Case No. 19-1392

IN THE
Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,
Respondents.

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

Brief *Amicus Curiae* of the Thomas More Society in Support of Petitioners

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INTEREST OF *AMICUS CURIAE*[*]

Amicus Curiae, the Thomas More Society is a not-for-profit, national public interest law firm, based in Chicago, Illinois, dedicated to restoring respect in law for human life, including unborn children, family integrity and religious liberty. The Thomas More Society advocates and fosters support for these causes by providing *pro bono* legal services at every level—from local trial courts to this Court. Consistent with its mission, the Thomas More Society submits this brief in support of petitioners.

SUMMARY OF ARGUMENT

This case presents the Court with a unique opportunity to correct a judicial error of historic proportions, an error that has resulted in the deaths of more than 60 million unborn children. *Roe v. Wade*, 410 U.S. 113 (1973), should and must be overruled.

1. Under the traditional methodology this Court has followed, an asserted liberty interest will not be regarded as "fundamental" for purposes of substantive due process analysis under the Due Process Clause unless, at a minimum, that interest, carefully described, is "deeply rooted" in "the Nation's history, legal traditions, and practices."

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[*] Letters of consent have been filed with the Court. None of the counsel for the parties authored this brief in whole or in part, and no one other than the *amicus* or its counsel has contributed money or services to the preparation or submission of this brief.

Washington v. Glucksberg, 521 U.S. 702, 721 (1997). A purported right to abortion fails that test.

At English common law, and in the American colonies, abortion after quickening was regarded as a serious crime. When States began to replace common law crimes with statutory crimes in the nineteenth century, the quickening distinction was rapidly abolished and abortion became criminal without regard to the stage of pregnancy. By the time the Fourteenth Amendment was adopted in 1868, thirty of the then thirty-seven States had enacted statutes prohibiting abortion, all but three prohibiting abortion throughout pregnancy. In scores of cases decided from the 1850s to the early 1970s, state courts recognized that these statutes were enacted with an intent to protect unborn human life.

2. The judicial policy of *stare decisis* does not preclude reconsideration of *Roe*. First, in affirming the viability rule of *Roe*, the Joint Opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), abandoned key aspects of *Roe* and overruled, in part, two decisions applying *Roe*. Second, the explanation of the viability rule in *Roe* was abbreviated and conclusory. Third, the viability rule has not proved to be workable. Fourth, the concept of viability has been increasingly rejected as a relevant consideration in other areas of law. Finally, there is no justifiable reliance interest in adhering to the viability rule.

3. Considerations of institutional integrity do not support retention of the viability rule. In deciding whether a woman has a right to obtain an abortion, regardless of reason, it was essential, in light of the consequences for unborn human life, that "the justification claimed [for that right] be beyond dispute." *Casey*, 505 U.S. at 865. For the reasons set forth herein, that justification does not exist. Accordingly, *Roe v. Wade* should be overruled.

ARGUMENT

I.

UNDER THE DUE PROCESS CLAUSE, ONLY INTERESTS THAT ARE "DEEPLY ROOTED" IN "THE NATION'S HISTORY, LEGAL TRADITIONS, AND PRACTICES" ARE "FUNDAMENTAL" AND THUS ENTITLED TO SPECIAL PROTECTION.

In determining whether an asserted liberty interest (or right) should be regarded as fundamental for purposes of substantive due process analysis under the Due Process Clause of the Fourteenth Amendment, this Court has applied a two-prong test. First, there must be a "careful description" of the asserted fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks and citation omitted). Second, the interest, so described, must be "deeply rooted" in "the Nation's history, legal traditions, and practices." *Id.*

In *Glucksberg,* the Court characterized the asserted liberty interest as "a right to commit suicide which itself includes a right to assistance in doing so." *Id.* at 722-23. In *Roe*, the Court described the right being asserted, not in general terms of "personal autonomy" or "bodily integrity,"[1] or even

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[1] To characterize some or all of the cases on which the Court relied in reaffirming *Roe* as standing for an abstract right to "personal autonomy," *Casey*, 505 U.S. at 847-49 (citing

more specifically as "reproductive freedom,"[2] but as the right of a woman "to choose to terminate her pregnancy." 410 U.S. at 129. As this brief demonstrates, however, nothing in our history, legal traditions or practices supports recognition of such a right. Accordingly, restrictions on abortion should be evaluated under the rational basis standard of review.

II.

THE COMMON LAW OF ENGLAND, AS RECEIVED BY THE AMERICAN COLONIES AND STATES, PROHIBITED ABORTION AFTER QUICKENING AS A CRIMINAL OFFENSE.

An understanding of the development of the common law crime of abortion in England is essential to any analysis of the status of abortion in American law prior to the gradual replacement of common law crimes by statutory crimes in the

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cases), simply creates an artificial common denominator among a very disparate and largely unrelated group of cases while at the same time denying what makes abortion unique. The Court has decided a number of cases that, taken together, recognize an interest in "bodily integrity," but it is not at all obvious how a law *forbidding* abortion (as opposed to one *mandating* abortion) contravenes that interest.

[2] In *Casey*, the Court analogized *Roe* to its contraception cases. 505 U.S. at 852-53, 857, but the analogy fails because, as the Court admitted, "[a]bortion is a unique act." *Id.* at 852. It is unique because abortion "involves the purposeful termination of potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).

nineteenth century. Although a comprehensive review of this history is beyond the scope of this brief,[3] the following is offered as a summary.

The thirteenth century commentators Bracton and Fleta classified abortion of a "formed" or "quickened" fetus as homicide.[4] The seventeenth century jurist, Sir Edward Coke, declared that while not "murder," abortion of a woman "quick with childe" was a "great misprision." E. Coke, Third Institute of the Laws of England 50 (1644) (a "misprision" was a "heinous offence under the degree of felony," *id.* at 139). If, however, "the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive." *Id.*[5] In his famous Commentaries, William Blackstone closely followed Coke:

> [T]he person killed must be "*a reasonable creature in being and under the king's peace*,"

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[3] *See generally* Joseph W. Dellapenna, Dispelling the Myths of Abortion History (Carolina Academic Press 2006).

[4] 2 H. de Bracton (c. 1250), On the Laws and Customs of England 341 (S. Thorne ed. 1968); Fleta (c. 1290), Bk. I, ch. XXIII, *Of Homicide*, Publications of the Selden Society, Vol. 72, pp. 60-61 (1955).

[5] Other leading authorities accepted Coke's declaration regarding the criminality of abortion at common law. *See* M. Hale, Summary of the Pleas of the Crown 53 (1678); 1 Wm. Hawkins, A Treatise of the Pleas of the Crown 80 (1716); 1 E. East, A Treatise on the Pleas of the Crown 227-28, 230 (1803); 1 Wm. Russell, A Treatise on Crimes and Misdemeanors 617-18, 796 (1819).

> at the time of the killing . . . . To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them.

4 W. Blackstone, Commentaries on the Laws Of England 198 (1769). Blackstone held that the killing of a child in the womb was "a very heinous misdemeanor." 1 W. Blackstone, Commentaries at 126 (1765).

