founder, Tom Parker, is now the Chief Justice of the Alabama Supreme Court. His writings were cited several times in the cert petition (*see* Pet. 4, 17, 18) because he has written extensively on how *Roe* deviates from the presumptions in criminal law, tort law, and other areas of the law that unborn children are people. Second, ACLL believes that life begins at the moment of fertilization and that unborn children are people entitled to equal protection of the law. Finally, the outcome of this case undoubtedly will affect ongoing litigation concerning Alabama's Human Life Protection Act, Ala. Code § 26-23-H-1 et seq., which bans abortion in Alabama in most cases. *See Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019). That litigation is currently pending before the U.S. District

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

Court for the Middle District of Alabama. ACLL is interested in seeing that law upheld.

SUMMARY OF THE ARGUMENT

In considering whether to revisit a precedent, this Court has held that it should consider whether the decision is an outlier among areas of the law that address the same subject. Across the country, many laws govern the lives and rights of unborn children. These include criminal law (specifically fetal homicide laws, penalty-enhancement statutes, and stays of execution for pregnant women), tort law (including fetal injury laws and wrongful-death laws), property law, guardianship law, family law, and healthcare law. Chief Justice Parker of the Alabama Supreme Court has done an excellent job of surveying the laws of all fifty states in these areas. His research shows that with the lone exception of wrongful-death actions, every other area of the law protects the rights of unborn children regardless of whether they have attained the point of viability or not. Consequently, *Roe*'s viability standard is an outlier.

Another factor the Court considers is the quality of its reasoning. Justice Scalia once observed briefly that drawing the line at viability made no more sense than drawing the line at when a child is past weaning. He was correct. The implication of the Court's reasoning is that one person has the right to kill another if the other is dependent on him for survival. Taken to its logical conclusion (and combined with an important precedent from this

Court), this means that parents have a right to kill their children as long as they are dependent on them. Moreover, taken to its ultimate conclusion, it means that one person has the right to kill another if he is dependent on him in any way for survival. Since very few of us are completely self-sufficient but instead rely on the goods and services others provide, *Roe*'s logic means that the people who provide those goods and services to us have the right to kill us if they feel that we are too much of a burden on them. Because the logic of *Roe*'s viability rule requires this outcome, it was not well-reasoned, and the Court should discard it.

But the Court should not stop there. If the Court discards the viability rule, it will have to ask which standard should replace it. Because the Court cannot answer that without constitutional exposition, the question of whether *Roe* as a whole was correctly decided is inextricably linked to the question presented. Therefore, the Court may and should consider that question.

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

application of substantive due process: *Roe v. Wade*. Just as the Court eventually did away with *Lochner*, so now it must do away with *Roe*. The doctrine of *stare decisis*, both as an original matter and as this Court has interpreted it, does not require the Court to retain *Roe* just because it is precedent.

If the Fourteenth Amendment has any application to abortion at all, it protects the unborn child's right to not to be murdered; consequently, state laws authorizing abortion are unconstitutional. The Framers of the Fourteenth Amendment believed that God gave every person the natural right to life and that unborn children were "people" entitled to the Amendment's protection. Consequently, laws that protect everyone from murder except unborn children violate the Equal Protection Clause.

If this is too far for the Court to go in the present case, then it should at a minimum decline to foreclose discussion of that issue in the future. But because the Court cannot replace the viability standard without wrestling with the question of whether *Roe* was decided correctly, it must overrule *Roe* in this case.

ARGUMENT

I. The Viability Rule Should Be Discarded

A. The Viability Rule Does Not Comport with Other Areas of the Law Addressing the Rights of Unborn Children

In considering whether to overrule a precedent, this Court considers whether the decision is an "outlier" among laws that address the same subject. *See Janus v. AFSCME, Council 31,* 138 S.Ct. 2448, 2482 (2018). Thus, in considering whether to overrule the viability standard, this Court should consider whether other areas of the law treat unborn children as people only when they become viable. Chief Justice Tom Parker of the Alabama Supreme Court has written extensively on this issue, and the information presented here come from his special writings.[2]

1. Criminal Law

The criminal laws of the states protect the rights of unborn children in three ways: fetal homicide laws, penalty-enhancement statutes, and suspending the executions of pregnant women. This subsection will summarize the laws of those states and discuss

[2] For the sake of being concise, ACLL will not reproduce every source Chief Justice Parker cited in these writings; however, it will provide the citation to the place where Chief Justice Parker listed every source upon which he relied.

whether the viability standard plays any part in those laws.

First, 27 states criminalize fetal homicide regardless of the gestational age of the child. *Ex parte Phillips*, 287 So. 3d 1179, 1248 n.20 (Ala. 2018) (Parker, J., concurring specially); *Ex parte Ankrom*, 152 So. 3d 397, 423 n.14 (Ala. 2013) (Parker, J., concurring specially).[3] Only three states continue to use viability as a limitation on criminal liability. *Phillips*, 287 So. 3d at 1248 n.20; *Ankrom*, 152 So. 3d at 424 n.15. Three others use the quickening to impose a limitation on liability, while three more use other gestational-age limitations. *Id.* at 424 nn. 16 & 17. Thus, of the states that criminalize fetal homicide, the vast majority have rejected the viability standard as a limitation on fetal homicide, instead imposing guilt if an unborn child is killed regardless of his or her age.

Second, of 27 states that authorize the death penalty,[4] four states provide that if a pregnant woman is murdered, then her pregnancy can be an aggravating factor that can justify the death penalty.

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[3] In Part I of this brief, all short-form citations to *Phillips* and *Ankrom* refer to Chief Justice Parker's special writings unless otherwise noted. In case there is any confusion, Justice Parker was an associate justice when he issued those writings but was elected as Chief Justice in 2018. *Chief Justice Parker*, Alabama Judicial System, https://judicial.alabama.gov/CourtMemberBio/ViewBio?id=3 (last visited June 16, 2021).

[4] *States and Capital Punishment*, NAT'L CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx (last visited July 21, 2021).

Ankrom, 152 So. 3d at 424 n.18. Half of those states do not require the child to reach viability or a gestational age.[5] Nine other states permit the death of a mother and her child to be considered an aggravating factor where two people are killed in one incident, regardless of the child's viability. *See Ankrom*, 152 So. 3d at 425 n.19. Finally, one state provides that "a killing that would be capital murder if the pregnant woman dies is capital murder if the mother survives but her unborn child dies," regardless of the child's viability. *Id.* at 425 & n.20 (citing Fla. Stat. Ann. § 782.09, citing in turn Fla. Stat. Ann. § 775.021(5)(e)). Thus, of the 14 states that allow an unborn child's death to be taken into account, 12 allow his or her death to be considered regardless of viability.

Finally, of the 27 states authorizing capital punishment, 22 expressly prohibit the execution of a pregnant woman until the baby has been delivered. *Ankrom*, 152 So. 3d at 425 n.21; *Phillips*, 287 So. 3d at 1248 & n.21. None of the statutes staying the execution of pregnant women contain a viability requirement. *See Ankrom*, 152 So. 3d at 425 n.21 and statutes cited therein.

Thus, the vast majority of the states that have addressed these matters have not imposed a viability standard. Put simply, if an unborn child is killed, the child's viability is irrelevant to the criminal's guilt or

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[5] Ariz. Rev. Stat. § 13-751(f)(7); Tenn. Code Ann. § 39-13-204(*i*)(16); Ind. Code Ann. tit. 11, § 35-50-2-9(b)(16) (requiring child to reach viability); 42 Pa. Const. Stat. Ann. § 9711(d)(17) (requiring child to reach third trimester).

punishment. Neither is the child's viability relevant to whether a pregnant woman should be executed or not. The law recognizes the child as a person regardless of his or her viability.

2. Tort Law

The law of torts recognizes the personhood of the unborn by allowing actions to recover damages from injuries the child sustained within the womb and the wrongful death of the child. As for prenatal injuries, 30 states permit an action to be brought for damages for nonfatal prenatal injuries, regardless of whether the child was viable when he suffered the injury or not. *Ankrom*, 152 So. 3d at 425 n.22. 17 other states and the District of Columbia allow such actions to be brought if the child sustained the injury after he had reached the point of viability. *Id.* at 426 n.23. However, even those jurisdictions have not determined whether such actions may be brought if the child sustained the injuries before viability. *Id.*

As for wrongful death actions, 40 states allow wrongful-death suits to be brought if the child sustained post-viability injuries that caused his or her death. *Ankrom*, 152 So. 3d at 427 n.24. Of those states, two permit an action to be brought if quickening had occurred, regardless of whether the child was viable; and 12 allow an action to be brought regardless of the child's gestational age. *Id.* at 427-28 nn.25-26; *Phillips*, 287 So. 3d at 1249 n.23.