"Quickening," the stage of pregnancy when the woman first begins to detect fetal movement (sixteen to eighteen weeks), was used in the common law as an evidentiary test to determine whether the abortion had been performed upon a live human being, and whether the abortion had caused the child's death. Robert Byrn, *An American Tragedy, The Supreme Court On Abortion*, 44 Fordham L. Rev. 807, 815-16 (1973). The test "was never intended as a judgment that before quickening the child was not a live human being." *Id.* at 816.

The views of Coke and Blackstone were accepted by American courts interpreting the common law. *See, e.g., Abrams v. Foshee*, 3 Iowa 273, 278-80 (1856); *Smith v. State*, 33 Me. 48, 55 (1851); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845); *State v. Cooper*, 22 N.J. L. 52, 53-58 (1849). In conformity with those views, these courts uniformly recognized abortion after

quickening as a common law crime.[6] And three States held that abortion was a common law crime at any stage of pregnancy. *State v. Reed*, 45 Ark. 333, 334 (1885); *State v. Slagle*, 82 N.C. 630, 632 (1880); *Mills v. Commonwealth*, 13 Pa. 630, 632-33 (1850).[7] These decisions lay to rest the doubt expressed in *Roe* that "abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." 410 U.S. at 136. No American court ever held that abortion after quickening was not a common law crime.

III.

THE NINETEENTH CENTURY ABORTION STATUTES, WHICH ABOLISHED THE COMMON LAW QUICKENING DISTINCTION AND PROHIBITED ABORTION THROUGHOUT PREGNANCY, WERE INTENDED TO PROTECT UNBORN HUMAN LIFE.

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[6] *See also Smith v. Gaffard*, 31 Ala. 45, 51 (1857) (*dictum*); *Eggart v. State*, 25 So. 144, 145 (Fla. 1898) (*dictum* in case decided under statute abolishing quickening distinction); *State v. Emerich*, 13 Mo. App. 492, 495 (1883) (same), *aff'd*, 87 Mo. 110 (1885); *Mitchell v. Commonwealth*, 78 Ky. 204, 205-10 (1879) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Evans v. People*, 49 N.Y. 86, 88 (1872) (*dictum* in case reversing conviction under manslaughter statute); *Arnold v. Gaylord*, 18 A. 177, 178-79 (R.I. 1889) (*dictum*).

[7] Leading nineteenth-century commentators were in accord. *See* Bishop on Statutory Crimes § 744, at 447 (2d ed. 1883); F. Wharton, A Treatise on the Criminal Law of the United States §§ 1220-30, at 210-18 (6th rev. ed. 1868).

The Court's assertions in *Roe* that "the pre-existing common law" of abortion remained in effect in this country "in all but a few States until [the] mid-19th century," and that "[i]t was not until after the War Between the States that legislation began generally to replace the common law," 410 U.S. at 138-39, are simply wrong. By the end of 1849, eighteen of the thirty States had enacted statutes prohibiting abortion,[8] and by the end

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[8] *Alabama*: Ala. Penal Code ch. VI, § 2, at 238 (Meek Supp. 1841), *as amended*, Ala. Code § 3605, at 690 (1866-67); *Arkansas*: Ark Rev. Stat. ch. 44, div. III, art. II, § 6, at 240 (1837); *Connecticut*: Conn. Pub. Stat. tit. 22, § 14, at 152 (1821), *replaced by* Conn. Pub. Acts, ch. LXXI, §§ 1-4, at 65-66 (1860), *codified at* Conn. Gen. Stat. tit. XII, ch. II, §§ 22-25, at 248-49 (1866), which made abortion at any stage of pregnancy a crime; *Illinois*, Act of Jan. 30, 1827, § 46, Ill. Rev. Laws, at 131 (1826-27), *repealed and replaced by* an Act of Feb. 26, 1833, § 46, Ill. Rev. Laws, at 179 (1833), *superseded by* Act of Feb. 28, 1867, §§ 1-3, Ill. Pub. Laws, at 89 (1867); *Indiana*: Act of Feb. 7, 1835, ch. XLVII, § 3, Ind. Gen. Laws, at 66 (1835), *codified at* Ind. Rev. Stat. ch. XXVI, at 224 (1838), *superseded by* Ind. Gen. Laws ch. LXXXI, § 2, at 130-31 (1859); *Iowa* (admitted to statehood Dec. 28, 1846): Act of Jan. 25, 1839, § 18, Iowa (Terr.) Stat., at 145 (1838), *superseded by* an Act of Mar. 15, 1858, Iowa Laws, ch. 58, § 1, at 93 (1858), *codified at* Iowa Rev. Laws pt. 4, tit. XXIII, ch. 165, art. 2, § 4221, at 723-24 (1860), which made abortion at any stage of pregnancy a crime; *Maine*: Me. Rev. Stat. ch. 160, §§ 13-14, at 686 (1840), *recodified, as amended, at* Me. Rev. Stat. tit. 11, ch. 124, § 8, at 685 (1857); *Massachusetts*: Mass. Acts & Resolves, ch. 27, at 406 (1845), *subsequently codified, as amended, at* Mass. Gen. Stat. ch. 165, § 9, at 818 (1860); *Michigan*: Mich. Rev. Stat. ch. 153, §§ 33-34, at 662 (1846); *Mississippi*: Act of Feb. 15, 1839, tit. III, art. 1, § 9, Miss. Laws, at 113 (1839), *codified at* Miss. Code ch. LXIV, tit. III, § 9, at 958 (1848), *recodified at* Miss. Rev. Code ch. LXIV, art. 173, at 601 (1857); *Missouri*: Act of Jan. 14, 1825, ch. I, § 12, *codified at* Mo. Rev. Stat. art. II, §§ 10, 36, at 168-69,

of the Civil War, twenty-seven of the thirty-six States had done so.[9] By the end of 1868, the year in

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172 (1835), *recodified, as amended, at* Mo. Gen. Stat. pt IV, tit. XLV, ch. 200, §§ 10, 34, at 778-79, 781 (1866); *New Hampshire*: Act of Jan. 4, 1849, N.H. Laws ch. 743, §§ 1-4, at 708-09 (1848), *codified at* N.H. Comp. Stat. tit. XXVI, ch. 227, §§ 11-14, at 544-45 (1853); *New Jersey*: Act of Mar. 1, 1849, N.J. Laws, at 266-67 (1849-1850); *New York*: N.Y. Rev. Stat. pt. IV, ch. I, tit. II, art. I, § 9, at 661, and tit. VI, § 21, at 694 (1828-29), *as amended by* an Act of Apr. 30, 1830, ch. 320, § 58, N.Y. Laws, at 401 (1830), *codified at* 2 N.Y. Rev. Stat. pt. IV, ch. I, tit. II, art. I, § 9, at 550-51, and pt. IV, ch. I, tit. VI, § 21, at 578-79 (1828-35), *repealed and replaced by* N.Y. Laws, ch. 260, §§ 1-3, 6, at 285-86 (1845), *codified at* 2 N.Y. Rev. Stat. pt. IV, ch. I, tit. VI, §§ 20-21, at 779 (1846), and N.Y. Laws, ch. 22, § 1, at 19 (1846), *codified at* 2 N.Y. Rev. Stat. pt. IV, ch. I, tit. II, art. I, § 9, at 750 (1846); *Ohio*: Act of Feb. 27, 1834, §§ 1, 2, Ohio Laws, at 20-21 (1834), *codified at* Ohio Gen. Stat. ch. 35, §§ 111, 112, at 252 (1841), *as amended by* an Act of Apr. 13, 1867, Ohio Laws, at 135-36 (1867); *Vermont*: Vt. Acts, No. 33, § 1, at 34-35 (1846), *codified at* Vt. Comp. Stat. tit. XXVIII, ch. 108, § 8, at 560-61 (1839-50), *as amended by* an Act of Nov. 21, 1867, Vt. Acts, No. 57, §§ 1-3, at 64-66 (1867); *Virginia*, Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, at 96 (1847-48), *codified, as modified*, at Va. Code, tit. 54, ch. CXCI, § 8, at 724 (1849), *recodified*, Va. Code tit. 54, ch. CXCI, § 8, at 784 (1860); *Wisconsin*: Wis. Rev. Stat. pt. IV, tit. XXX, ch. 133, § 11, at 683-84 (1849), *superseded by* Wis. Rev. Stat. pt. IV, tit. XXVII, ch. CLXIV, § 11, at 930, and ch. CLXIX, §§ 58, 59, at 969 (1858).

[9] In addition to the eighteen States listed in n. 8, nine other States adopted abortion statutes between 1850 and 1865. *California* (admitted to statehood Sep. 9, 1850): Cal. Sess. Laws, ch. 99, § 45, at 233 (1849-1850), *as amended by* an Act of May, 20, 1861, Cal. Stat. ch. DXXI, at 588 (1861); *Kansas* (admitted to statehood Jan. 29, 1861): Kan. (Terr.) Stat. ch. 48, §§ 10, 39, at 238, 243-44 (1855), *superseded by* An Act of Feb. 3, 1859, ch. XXVIII, §§ 10, 37, Kan. (Terr.) Laws, at 232, 237,

which the Fourteenth Amendment was ratified, thirty of the then thirty-seven States had enacted such statutes,[10] including twenty-five of the thirty ratifying States, together with six of the ten federal

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codified at Kan. Comp. Laws ch. XXXIII, §§ 10, 37, at 288, 293 (1862); *Louisiana*: Act of March 14, 1855, § 24, La. Acts, No. 120, at 32-33 (1855), *codified at* La. Rev. Stat., p. 138 (Crimes & Offences, § 24) (1856); *Minnesota* (admitted to statehood May 11, 1858): Minn. (Terr.) Rev. Stat. ch 100, § 11, at 493 (1851); *Nevada* (admitted to statehood Oct. 31, 1864): Nev. (Terr.) Laws, ch. XXVIII, div. IV, § 42, at 63 (1861); *Oregon* (admitted to statehood Feb. 14, 1859): Act of Dec. 22, 1853, ch. III, § 13, Or. (Terr.) Stat. at 187 (1853-54), *superseded by* an Act of Oct. 19, 1864, ch. XLIII, § 509, Or. Organic & Other Gen. Laws, at 528 (1845-1864); *Pennsylvania*: Pa. Laws, No. 374, tit. VI, §§ 87, 88, at 404-05 (1860); *Texas*: Act of Feb. 9, 1854, § 1, Tex. Gen. Laws ch. XLIX,, § 1, at 58 (1854), *superseded by* an Act of Aug. 28, 1856, *codified at* Tex. Penal Code of 1857, arts. 531-536, at 103-04, *as amended by* an Act of Feb. 12, 1858, Tex. Gen. Laws, ch. 121, at 172 (1858), *codified at* Digest of the Laws of Texas, ch. VII, arts. 531-536, at 524 (Oldham & White's 1859); *West Virginia* (admitted to statehood June 20, 1863): *see* Virginia statutes cited in n. 8, *supra*, and W. Va. Const. art. XI, § 8 (1863) (adopting Virginia laws).

[10] In addition to the twenty-seven States listed in nn. 8 and 9, three other States adopted abortion statutes between 1865 and 1868. *Florida*: Act of Aug. 6, 1868, ch. III, § 11, ch. VIII, § 9, Fla. Acts, ch. 1,637 [No. 13] at 64, 97 (1868); *Maryland*: Act of Mar. 20, 1867, Md. Laws, ch. 185, § 11, at 342-43 (1867), *repealed and re-enacted by* an Act of Mar. 28, 1868, Md. Laws, ch. 179, § 2, at 315 (1868), *codified at* Md. Code art. XXX, § 1, at 105-06 (Mayer's Supp. 1868); *Nebraska* (admitted to statehood Mar. 1, 1867): Act of Feb. 12, 1866, Neb. (Terr.) Stat. pt. III, ch. IV, § 42, at 598-99 (1866-67).

territories.[11]

The widespread adoption of these laws prior to the ratification of the Fourteenth Amendment in 1868 under-mines the Court's conclusion in *Roe* that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . encompass[es] a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153.

The Court dismissed the importance of this legislation, concluding that the nineteenth century statutory prohibitions of abortion were enacted not to protect prenatal life but to guard maternal health against the dangers of what were then regarded as unsafe surgical operations. *Id.* at 151-52. Three reasons were offered in support of this conclusion, none of which withstands scrutiny.

First, the Court stated that "[t]he few state courts called upon to interpret their laws in the late nineteenth and early twentieth centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and

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[11] *Arizona*: Ariz. (Terr.) Code, ch. X, div. 5, § 45, at 54 (1865); *Colorado*: Act of Nov. 5, 1861, § 42, Colo. (Terr.) Laws, at 296-97 (1861); Colo. (Terr.) Rev. Stat. ch. XXII, § 42, at 202 (1868); *Idaho*: Act of Feb. 4, 1864, ch. IV, § 42, Idaho (Terr.) Laws, at 443 (1863-64), *repealed and re-enacted by* an Act of Dec. 21, 1864, ch. III, pt. IV, § 42, Idaho (Terr.) Laws, at 305 (1864); *Montana*: Mont. (Terr.) Laws, Criminal Practice Acts, ch. IV, § 41, at 184 (1864); *New Mexico*: N.M. (Terr.) Laws, No 28, ch. 3, § 11, at 88 (1854), *codified at* N.M. Rev. Stat. art. XXIII, ch. LI, § 11, at 320 (1865); *Washington*: Act of Apr. 28, 1854, §§ 37, 38, Wash. (Terr.) Stat., at 81 (1854).

fetus." 410 U.S. at 151 & n. 48 (citing *State v. Murphy*, 27 N.J.L. 112 (1858)). The Court not only misapprehended the holding in the single case cited for this proposition,[12] but also overlooked thirty-two decisions from eighteen jurisdictions expressly affirming that their nineteenth century statutes were intended to protect unborn human life,[13] and

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[12] The Court's reading of *Murphy* appears to be at odds with the New Jersey Supreme Court's own understanding of its earlier opinion. *See State v. Siciliano*, 121 A.2d 490, 495 (N.J. 1956), and *Gleitman v. Cosgrove*, 227 A.2d 689, 699 (N.J. 1967) (Francis, J., concurring).