Thus, with the exception of wrongful death actions, the majority of states do not use viability as

a limiting principle as to whether the child may recover damages for injuries done to him or her *in utero*.

3. Property, Guardianship, Family, and Healthcare Law

The law protects unborn children in at least four other areas of the law without regard to whether they have reached the point of viability or not: property, guardianship, family, and healthcare law.

The common law recognized that unborn children could have property rights.[6] *See, e.g.*, 1 William Blackstone, *Commentaries* *119. To this day, the States have retained this principle. For instance, if a father dies before his unborn child is born, then the child will still inherit from the father as if he had been born. *Ankrom*, 152 So. 3d at 422 & n.11. The inheritance rights of these children are not contingent upon them reaching the point of viability before their father dies.

The common law also recognized the personhood of the unborn through guardianship law. Blackstone noted that "any father, under age or full age, may by deed or will dispose of the custody of his child, *either born or unborn*, to any person …." 2 William Blackstone, *Commentaries* *462 (emphasis added). Today, "[a]ll states – by statute, rule, or precedent – permit a court to appoint a guardian ad litem to

[6] Unlike England's fetal homicide law, the laws of property and guardianship were not limited by the quickening principle. *Cf.* 1 William Blackstone, *Commentaries* *130.

represent the interests of an unborn child in various matters including estates and trusts." *Ankrom*, 152 So. 3d at 428 & n.27. Again, the laws governing these matters do not impose a viability rule as a limiting principle on the child's rights. *See id.*

In the arena of family law, eight states have applied child-protection laws to unborn children in various ways. *Phillips*, 287 So. 3d at 160 n.29. Five other states have held that unborn children can be "victims of abuse and neglect." *Id.* at 160 & n.31. It appears that these laws protect the unborn child's right "'to a gestation undisturbed by wrongful injury and the right to be born with a sound mind and body free from parentally inflicted abuse or neglect.'" *Id.* at 160-61 (quoting *In re Fathima Ashanti K.J.*, 558 N.Y.S. 2d 447, 449 (Fam. Ct. 1990)). The right to an undisturbed gestation applies to the total gestation period, not just gestation after viability.

Finally, regarding healthcare law, even though every state allows a patient to execute an advance directive, "most states prohibit the withdrawal or withholding of life-sustaining treatment for a pregnant woman, regardless of her advance directive." *Ankrom*, 152 So. 3d at 429 & n.28. Those states also "generally prohibit an agent acting under a health-care power of attorney from authorizing an abortion." *Id.* at 429 &. n.29. While these statutes sometimes include a limiting principle (such as requiring the doctors to determine whether the baby would probably live if the mother were kept on life support), they do not typically include a viability rule. *See id.* at 429 nn. 28-29 and statutes cited therein.

4. Conclusion

With the lone exception of wrongful death actions, the majority of state laws protecting unborn children do not impose a viability requirement on the child's rights. *Roe's* viability standard is therefore an "outlier" among laws that address the same subject. *Janus*, 138 S.Ct. at 2482. Because the vast majority of the laws governing the unborn do not require an unborn child to be viable in order to merit legal protection, neither should this Court.

B. Taken To Its Logical Conclusion, the Viability Rule Could Permit Families to Kill Children Who Have Already Been Born

Another factor the Court considers in revisiting a precedent is "the quality of its reasoning[.]" *Janus*, 138 S.Ct. at 2479. As to *Roe*'s viability holding, the quality of its reasoning should be examined by taking the holding to its logical conclusion.

Justice Scalia once pointed out a fatal flaw in the reasoning of drawing the line at viability, arguing it "makes no more sense than according infants legal protection only after the point at which they can feed themselves." *Planned Parenthood v. Casey*, 505 U.S. 833, 989 n.5 (1992) (Scalia, J., dissenting). What was once raised in that footnote deserves exposition here.

As one commentator noted,

> "For the Court to make its argument valid, it would have to add to its factual premise [the fact of fetal non-viability] the normative premise: whenever a human being cannot live on its own because it uniquely depends on another human being for its physical existence, it is permissible for the second human being to kill the first to rid the second of the burden."

Francis J. Beckwith, *Defending Life: A Moral and Legal Case Against Abortion Choice* 37 (Cambridge Univ. Press 2007).

If this Court allows one person to kill another as long as the latter is dependent on the former for survival, then there is no logical reason why, as Justice Scalia noted, a mother should not be able to kill a weaning child as well. But this logic, horrifying as it is, does not necessarily stop when the child is no longer nursing. Children will always, in one form or another, be dependent on their parents until they are able to support themselves financially. Consequently, under the logic of the viability rule, parents ought to be able to kill their children at any point from the moment of conception until they day where they move out of the house. By the same token, a family would not only have the right to kill a dependent child, but also any family member who would not be able to live without help from others (such as a handicapped sibling or an aging parent).

One might counter that this conclusion does not follow because the right to abortion is based on the right to privacy, which protects a woman's right to do what she wishes with her own body. *See Roe*, 410 U.S. at 152-54. However, this Court has recognized not only a right to *personal* privacy but also a right to *family* privacy. *See, e.g.*, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842 (1977). If the right to abort a child that cannot survive on his own can be justified by the right of personal privacy, then the same logic would require the Court to hold that the right of family privacy justifies a family in killing one of its own members who cannot survive on his own.

That proposition is of course horrific, barbaric, and immoral. But that is exactly the point. If it makes no sense to hold that a person who has been born may be killed because he cannot survive on his own, then it likewise makes no sense to hold that a person who is unborn may be killed because he cannot survive on his own. This dilemma exposes the viability standard for what it is: an arbitrary line that should be discarded.

On one last note, if a person's right to life is dependent on his ability to survive without the help of others, then most people would not have a right to life. Most of us wake up each day in a dwelling that was built by someone else, eat food that was grown by someone else, drink water that was sent to our house by someone else, go to work in a car that was built by someone else, and provide goods or services to someone else in exchange for payment so that we

can take care of ourselves. *Roe's* viability holding, taken to its ultimate conclusion, would mean that only those among us who can perform all these tasks without the help of others have a right to life. Since most of us therefore are dependent on others for our own survival, we should not kill the unborn for likewise being dependent on others for their survival.

II. This Court Should Take the Opportunity to Overrule *Roe* and Its Progeny

A. If the Court Revisits the Viability Standard, Then It Cannot Escape the Question of Whether the Constitution Protects a Right to Abortion at All

If the Court agrees to revisit the viability standard, then it will have to decide how much of *Roe* and *Casey*'s framework remains. In *Roe* and *Casey*, the Court held that the State may not ban abortions, or at least place an undue burden in the path of a woman seeking an abortion, before viability. *Casey*, 505 U.S. at 877; *Roe*, 410 U.S. at 164. Thus, viability is not only an important part of the equation; it is *the* most important part of the equation. Under this Court's precedents, viability is the point that separates the State's interests in protecting the baby's life from the mother's interest in choosing whether to have the baby or not.

Consequently, if this Court revisits the viability standard, then it will necessarily and inescapably trigger the larger question of whether the State's interest in protecting life outweighs the mother's

interest in choice. The Court therefore will have to choose between two options as it makes its decision: creating another arbitrary rule, or expounding and applying the Constitution as it is written. The former would do violence to the Constitution by creating law, which is reserved for the legislative branch alone, instead of applying the law, which is for the courts. The latter may require the Court to go beyond the question presented. However undesirable it is to decide more, "sometimes it is necessary to decide more. There is a difference between judicial restraint and judicial abdication." *Citizens United v. FEC*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring).

The question of whether a State may prohibit abortions and whether the Constitution protects the mother's right to choose is "inextricably linked to, and is thus 'fairly included' within, the questions presented." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005). It is impossible for the Court to answer the question presented without considering this issue as well, making it therefore a matter "antecedent to ... and ultimately dispositive of" the dispute before the Court. *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). Consequently, this Court can and should consider the threshold issue of whether the Constitution protect a right to abortion or not.

B. *Roe* and Its Progeny Are Unconstitutional.

1. *Roe* Does Not Comport with Either the Text or Original Meaning of the Constitution.

In *Casey*, this Court held that the Due Process Clause of the Fourteenth Amendment protects a woman's right to abort her baby. *Casey*, 505 U.S. at 846. The Due Process Clause of the Fourteenth Amendment states, "No State shall ... deprive any person of life, liberty, or property without due process of law." U.S. Const., amend. XIV, § 1. Grammatically, this Clause does not prohibit the government from abridging *substantive* rights. Instead, it guarantees the people of the states the right to due *process* of law before the states deprive them of life, liberty, or property. It is procedural, not substantive; therefore it cannot be construed to recognize rights that are not in the Constitution. "Substantive due process," is, in fact, an oxymoron. *See Timbs v. Indiana*, 139 S.Ct. 682, 692 (2019) (Thomas, J., concurring in judgment) (explaining that "due process" meant "by the law of the land"); *id.* at 691 (Gorsuch, J., concurring).