[13] *Trent v. State*, 73 So. 834, 836 (Ala. App. 1916); *Hall v. People*, 201 P.2d 382, 383 (Colo. 1948) ("offense described by the statute . . . is the criminal act of destroying the foetus at any time before birth"); *Dougherty v. People*, 1 Colo. 514, 522-23 (1872); *Gaines v. Wolcott*, 167 S.E.2d 366, 369 (Ga. Ct. App. 1969), *aff'd*, 169 S.E.2d 165 (Ga. 1969); *Passley v. State*, 21 S.E.2d 230, 232 (Ga. 1942); *Nash v. Meyer*, 31 P.2d 273, 280 (Idaho 1934); *State v. Alcorn*, 64 P. 1014, 1019 (Idaho 1901); *Joy v. Brown*, 252 P.2d 889, 892 (Kan. 1953); *State v. Miller*, 133 P. 878, 879 (Kan. 1913) (statute "carries the facial evidence of a legislative intent to cover the extent of the criminal machinations and devices of the abortionist in order to protect the pregnant woman and the unborn child"); *State v. Watson*, 1 P. 770, 771-72 (Kan. 1883); *Rosen v. Louisiana Board of Medical Examiners*, 318 F. Supp. 1217, 1222-32 (E.D. La. 1970) (three-judge court) (interpreting Louisiana law), *vacated and remanded*, 412 U.S. 902 (1973); *State v. Rudman*, 136 A. 817, 819 (Me. 1927) (abortion law intended "to be an express and absolute prohibition" of "the destruction of unborn life for reasons . . . other than necessity to save the mother's life"); *Smith v. State*, 33 Me. 48, 57-59 (1851); *State v. Siciliano*, 121 A.2d 490, 495 (N.J. 1956); *State v. Gedicke*, 43 N.J.L. 86, 89-90, 96 (1881); *Endresz v. Friedberg*, 248 N.E.2d 901, 904 (N.Y. 1969); *State v. Hoover*, 113 S.E.2d 281, 283 (N.C. 1960); *State v. Jordon*, 42 S.E.2d 674, 675 (N.C. 1947); *State v. Powell*, 106

twenty-five other decisions from eighteen additional jurisdictions strongly implying the same,[14] all

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S.E. 133 (N.C. 1921); *Williams v. Marion Rapid Transit*, 87 N.E.2d 334, 336 (Ohio 1949); *State v. Tippie*, 105 N.E. 75, 77 (Ohio 1913) ("The reason and policy of the statute is to protect women and unborn babes from dangerous criminal practice . . ."); *Bowlan v. Lunsford*, 54 P.2d 666, 668 (Okla. 1936); *State v. Elliott*, 383 P.2d 382, 385 (Or. 1963) ("The gist . . . of the offense is . . . the acts done intentionally to cause the death of the unborn child"); *Mallison v. Pomeroy*, 291 P.2d 225, 228 (Or. 1955) ("In Oregon we have recognized by statute the separate entity of an unborn child by protecting him . . . against criminal conduct"); *State v. Ausplund*, 167 P. 1019, 1022-23 (Or. 1917); *State v. Steadman*, 51 S.E.2d 91, 93 (S.C. 1948) (statute prohibiting pre-quickening abortion was intended to change the common law rule and prevent "the destruction of a child before it has quickened"); *State v. Howard*, 32 Vt. 380, 399-401 (1859); *Anderson v. Commonwealth*, 58 S.E.2d 72, 75 (Va. 1950); *Miller v. Bennett*, 56 S.E.2d 217, 221 (Va. 1949); *State v. Cox*, 84 P.2d 357, 361 (Wash. 1938); *Puhl v. Milwaukee Automobile Ins. Co.*, 99 N.W.2d 163, 170 (Wis. 1959); *State v. Dickinson*, 41 Wis. 299, 309 (1877); *but see Foster v. State*, 196 N.W. 233, 235 (Wis. 1923) (contra regarding pre-quickening abortion but acknowledging that "[i]n a strictly scientific and physiological sense there is life in an embryo from the time of conception").

[14] *McClure v. State*, 215 S.W.2d 524, 530 (Ark. 1949); *Scott v. State*, 117 A.2d 831, 835-36 (Del. 1955); *State v. Magnell*, 51 A. 606 (Del. 1901); *Urga v. State*, 20 So.2d 685, 687 (Fla. 1944) (approving jury instruction that "the statute was intended to prohibit" anyone from intending "to terminate the creation by nature of a child"); *Weightnovel v. State*, 35 So. 856, 858-59 (Fla. 1903); *Territory v. Young*, 37 Haw. 150, 159-60 (1945); *Amann v Faidy*, 114 N.E.2d 412, 416 (Ill. 1953) ("the law recognizes the separate existence of an unborn child . . . to protect him against criminal conduct"); *Earll v. People*, 99 Ill. 123, 132 (1881) (abortion "a grave crime, involving the destruction of an unborn child"); *State v. Moore*, 25 Iowa 128, 131-32, 135-36 (1868); *Worthington v. State*, 48 A. 355, 356-57

decided before 1970. In every decade since the 1850's, there has been at least one American state court decision recognizing this purpose.

In 1851, the Maine Supreme Court explained that under its 1840 abortion statute, which abolished the common law quickening distinction, "the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not." *Smith v. State*, 33 Me. 48, 57 (1851). In 1859, the Vermont Supreme Court held that "the preservation of the life of the child" was one of the "important considerations" underlying the State's

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(Md. 1901); *Lamb v. State*, 10 A. 208 (Md. 1887); *Keyes v. Construction Service, Inc.*, 165 N.E.2d 912, 914 (Mass. 1960) ("the law protects an unborn child . . . in the enforcement of criminal law"); *La Blue v. Specker*, 100 N.W.2d 445, 450 (Mich. 1960) ("Courts in the field of criminal law have long recognized a child's legal existence while *en ventre sa mere*"); *People v. Sessions*, 26 N.W. 291, 293 (Mich. 1886); *People v. Olmstead*, 30 Mich. 431, 432-33 (1874); *Verkennes v. Corniea*, 38 N.W.2d 838, 840 (Minn. 1949) (noting, in wrongful death case, that "the law recognizes the separate existence of the unborn child sufficiently to punish the crime [of abortion]") (internal quotation marks and citation omitted); *Rainey v. Horn*, 72 So.2d 434, 439 (Miss. 1954) ("the law . . . protects [an unborn child] against the crimes of others"); *Smith v. State*, 73 So. 793, 794 (Miss. 1916); *Hans v. State*, 22 N.W.2d 385, 389 (Neb. 1946); *Bennett v. Hymers*, 147 A.2d 108, 109-110 (N.H. 1958); *but see State v. Millette*, 299 A.2d 150, 154 (N.H. 1972) ("[e]arly proscription of the practice of abortion primarily sought to protect pregnant women from risks present in all surgical procedures at that time"); *State v. Bassett*, 194 P. 867, 868 (N.M. 1921); *Railing v. Commonwealth*, 1 A. 314, 315 (Pa. 1885); *Sylvia v. Gobeille*, 220 A.2d 222, 223 (R.I. 1966); *State v. Crook*, 51 P. 1091, 1093 (Utah 1898); *State v. Lilly*, 35 S.E. 837, 838 (W.Va. 1900).

1846 abortion statute. *State v. Howard*, 32 Vt. 380, 399 (1859).