The original meaning of the Due Process Clause likewise discounts any possibility of protecting the right to abortion. As Justice Thomas explains, the liberty protected by the Due Process Clause likely means freedom from physical restraint. *Obergefell v. Hodges*, 576 U.S. 644, 723 (2015). Still, the grammar of the Due Process Clause is as inescapable now as it was in 1868: it guarantees that an individual may

not be physically restrained without due process of law. Consequently, "substantive due process" is indefensible from an originalist perspective. *Id.* at 722.

If the text of the Constitution were not clear enough, 36 out of 37 states had laws either restricting our outlawing abortion in 1868.[7] *Roe*, 410 U.S. at 175 & n.1 (Rehnquist, J., dissenting). There was therefore "no question concerning the validity of [these] statutes when the Fourteenth Amendment was adopted." *Id.* at 177. Therefore, "nothing in the language or history of the Constitution supports the Court's judgment" that the Constitution protects the right to abortion. *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting).

2. *Roe* Does Not Comport with This Court's Traditional Substantive Due Process Jurisprudence Under *Washington v. Glucksberg*

For over a hundred years, however, this Court has held that the Due Process Clause protects certain rights that are not enumerated in the Constitution itself. To ensure that this Court does not cross the line from protecting fundamental rights into

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[7] Nebraska became the 37th State admitted to the Union in 1867. *Nebraska Statehood*, History Nebraska, https://history.nebraska.gov/tags/nebraska-statehood (last visited May 24, 2021). Nebraska was the only state in 1868 without a law addressing abortion, probably because it had just become a state and did not have many laws at all. *See Roe*, 410 U.S. at 175 n.1 (Rehnquist, J., dissenting).

legislating new rights, the Court recognizes only those rights that are "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (cleaned up). This limiting principle is important because it "tends to reign in the subjective elements that are necessarily present in due process judicial review." *Id.* at 722.

At the time of the Founding, the common law made abortion after "quickening" a criminal offense. 1 William Blackstone, *Commentaries* *129-30. The fact that the common law protected the unborn only after quickening should not be confused with the creation of a right to abort a child. The common law protected the unborn based on the best evidence available at the time of when life began, but the common law never *affirmatively* protected the right to terminate a pregnancy before quickening.

In the mid-nineteenth century, scientific and medical advancements led physicians to believe that life started at conception. Esther Slater McDonald, *Note: Patenting Human Life and the Rebirth of the Thirteenth Amendment*, 78 Notre Dame L. Rev. 1359, 1376-77 (2003). The American Medical Association launched an aggressive campaign to protect life from the moment of conception, leading nearly every state or territory to adopt such a law. *Id.* at 1379. It was not until just before *Roe* that a trend toward liberalization occurred. *Roe*, 410 U.S. at 139-40.

Thus, between the common law history and the further development of medicine in the nineteenth century, the trend in our history was always to

protect life from the moment we knew it existed. Consequently, "it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as 'fundamental' under the Due Process Clause of the Fourteenth Amendment." *Casey*, 505 U.S. at 952-53 (Rehnquist, C.J., dissenting).

3. *Dred Scott*, *Lochner*, and *Roe*: the Substantive Due Process "Hall of Shame"

As Justice Thomas has explained, "substantive due process" is a "dangerous fiction" that "distorts the constitutional text" and invites judges to "roam at large in the constitutional field guided only by their personal views...." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2631 (2015) (Thomas, J., dissenting) (quotations, citations, and alterations omitted). "And because the Court's substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court's most notoriously incorrect decisions." *Timbs,* 139 S.Ct. at 692 (Thomas, J., concurring in judgment) (citing *Dred Scott* and *Roe*).

As four of the sitting justices of this Court have recognized, the doctrine of substantive due process was born in the notorious *Dred Scott* case. Relying on the Fifth Amendment's Due Process Clause, this Court held,

> [A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

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

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

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

Neil Gorsuch, *A Republic, If You Can Keep It* 125 (2019); *accord Obergefell v. Hodges*, 576 U.S. 644, 695 (2015) (Roberts, C.J., joined by Scalia, Thomas,

and Alito, JJ., dissenting) (acknowledging *Dred Scott* as the first case applying substantive due process).