In 1868, the Iowa Supreme Court, interpreting an 1858 statute, condemned abortion as "an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child." *State v. Moore*, 25 Iowa 128, 136 (1868). In 1872, the Colorado Territorial Supreme Court held that its 1868 abortion statute was "intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other." *Dougherty v. People*, 1 Colo. 514, 522 (1872).

In 1881, the New Jersey Supreme Court declared that its original 1849 abortion statute had been amended in 1872 "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die." *State v. Gedicke*, 43 N.J.L. 86, 90 (1881). In 1898, the Utah Supreme Court characterized abortion under its 1876 statute as "the criminal act of destroying the foetus at any time before birth." *State v. Crook*, 51 P. 1091, 1093 (Utah 1898).

In 1901, the Maryland Court of Appeals explained that American abortion statutes had been strengthened and the penalties for their violation increased precisely because the procedures for inducing abortions had become safer. *Worthington v. State*, 48 A. 355, 356-57 (Md. 1901). The court characterized abortion as an "abhorrent crime,"

which "can only be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child." *Id.* at 357.

In 1916, the Alabama Court of Appeals held that the "manifest purpose" of its abortion statute, first adopted in 1841, was "to restrain after conception an unwarranted interference with the course of nature in the propagation and reproduction of human kind . . . ." *Trent v. State*, 73 So. 834, 836 (Ala. Civ. App. 1916).

In 1921, the New Mexico Supreme Court described the offense of abortion under its statute, first enacted as a territorial law in 1854 and later codified in 1915, as "the *murder* of a quick child, still in its mother's womb, accomplished by means of the use of drugs or instruments upon the mother." *State v. Bassett*, 194 P. 867, 868 (N.M. 1921) (emphasis supplied).

In 1934, the Idaho Supreme Court determined that the state abortion statute, first adopted in 1864, was designed "not for the protection of the woman, but to discourage abortions because thereby the life of a human being, the unborn child, is taken." *Nash v. Meyer*, 31 P.2d 273, 280 (Idaho 1934). In 1936, the Oklahoma Supreme Court expressly held that "the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and . . . society." *Bowlan v. Lunsford*, 54 P.2d 666, 668 (Okla. 1936).

In 1942, the Georgia Supreme Court declared that in enacting its abortion statute in 1876, "the legislature was undertaking to provide by penal law appropriate penalties for the destruction of an unborn child." *Passley v. State*, 21 S.E.2d 230, 232 (Ga. 1942). In 1949, the Virginia Supreme Court of Appeals stated that its abortion statute, first enacted in 1848, "was passed, not for the protection of the woman, but for the protection of the unborn child and through it society." *Miller v. Bennett*, 56 S.E.2d 217, 221 (Va. 1949).

In 1953, the Kansas Supreme Court held that the next of kin of a woman who had died as a result of a negligently performed abortion could sue the abortionist for damages. *Joy v. Brown*, 252 P.2d 889 (Kan. 1953). Rejecting the defendant's argument that the decedent's consent to an illegal act barred recovery, the court said, "We are of the opinion that no person may lawfully and validly consent to any act the very purpose of which is to destroy human life." *Id.* at 892. In 1959, the Wisconsin Supreme Court, in recognizing a cause of action for prenatal injuries, said that the "public policy" for prohibiting abortion "is based on the belief that it is wrong to deprive a living fetus of its right to be born." *Puhl v. Milwaukee Auto Ins. Co.*, 99 N.W.2d 163, 170 (Wis. 1959).

In 1960, the North Carolina Supreme Court declared that its abortion statute, which had remained essentially unchanged since it was first enacted in 1881, was "designed to protect the life of a child *in ventre sa mere*." *State v. Hoover*, 113 S.E.2d

281, 283 (N.C. 1960). And in 1969, the Georgia Court of Appeals held that "the protection of the unborn child and society are valid purposes of the statute," along with "the protection of the woman." *Gaines v. Wolcott*, 167 S.E.2d 366, 369 (Ga. Ct. App. 1969), *aff'd*, 169 S.E.2d 165 (Ga. 1969).

And in the fifteen months before *Roe* was decided, another six state courts upheld the constitutionality of their abortion statutes, expressly holding that their laws had been enacted with an intent to protect unborn children.[15]

In sum, more than sixty decisions from forty-two States have recognized that their nineteenth century abortion statutes were enacted with an intent to protect unborn human life. Given this wealth of case authority, the Court's conclusion in *Roe* that state court decisions "focus[ed] on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus," 410 U.S. at 151 & n. 48, is insupportable.

As a second reason offered in support of its

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[15] *Nelson v. Planned Parenthood Center of Tucson, Inc.*, 505 P.2d 580, 582 (Ariz. Ct. App. 1973), *modified on rehearing pursuant to Roe*; *Cheaney v. State*, 285 N.E.2d 265, 267-70 (Ind. 1972); *Sasaki v. Commonwealth*, 485 S.W.2d 897, 901-03 (Ky. 1972), *vacated and remanded*, 410 U.S. 951 (1973); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972); *State v. Munson*, 201 N.W.2d 123, 125-27 (S.D. 1972), *vacated and remanded*, 410 U.S. 950 (1973); *Thompson v. State*, 493 S.W.2d 913, 917-20 (Tex. Crim. App. 1971), *vacated and remanded*, 410 U.S. 950 (1973).

conclusion that the nineteenth century abortion statutes were intended solely to promote maternal health and not to protect prenatal life, the Court in *Roe* observed that "[i]n many States . . . by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another." 410 U.S. at 151. But the Court failed to note that at least nineteen States criminalized the woman's participation in her own abortion.[16]

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[16] *Arizona*: Ariz. Rev. (Terr.) Stat., p. 711 (Ariz. Penal Code § 455) (1887), *repealed and re-enacted*, Ariz. Rev. (Terr.). Stat., p. 1228 (Ariz. Penal Code § 244) (1901); *California*: Cal. Stat. ch. DXXI (1861); Cal. Penal Code § 275 (1874); *Connecticut*: Conn. Pub. Acts, ch. LXXI,, § 3, at 65-66 (1860), *codified at* Conn. Gen. Stat. tit. XII, ch. II, § 24, at 249 (1866); *Delaware*: Act of July 6, 1972, § 1, 58 Del. Laws Part II (1971), ch. 497, at 1611, *codified at* Del. Code Ann. tit. 11, § 652 (1974 rev.); *Idaho*: Idaho Rev. Stat. § 6795 (1887); *Indiana*: Act of April 14, 1881, § 23, Ind. Laws, at 177 (1881), *codified at* Ind. Rev. Stat. § 1924 (1881); *Minnesota*: Act of Mar. 10, 1873, Minn. Laws, ch. IX, § 3, at 118 (1873), *codified at* Minn. Stat. ch. XCIV, § 18 (Young's 1878), *recodified at* 2 Minn. Gen. Stat. § 6546 (1894); *Montana*: Mont. Penal Code § 481 (1895), *re-enacted and recodified at* Mont. Rev. Code § 94-402 (1947); *Nevada*: Act of Feb. 16, 1869, ch. XXII, § 1, Nev. Laws, at 64-65 (1869), *superseded by* an Act of Mar. 17, 1911, ch. 13, § 140, *codified at* 2 Nev. Rev. Laws § 6405 (1912), *recodified at* Nev. Rev. Stat. § 200.220 (1963); *New Hampshire*: Act of Jan. 4, 1849, N.H. Laws, ch. 743, § 4 (1848), *codified at* N.H. Comp. Stat. tit. XXVI, ch. 227, §§ 11-14 (1853); *New York*: N.Y. Laws, ch. 260, § 3 (1845), *codified at* N.Y. Rev. Stat. pt. IV, ch. I, tit. VI, § 21 (1846), *superseded by* N.Y. Laws, ch. 181, § 2, at 509-10 (1872), *codified at* 3 N.Y. Rev. Stat. pt. IV, ch. I, tit. II, art. I, § 10 (1875); *North Dakota*: Dak. Penal Code § 338 (1877), *recodified* at N.D. Rev. Codes § 7178 (1895); *Oklahoma*: Okla. Stat. § 2188 (ch. XXV, art. 29, § 2), at 459 (1890), *codified at* 1

Although no prosecutions were reported under these statutes, their enactment casts doubt on the conclusion that women possessed a legal "right" to choose abortion, or that safeguarding maternal health was the sole intention of the lawmakers.

Although the majority of States did not criminalize the woman's own conduct in obtaining an abortion, that was not because their protection was the sole purpose of these laws. Traditionally, abortion was viewed as an assault upon the woman because she "was not deemed able to assent to an unlawful act against herself . . . ." *State v. Farnam*, 161 P. 417, 419 (Or. 1916). The woman was seen as a second victim of the abortion. *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858); *Dunn v. People*, 29 N.Y. 523, 527 (1864). Moreover, conviction of the abortionist often depended upon the testimony of the woman who underwent the abortion. Absent a grant of immunity, however, her testimony could not be compelled if she were regarded as an accomplice in the offense. And in most States a criminal conviction cannot be based on the uncorroborated testimony of an accomplice. Thus for both principled and

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Okla. Rev. Laws § 2437 (1910); *South Carolina*: Act of Dec. 24, 1883, No. 354, § 3, S.C. Acts, at 548 (1883), *codified at* 2 S.C. Rev. Stat. at 309, Crim.. Stat., § 138 (1893); *South Dakota*: Dak. Penal Code § 338 (1877), *recodified at* 2 S.D. Ann. Stat. § 7798, at 1919 (1899); *Utah*: Utah Rev. Stat. § 4227 (1898), *recodified at* Utah Code Ann. § 76-2-2 (1953); *Washington*: Wash. Laws, ch. 249, § 197, at 948-49 (1909), *codified at* Rev. Code Wash. § 9.02.020 (1961); *Wisconsin*: Wis. Rev. Stat. pt. IV, tit. XXVII, ch. CLXIX, § 59, at 969 (1858); *Wyoming*: Wyo. Laws, ch. 73, § 32, at 131 (1890), *codified at* Wyo. Stat. § 6-78 (1957).

practical reasons, the woman who had an abortion was considered a victim of the offense.

Finally, the Court stated that "[m]ost of [the] initial statutes dealt severely with abortion but were lenient with it before quickening." 410 U.S. at 139. From this premise, the Court drew the conclusion that "adoption of the 'quickening' distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception." *Id.* at 151-52. The Court's premise, as well as its conclusion, was flawed.

As of late 1868, thirty of the then thirty seven States had enacted statutes restricting abortion. All but three of those States—Arkansas, Minnesota and Mississippi—prohibited abortion at *any* stage of pregnancy. Although seven of the twenty-seven States that prohibited abortion throughout pregnancy punished post-quickening abortions more severely than pre-quickening abortions, the other twenty States with such laws punished abortion equally, regardless of the stage of pregnancy.[17] Rather than the occurrence of quickening, "the crucial factor which determined the range of punishment applicable to an attempted abortion was whether the attempt caused the death of the child." James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St.Mary's L.J. 29, 36

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[17] The statutes are set forth in nn. 8-10, *supra*.

(1985). Twenty of the thirty-six States that had enacted abortion statutes by the end of 1883 provided for a higher range of punishment if it were proved that abortion caused the death of the unborn child.[18] As Witherspoon observed, "[i]f the state anti-

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[18] *Arkansas*: Ark. Rev. Stat. ch. 44, div. III, art.II, § 6, at 240 (1837); Act of Nov. 8, 1875, § 1, Ark. Acts, No. IV, at 5 (1875); *Florida*: Act of Aug. 6, 1868, ch. III, § 11, ch. VIII, § 9, Fla. Acts, ch. 1,637 [No. 13], at 64, 97 (1868); *Georgia*: Act of Feb. 25, 1876, ch. CXXX, §§ II, III, Ga. Laws, at 113 (1876), *codified at* Ga. Code § 4337(a)-(c), at 1143 (1882); *Indiana*: Ind. Rev. Stat. § 1923 (1881); *Maine*: Me. Rev. Stat. tit. 11, ch. 124, § 8, at 685 (1857); *Michigan*: Mich. Rev. Stat. ch. 153, §§ 33-34, at 662 (1846); *Minnesota*: Act of Mar. 10, 1873, Minn. Laws, ch. IX, §§ 1-3, at 117-18 (1873), *codified at* Minn. Stat. ch. XCIV, §§ 16-18, at 884-85 (Young's 1878); *Missouri*: Mo. Gen. Stat. pt IV, tit. XLV, ch. 200, §§ 10, 34, at 778-79, 781 (1866); *Nebraska*: Neb. Gen. Stat. ch. 58, §§, 6, 39, at 720, 727-28 (1873); *New Jersey*: Act of March 25, 1881, N.J. Laws ch. CXCL, at 240 (1881); *New York*: Act of July 26, 1881, N.Y. Laws ch. 676 (N.Y Penal Code), §§ 191, 194, 294, 295, at 45-46, 72-73 (1881); 3 N.Y. Rev. Stat. at 2478-80 (1881); *Ohio*: Act of Apr. 13, 1867, Ohio Laws, at 135-36 (1867); *Oregon*: Act of Oct. 19, 1864, ch. XLIII, § 509, Or. Organic & Other Gen. Laws, at 528 (1845-1864); *Pennsylvania*: Pa. Laws, No. 374, tit. VI, §§ 87, 88, at 404-05 (1860); *South Carolina*: Act of Dec. 24, 1883, No. 354, §§ 1-3, S.C. Acts, at 547-58 (1883), *codified at* S.C. Rev. Stat., Crim. Law, §§ 122, 137, 138, at 305, 309-10 (1893); *Tennessee*: Act of Mar. 26, 1883, ch. CXL, Tenn. Acts, at 188-89 (1883), *codified at* Tenn. Code §§ 5371, 5372, at 1031 (Milliken & Vertree's 1884); *Texas*: Tex Penal Code arts. 531, 535, at 103-04 (1857); *Virginia*: Act of Mar. 14, 1878, ch. II, § 8, Va. Acts, ch. 311, at 281-82 (1878), *codified at* Va. Code § 3670, at 879 (1887); *West Virginia*: W. Va. Acts, ch. CXVIII, § 8, at 335; (1882), *codified at* W. Va. Code ch. CXLIV, § 8, at 677 (1890); *Wisconsin*: Wis. Rev. Stat. pt IV, tit. XXVII, ch. CLXIV, § 11, at 930, and ch. CLXIX, §§ 58, 59, at 969 (1858). Six of these States also required proof of quickening.

abortion statutes were intended solely to protect the health of the pregnant woman, there would be no reason whatsoever for the state legislatures to authorize the judge or jury to assess a greater punishment if it were proven that the attempted abortion killed the fetus." *Id.* at 38. "The only explanation of this element of these statutes is that the enacting legislatures attributed value to the life of the unborn child." *Id.*

Abortion *before* quickening may not have been criminal at common law (although that is debatable). And a few of the early American statutes did distinguish between pre- and post-quickening abortions. But this distinction simply reflected the lack of medical knowledge regarding human reproduction, and cannot be regarded as a repudiation of the theory that life begins at conception or an implicit acknowledgment that abortion statutes were enacted solely to safeguard women from dangerous medical procedures. The foregoing review of nineteenth century abortion statutes and cases interpreting them leads to one inescapable conclusion: they were enacted with an intent to protect unborn human life.