The Court's new invention of substantive due process did not accomplish the result it intended. It set America on a course for Civil War, which cost over three million lives.[8] The similar invocation of substantive due process 116 years later resulted in over sixty million deaths,[9] making *Roe* twenty times deadlier than *Dred Scott*.

The second advent of substantive due process came in *Lochner v. New York*, 198 U.S. 45 (1905). In that case, this Court concluded that the Due Process Clause prohibited state interference with freedom of contract. 198 U.S. at 64. Justice Holmes famously dissented, arguing that the Court's decision was based on economic theory instead of the Constitution. *Id.* at 75 (Holmes, J., dissenting). Justice Holmes's position eventually prevailed. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (signaling the end of the *Lochner* era).[10] After the Thirteenth

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[8] *America's Wars*, U.S. Department of Veterans Affairs, https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (last visited July 21, 2021).

[9] *Abortion Statistics*, National Right to Life Committee, https://nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf (last visited July 21, 2021).

[10] ACLL believes in free markets but does not believe such rights can be deduced logically from the text or history of the Due Process Clause. Moreover, while ACLL believes there is a right to work, it also believes that the Tenth Amendment permits the States to use their police powers in a reasonable way to protect the people's health, safety, welfare, and morals. A balance therefore must be struck, which is different than *Lochner*'s limitless protection of every kind of economic activity.

Amendment invalidated *Dred Scott* and the Court repudiated *Lochner*, one would think the Court would have ceased using (or rather abusing) substantive due process to create new rights that are neither in the Constitution nor deeply rooted in this nation's history and traditions.

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

Judge Henry Friendly of the Second Circuit, echoing Justice Holmes's dissent in *Lochner*, recognized that abortion had nothing to do with the Constitution. In a draft opinion for an abortion case that was prepared shortly before this Court decided *Roe*, Judge Friendly addressed the heart of the pro-abortion argument, which was "that a person has a constitutionally protected right to do as he pleases with his—in this instance, her—own body so long as no harm is done to others." A. Raymond Randolph, *Before* Roe v. Wade*: Judge Friendly's Draft Abortion Opinion*, 29 Harv. J. L. & Pub. Pol. 1035 (2006). Judge Friendly responded,

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

Id.

As Justice Curtis recognized in *Dred Scott*, as Justice Holmes recognized in *Lochner*, and as Judge Friendly recognized in his abortion case, the Due Process Clause does not authorize the Justices of this Court to interpret the word "liberty" according to their personal philosophies instead of what the Constitution really means.

But that is exactly what the Court did in *Roe*. As Justice White lamented, "The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes." *Doe*, 410 U.S. at 221-22 (White, J., dissenting). The price of judicial activism in *Lochner* was (arguably) allowing employers to push their employees too far. The price of judicial activism in *Dred Scott* was a Civil War that cost over 3 million lives. The cost of judicial activism in *Roe*, however, was over 60 million abortions, which is ten times the

amount of Jews murdered in the Holocaust[11] and twenty times the casualties of the Civil War. Thus, among judicial activism's worst decisions, *Roe* earns the place of foremost prominence in the Substantive Due Process Hall of Shame.

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

The right to abortion cannot "be logically deduced from the text of the Constitution." *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring). Even if substantive due process comported with the Fourteenth Amendment, it would not support the right to an abortion because it is not "found in the longstanding traditions of our society[.]" *Akron*, 497 U.S. at 520 (Scalia, J., concurring). *Roe* was a bare power grab by judges who read their own philosophies of liberty into the Constitution, costing tens of millions of innocent lives. It was judicial activism at its worst and must be overruled.

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[11] *Documenting Numbers of Victims of the Holocaust and Nazi Persecution*, United States Holocaust Memorial Museum, https://encyclopedia.ushmm.org/content/en/article/documenting-numbers-of-victims-of-the-holocaust-and-nazi-persecution (last visited May 24, 2021).

B. The Doctrine of *Stare Decisis* Does Not Bar This Court from Overruling *Roe* and *Casey*.

As an original matter, a precedent should be overruled if it clearly conflicts with the Constitution. Justice Thomas's masterful concurrence in *Gamble v. United States*, 139 S.Ct. 1960, 1980-89 (2019), illustrates in great detail the meaning of precedent in light of the common law and the history and structure of our Constitution. ACLL agrees with Justice Thomas: "When faced with a demonstrably erroneous precedent," such as *Roe* or *Casey*, the Court "should not follow it." *Id.* at 1984 (Thomas, J., concurring). When forced to choose between original meaning and stare decisis, "a justice's duty is to the Constitution[, and] it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it." Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex L. Rev. 1711, 1728 (2013). After all, "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1405 (2020).