IV.

NEITHER THE JUDICIAL POLICY OF *STARE DECISIS* NOR CONSIDERATIONS OF INSTITUTIONAL INTEGRITY PRECLUDE RECONSIDERATION OF *ROE V. WADE.*

In reaffirming what it variously characterized

as the "essential" or "central" holding of *Roe v. Wade*, 410 U.S. 113 (1973)—that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," *Casey*, 505 U.S. at 879—the Court relied largely upon the judicial policy of *stare decisis* and considerations of institutional integrity. *Id.* at 854-69. Neither factor precludes reconsideration of *Roe*.

1. Given the multiple respects in which *Casey* departed from *Roe*,[19] it is difficult to regard the Court's retention of the viability rule as a result dictated in any way by a need to follow precedent. Moreover, the articulation of the viability rule in *Roe* was *not* "a reasoned statement, elaborated with great care." 505 U.S. at 870. The entire discussion of viability in *Roe* took up one paragraph out of an opinion of more than fifty pages, the key sentence concluding that the State's interest in "potential life" becomes "compelling" at viability "because the fetus then presumably has the capability of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163. But this "mistakes a definition for a syllogism." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 924 (1973). Notably, the statutes challenged in *Roe* did

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[19] The Joint Opinion in *Casey* rejected the "rigid trimester framework" of *Roe*, 505 U.S. at 873, never referred to abortion as a fundamental right, changed the standard of review from strict scrutiny to the newly-minted "undue burden" test, *id.* at 873-79, and overruled, in part, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), *id.* at 881-87.

not distinguish among the different stages of pregnancy and the issue of viability was neither briefed nor argued by the parties.

The determination of viability depends upon a myriad of factors, including the ability of a physician to assess accurately fetal age, weight and lung maturity, advances in medical technology and the availability of neonatal care in a particular community, all of which make application of the rule anything but "workable." *Casey*, 505 U.S. at 855.[20] Insofar as the "evolution of legal principle," *id.* at 857, is concerned, the foundations of *Roe* have been eroded by the methodology set forth in *Washington v. Glucksberg* for evaluating fundamental rights under the "substantive due process" doctrine. *See* Arguments I-III, *supra*.[21] It must also be noted that in other areas of law, the concept of viability as an

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[20] *See* Paul Benjamin Linton and Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of Roe v. Wade? A Critique of Planned Parenthood v. Casey*, 70 Case Western Reserve L. Rev. 283, 294-309 (2019) (hereafter "*Stare Decisis*").

[21] On rare occasion this Court has recognized a fundamental liberty interest in the absence of any history, legal tradition or practice protecting that particular interest. *See Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that States must license and recognize same-sex marriages). *Obergefell*, however, articulated no limiting principle on the basis of which States may prohibit polygamy or incestuous marriages. For that reason, it should be regarded as a constitutional outlier that has no application to the evaluation of fundamental liberty interests other than those asserted therein. *Obergefell*, notably, did *not* overrule *Glucksberg*, *id.* at 671. and, unlike assisted suicide or abortion, did not implicate the State's compelling interest in the protection of human life.

appropriate benchmark in defining public wrongs and redressing private injuries has been rejected by the overwhelming majority of States that have enacted fetal homicide statutes, by virtually all States with respect to prenatal injuries, and by an increasing number of States with respect to wrongful death actions. *See Stare Decisis*, 70 Case Western Reserve L. Rev. at 314-26.[22]

Finally, with respect to any specific "reliance interest," the Court admitted that "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." 505 U.S. at 856. The Court, however, posited a more general reliance interest, stating that "for two decades of economic and social developments, people have organized their intimate relationships and made choices that define their views of themselves and their places in society, in reliance upon the availability of abortion in the event that contraception should fail." *Id.* But "[t]his falsely assumes that the consequence of overruling *Roe* would have been to make abortion unlawful. It would not; it would merely have *permitted* the States to do so." *Lawrence v. Texas*, 539 U.S. 558, 591-92 (2003) (Scalia, J., dissenting).

The Court's belief that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," 505 U.S. at 856, assumes that women must deny a unique

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[22] *See also* Appendixes A, B, to this Brief.

characteristic—their ability to conceive and bear children—in order to be treated equally with men and by society. That is not an assumption that promotes the rights of women or their dignity as persons.

2. Considerations of institutional integrity do not support retention of what remains of *Roe*–the viability rule. In deciding whether a woman has a right to obtain an abortion before viability, regardless of her reason, it was critical, in view of the dramatic consequences for unborn human life, that "the justification claimed [for recognizing such a right] be beyond dispute." *Casey*, 505 U.S. at 865. Neither *Roe* nor *Casey* provided that justification.

Although a precedent should not be overruled if overruling could be seen as "a surrender to political pressure," 505 U.S. at 867, that consideration, in the case of *Roe*, cuts both ways, as the Court readily acknowledged, *id.* at 869. And it is ironic that, in refusing to overrule *Roe*, the Court relied on two landmark decisions of the last century in which it *overruled* longstanding precedents.[23]

"[A] decision without principled justification would be no judicial act at all." *Casey*, 505 U.S. at 865. That precisely describes *Roe v. Wade*. *See Doe*

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[23] *Id.* at 861-64, citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), overruling *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525 (1923) (which was based on *Lochner v. New York*, 198 U.S. 45 (1905)), and *Brown v. Board of Education*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896).

v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting) (denouncing *Roe* and *Doe* as "an exercise in raw judicial power"). The Court in *Casey* stated that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." 505 U.S. at 864. If so, *amicus* submits that there are more than 60 million special reasons to do so. *Roe v. Wade* should be overruled.

CONCLUSION

The judgment of court of appeals should be reversed.