If the Court does not believe that grave constitutional error alone is enough to warrant overturning a demonstrably erroneous precedent, then it should look to the factors it articulated recently in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018). Those factors are: (1) the quality of the precedent's reasoning, (2) the workability of the precedent in question, (3) whether legal or factual

developments have eroded the decision's underpinnings and left it as an outlier, and (4) reliance interests. *Id.* at 2479-84.

As for the first factor, *Casey* has been attacked as the worst constitutional decision of all time because the Court knew *Roe* was wrongly decided but applied it anyway to save face, with the result that millions of people died. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 998-1004 (2003). *Roe*'s reasoning likewise does not comport with the original meaning of the Due Process Clause or the Court's traditional substantive due process analysis.

As for the second factor, the present case addresses whether viability is a workable line to draw or not. If the Court finds that it is not, then the second factor weights in favor of overruling *Roe* and *Casey*.

As for the third factor, we know far more about prenatal life now than we did when *Roe* and *Casey* were decided. *Hamilton v. Scott*, 97 So. 3d 728, 746 (Ala. 2012) (*Hamilton I*) (Parker, J., concurring specially). Furthermore, criminal law, tort law, guardianship law, health care law, property law, and family law often treat the unborn as persons, leaving abortion as an outlier. *Ex parte Phillips*, 284 So. 3d 101, 165-69 (Ala. 2018) (Parker, J., concurring specially).

The fourth factor is the only potential factor that weighs the other way. However, reliance interests

were not enough to save the precedent in question from being overruled in *Janus* when the other three factors weighed the other way. *Janus*, 131 S.Ct. at 2485-86. Neither should it in this case.

Since *Dred Scott* has been mentioned, it is also worth noting that reliance was the reason why slaveholding states refused to abolish slavery. That issue was settled on the battlefields of the Civil War, and the outcome was that reliance interests did not justify holding human beings as property. Neither does reliance here justify murdering innocent people.

Finally, the Court has sometimes stated that a "special justification" is required to overrule precedent. The Court found in *Janus* that if the first three factors are met, then the special justification is met also. *Janus*, 138 S.Ct. at 2486. Beyond that, sixty million people have been murdered since 1973 because of this Court's decision. If that is not "special justification," then with respect, nothing is. It is time to end the bloodshed and overrule *Roe* and its progeny once and for all.

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

Roe itself conceded that if an unborn child is a person, the case for abortion collapses, because the child's right to life would be specifically guaranteed by the Amendment. *Roe*, 410 U.S. at 156-57. The Court was correct in that regard. The Fourteenth Amendment states, in relevant part: "nor shall any

State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1 (emphasis added).

Since other *amicus* briefs are developing this point in more detail, ACLL will point out briefly that the question of whether unborn children are "persons" within the meaning of the Fourteenth Amendment has gained considerable attention. The Alabama Supreme Court, for instance, has acknowledged that it could be true. *See Phillips*, 287 So. 3d at 1212 (opinion of the Court). Two Chief Justices of the Alabama Supreme Court have argued the same in special writings on multiple occasions. *Id.* at 1244 (Parker, J., concurring specially); *Hamilton v. Scott*, 278 So. 3d 1180, 1190 (Ala. 2018) (*Hamilton II*) (Parker, J., concurring specially); *Stinnett v. Kennedy*, 232 So. 3d 202, 223 (Ala. 2016) (Parker, J., concurring specially); *Ex parte Hicks*, 153 So. 3d 53, 71-72 (Ala. 2014) (Moore, C.J., concurring). This issue has also been debated in conservative academic circles. *See generally* Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harv. J. L. & Pub. Pol'y 539, 554-55 (2017); Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 Ohio St. L.J. 13 (2013); Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 4 Geo. J. L. & Pub. Pol'y 360 (2007).

Blackstone said, "Natural persons are such as the God of nature formed us." 1 Blackstone, *Commentaries* *123. "The principle of Blackstone's rule was that 'where life can be shown to exist, legal personhood exists.'" Craddock, *supra*, at 554-55.[12] Given that the dominant view at the Fourteenth Amendment's passage was that life begins at conception, there is a strong case that the Fourteenth Amendment applies to unborn children.[13]

Moreover, the Framers of the Fourteenth Amendment "attempted to create a legal bridge between their understanding of the Declaration of Independence, with its grand declarations of equality and rights endowed by a Creator God, and constitutional jurisprudence." David Smolin, *Equal Protection*, in *The Heritage Guide to the Constitution*

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

[13] *Roe* rejected this argument by reasoning that the word "person" as used elsewhere in the Constitution did not appear to apply to the unborn. *Roe*, 410 U.S. at 157-58. However, the better practice would have been to examine what the word "person" meant at the time of the Fourteenth Amendment's ratification. *See District of Columbia v. Heller*, 554 U.S. 570, 574-605 (2008) (engaging in a remarkably disciplined exposition of what the words in one particular amendment meant); *Gibbons v. Ogden*, 22 U.S. 1, 188-89 (1824) (holding that the Constitution's provisions must be interpreted by their words and by how their framers and readers understood them).

400 (2005). Thaddeus Stevens, the most powerful man in Congress and the author of the first version of the Fourteenth Amendment, said the following when he introduced it: "Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more proprietous time. That time ought to be present now." 2 *The Reconstruction Amendments* 158 (Kurt T. Lash, ed., 2021). John Bingham, who introduced the version of the Fourteenth Amendment that ultimately passed, said, "I am for the proposed amendment from a sense of right—that absolute, eternal verity which underlies your Constitution. So it was proclaimed in your imperishable Declaration by the words, all men are created equal; that they are endowed by their Creator with the rights of life and liberty…." *Id.* at 59.

Thus, if all people are endowed with their Creator with the unalienable gift of life, and if unborn children are people, then the States may not deny equal protection of the laws to them.[14]

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[14] Justice Ginsburg argued that the Equal Protection Clause cuts the other way, guaranteeing a woman's right to abort her pregnancy so that she could have the same liberties as men. *See Gonzalez v. Carhart*, 550 U.S. 124, 171-72 (2007) (Ginsburg, J., dissenting). But with respect, Justice Ginsburg's arguments suffered from two flaws. First, as argued above, it discounts the fact that Americans viewed unborn children as people when they ratified the Fourteenth Amendment. As *Roe* itself conceded, establishing the suggestion of personhood would make the case for abortion collapse. *Roe*, 410 U.S. at 156-57. Second, her argument presumes that to be equal with men, women would have to give up something that makes them uniquely feminine: the ability to get pregnant. Consequently, Justice Ginsburg's argument does not actually make women equal with

Therefore, this Court should not only overrule *Roe* and its progeny but also hold that the Fourteenth Amendment protects unborn children from abortion. If this is too far for the Court to go in the present case, then it should at the very least refrain from foreclosing that question from being presented in the future.

CONCLUSION

As the writings of Chief Justice Parker of the Alabama Supreme Court demonstrate in detail, the viability standard remains an outlier among the vast majority of laws that address the same subject, which generally protect the lives and rights of the unborn regardless of whether they are viable or not. Taking the viability precedent to its logical conclusion creates the absolutely horrifying result that one person has the right to kill another who is dependent on him or her. In such a case, the right to life would never be secured for minor children, handicapped relatives, aging parents, or possibly for anyone who is in some way dependent on another for survival. Since the viability standard does not comport with the other laws governing unborn children or even with the law of logic because of the horrifying result that it creates, it should be discarded.

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men, but rather seeks to make them men by depriving them of a unique female characteristic, which is not pro-woman at all. *See* Erica Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 Harv. J. L. & Pub. Pol. 889 (2011).

But the Court should not stop there. Because this Court's duty is to uphold the Constitution and apply it as written instead of creating law, which is reserved for the legislature alone, it should look to the Constitution itself to determine what should replace the viability standard. Because neither the text nor history of the Constitution protects the right to abortion, the Court should discard it altogether.[15] It should further recognize that the Fourteenth Amendment protects the lives of the unborn. But if the Court is unwilling to go that far in the present case, then it should at the very least not foreclose that issue from consideration in the future. But regardless of whether it recognizes the personhood of the unborn now, *Amicus Curiae* respectfully urges the Court to do what the Constitution requires in the present case: overrule *Roe* once and for all.

Respectfully submitted,

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[15] *Amicus Curiae* simply asks the same thing that Chief Justice Roberts once urged the Court to do as Deputy Solicitor General when the question presented was also narrow. Brief for Respondent, *Rust v. Sullivan*, 500 U.S. 173 (1991), available at https://www.justice.gov/sites/default/files/osg/briefs/1990/01/01/sg900805.txt (last visited July 21, 2021).