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APPENDIXES

Appendix A

States That Criminalize The Killing Of An Unborn Child (Outside The Context Of Abortion) Without Regard To Gestational Age (Thirty-One States)

Alabama	Ala. Code § 13A-6-1(a)(3) (LexisNexis Supp. 2020)
Alaska	Alaska Stat. § 11.81.900(b)(64) (definition of unborn child); § 11.41.150 *et seq.* (2014) (substantive offenses)
Arizona	Ariz. Rev. Stat. §§ 13-1102(A), (B) (negligent homicide), 13-1103(A)(5), (B) (manslaughter), 13-1104(A), (B) (second degree murder), 13-1105(A)(1), (C) (first degree murder) (LexisNexis 2020)
Arkansas	Ark. Code Ann. § 5-1-102(13)(B)(i), (ii) (2013)
Florida	Fla. Stat. Ann. §§ 775.021(5) (definition); 782.071 (vehicular homicide), 782.09 (killing of unborn child by injury to mother) (LexisNexis Supp. 2018)
Georgia	Ga. Code Ann. §§ 16-5-80 (feticide), 40-6-393.1 (feticide by vehicle), 52-7-12.3 (feticide by vessel) (2007 & Supp. 2010)

Idaho	Idaho Code Ann. §§ 18-4016 (definition of human embryo and fetus), 18-4001 (definition of murder), 18-4006 (definition of manslaughter) (2004)
Illinois	720 Ill. Comp. Stat. Ann. §§ 5/9-1.2 (intentional homicide of an unborn child), 5/9-2.1 (voluntary manslaughter of an unborn child), 5/9-3.2 (involuntary manslaughter or reckless homicide of an unborn child) (West Supp. 2020);
Indiana	Ind. Code Ann. § 35-42-1-6 (feticide) (LexisNexis Supp. 2020)
Kansas	Kan. Stat. Ann. § 21-5419 (Supp. 2014)
Kentucky	Ky. Rev. Stat. Ann. § 507A.010 *et seq.* (fetal homicide) (LexisNexis 2008)
Louisiana	La. Rev. Stat. Ann. §§ 14:2(A)(11) (defining "unborn child"), 14:32.5 (defining feticide), 14:32.6 *et seq.* (substantive offenses) (2007 & Supp. 2015)
Michigan	Mich. Comp. Laws Ann. § 750.90a *et seq.* (West 2014)
Minnesota	Minn. Stat. Ann. § 609.266 *et seq.* (West 2009)
Mississippi	Miss. Code Ann. § 97-3-37 (West 2011)

Missouri	Mo. Ann. Stat. § 1.205 (West 2000) (rule of construction), as applied to State's homicide statutes in *State v. Knapp*, 843 S.W.2d 345 (Mo. 1992), *State v. Holcomb*, 956 S.W.2d 286 (Mo. Ct. App. 1997), *State v. Rollen*, 133 S.W.3d 57 (Mo. Ct. App. 2003)
Nebraska	Neb. Rev. Stat. Ann. § 28-388 *et seq.* (LexisNexis 2009)
North Carolina	N.C. Gen. Stat. § 14-23.1 *et seq.* (2015)
North Dakota	N.D. Cent. Code § 12.1-17.1-01 *et seq.* (2012)
Ohio	Ohio Rev. Code Ann. §§ 2903.01(A), (B) (aggravated murder), 2903.02(A) (murder), 2903.03(A) (voluntary manslaughter), 2903.04(A), (B) (involuntary manslaughter); 2903.041(A) (reckless homicide), 2903.05(A) (negligent homicide), 2903.06(A) (aggravated vehicular homicide, vehicular homicide and vehicular manslaughter), 2903.09(A), (B) (definitions) (LexisNexis 2014)
Oklahoma	Okla Stat. Ann. tit. 21, § 691 (definition of homicide), tit. 63, § 1-730(4) (definition of "unborn child") (West Supp. 2015)

Pennsylvania	18 Pa. Cons. Stat. Ann. § 2601 *et seq.* (West 2015)
South Carolina	S.C. Code Ann. § 16-3-1083 (Supp. 2014)
South Dakota	S.D. Codified Laws §§ 22-1-2(31) (definition of "person"), 22-1-2(50A) (definition of "unborn child"); 22-16-1 (definition of homicide), 22-16-1.1 (fetal homicide), 22-17-6 (intentional killing of a human fetus) (2006 & Supp. 2014)
Tennessee	Tenn. Code Ann. § 39-13-214 (Supp. 2015)
Texas	Tex. Penal Code §§ 1.07(a)(26) (definition of "individual"), 1.07(a)(38) (definition of "person") (West 2021)
Utah	Utah Code Ann. § 76-5-201(1)(a) (West 2012)
Virginia	Va. Code Ann. § 18.2-32.2 (West 2009)
West Virginia	W.Va. Code Ann. § 61-2-30 (LexisNexis 2014)

Wisconsin	Wis. Stat. Ann. §§ 939.75(1) (definition of "unborn child"), 940.01(1)(b) (first degree intentional homicide), 940.02(1m) (first degree reckless homicide), 940.05(2g) (second degree intentional homicide); 940.06(2) (second degree reckless homicide), 940.08(2) (homicide by negligent handling of a dangerous weapon, explosive or fire); 940.09(1)(c), (1)(cm), (1)(d), (1)(e) (homicide by intoxicated use of a vehicle); 940.09(1g)(c), (1g)(cm), (1g)(d) (homicide by intoxicated use of a firearm), 940.10(2) (homicide by negligent operation of a vehicle), 940.04(1) (intentional destruction of the life of an unborn child) (West 2005 & Supp. 2020)
Wyoming	Wyo. Stat. Ann. §§ 6-104 (definition), 6-2-101 (murder in the first degree), 6-2-104 (murder in the second degree), 6-2-109 (sentencing enhancement) (eff. July 1, 2021)

Appendix B

States That Recognize A Statutory Cause Of Action For The Wrongful Death Of Unborn Children Without Regard To Gestational Age (Sixteen States)

Alabama	*Mack v. Carmack*, 79 So.3d 597 (Ala. 2012), interpreting Ala. Code § 6-5-391 (2014)
Alaska	Alaska Stat. § 09.55.585 (Michie 2014)
Arkansas	Ark. Code Ann. § 16-62-102 (Supp. 2015), in conjunction with § 5-1-102 (2013)
Illinois	740 Ill. Comp. Stat. Ann. § 180/2.2 (West 2010)
Kansas	Kan. Stat. Ann. § 60-1901 (West Supp. 2014)
Louisiana	La. Civ. Code Ann. art. 26 (2013)
Michigan	Mich. Comp. Laws Ann.§ 600.2922a (West 2017)
Missouri	*Connor v. Monkem*, 898 S.W.2d 89 (Mo. 1995), interpreting Mo. Ann. Stat. § 537.080 (West 2008)
Nebraska	Neb. Rev. Stat. Ann.. § 30-809(1) (LexisNexis 2010)

Oklahoma	Okla Stat. Ann. tit. 12, § 1053(F) (West Supp. 2015), tit. 63, § 1-730 (West Supp. 2015)
South Dakota	S.D. Codified Law § 21-5-1 (2014)
Tennessee	Tenn. Code Ann. § 20-5-106(d) (Supp. 2015), as amended by 2021 Tenn. Acts, ch. 379, § 2
Texas	Tex. Civ. Prac. & Rem. Code Ann. § 71.001(4) (West 2008)
Utah	*Carranza v. United States*, 267 P.3d 912 (Utah 2011)
Virginia	Va. Code Ann. § 8.01-50(B) (2015), in conjunction with § 32.1-249
West Virginia	*Farley v. Sartin*, 466 S.E.2d 522 (W.Va. 1995), intepreting W.Va. Code § 55-7-5 (LexisNexis 2008)