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,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the natural right to "life" as expressed in the Declaration of Independence and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The Center has filed amicus briefs in cases raising this issue including *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) and *Gonzales v. Carhart*, 550 U.S. 127 (2007), and its attorneys were counsel of record in *Horne v. Isaacson*, 571 U.S. 1127 (2014).

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment protects against deprivation "life, liberty, or property." In the abortion rights cases, this Court has focused on "liberty." The real issue, however, is life.

Life is a natural right endowed by our Creator and is the first unalienable right recognized in the Declaration of Independence. Governments are formed to protect natural rights and the State of Mississippi has a compelling interest in the protection of life, even the life of a yet-to-be-born child. Any liberty interest to procure an abortion (which is not found in

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[1] All parties have consented to the filing of this amicus brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

the text of the Fourteenth Amendment or anywhere else in the Constitution) must be balanced against this compelling interest in the protection of life.

While it may be true that "[l]iberty finds no refuge in a jurisprudence of doubt," neither can it find refuge in a claim of that prior, erroneous, judicial pronouncements are more important than the words of the Constitution. This Court has had no trouble in overruling prior decisions that incorrectly interpreted the Constitution. Prior decisions that upheld a claimed liberty interest in terminating the life of an unborn child without ever considering the express constitutional protection of that child's life can be no barrier to upholding the Constitution in this case.

ARGUMENT

I. Mississippi Has a Compelling Interest in Protecting the Lives of Unborn Children Under the Due Process Clause of the Fourteenth Amendment

Beginning a legal analysis with the wrong proposition is likely to lead to an erroneous result. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), is an example of this. The lead opinion noted that the case focused on the Due Process Clause of the Fourteenth Amendment. "The controlling word in the cases before us is 'liberty.'" *Id*. at 846. But that is true if the Court considers only the claimed liberty interest of the mother. The interest the mother claims, however, is the right to terminate the life of her unborn child. Thus, the Court should focus first and foremost on the word "life."

The duty of government to protect life is at the center of the nation's first legal document.

> We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are *Life*, Liberty, and the Pursuit of Happiness—That *to secure these Rights, Governments are instituted among Men*, deriving their just Powers from the Consent of the Governed…

Declaration of Independence ¶ 2; 1 Stat. 1 (emphasis added). From the foundation of this nation, the first duty of government has been to preserve the unalienable right to life. Even before the colonies declared independence, this claim of an inherent right to "life" was declared by the Continental Congress. Declaration and Resolves of the First Continental Congress, Oct. 14, 1774, *reprinted in* 5 THE FOUNDERS' CONSTITUTION at 312.

This duty is expressed in the constitutions and declarations of rights of the first states. The Virginia Declaration of Rights of 1776 notes that all men have "certain inherent rights … namely the enjoyment of life and liberty." Virginia Declaration of Rights, § 1, *reprinted in* 5 THE FOUNDERS' CONSTITUTION at 312. Protection of "life" was also found in the 1776 Declaration of Rights for Maryland. Declaration of Rights, § 21 *reprinted in* Francis Thorpe, 3 THE FEDERAL AND STATE CONSTITUTIONS, 1688. The 1777 Constitution of New York quoted the Declaration of Independence in full, including the duty of government to protect life. Constitution of New York (1777) *reprinted in* Francis Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS, 2627. Similar protections of life were found in the 1776 Constitution of North Carolina (Declaration

of Rights, §12 *reprinted in* Francis Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS, 2788), the 1776 Constitution of Pennsylvania (Declaration of Rights, § 8 *reprinted in* Francis Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS, 3704), the 1778 Constitution for South Carolina (Constitution of South Carolina §XLI (1778) *reprinted in* Francis Thorpe, 6 THE FEDERAL AND STATE CONSTITUTIONS, 3257)), the 1777 Constitution for Vermont (Vermont Declaration of Rights § 1, *reprinted in* Francis Thorpe, 6 THE FEDERAL AND STATE CONSTITUTIONS, 3739); the 1780 Massachusetts Constitution (Declaration of Rights, Article X, *reprinted in* Francis Thorpe, 3 THE FEDERAL AND STATE CONSTITUTIONS, 1892), the 1884 New Jersey Constitution (the 1776 New Jersey Constitution did not contain a declaration of rights) (Constitution of New Jersey, Art. 1, §1 (1884) *reprinted in* Francis Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS, 2599), the 1792 Delaware Constitution (Constitution of Delaware, Art. I, § 7, *reprinted in* Francis Thorpe, 1 THE FEDERAL AND STATE CONSTITUTIONS, 569), and the 1784 New Hampshire Constitution (New Hampshire Constitution, Part I, Art. I, *reprinted in* Francis Thorpe, 4 THE FEDERAL AND STATE CONSTITUTIONS, 2453).

It is no surprise, therefore, that both the Fifth and the Fourteenth Amendments contained explicit textual protections for "life." U.S. Const., Amends. V, XIV. From the founding, the government has recognized that it has the duty to protect this natural right to life – indeed, that is the purpose of government.

The Founding generation and the ratifiers of the Fifth and Fourteenth Amendments were not confused about the "life" to be protected.

> With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. *In the contemplation of law, life begins when the infant is first able to stir in the womb.* By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.

James Wilson, Lectures on the Law (1790-91), *reprinted in* 2 COLLECTED WORKS OF JAMES WILSON, 1068 (Liberty Fund) (emphasis added).

This idea that the life protected by the common law includes the life of children who are not yet born was not invented by Wilson. Blackstone identified life as an absolute right. Further, he noted that life "begins as soon as an infant is able to stir in the mother's womb." Sir William Blacktone, COMMENTARIES ON THE LAWS OF ENGLAND, Book 1, ch. 1 at 125. Because of this, killing a child in the womb was a crime at common law. *Id*. at 125-26. Under the common law, a child still in the womb was a protected life, he could have a guardian, and could receive an estate. *Id*. at 126.

Blackstone's Commentaries were well known to the founding generation. When debating various provisions of the Constitution, the Founders frequently cited to Blackstone. DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION at 322. Whether arguing for or against the Constitution, Blackstone's Commentaries were treated as an authoritative source. *E.g.*, Federal Farmer: An Additional Number of Letters to the Republican, New York, May 1788, *re-*

printed in 20 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION at 1048; Marcus II, Norfolk and Portsmouth Journal, *reprinted in* 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION at 247.

It is clear that from the Founding, protection of life was one of the core purposes of government. The founding generation understood that the life to be protected began while the child was still in the womb.

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), this Court limited heightened scrutiny review for substantive due process claims to those "'deeply rooted in this Nation's history and traditions.'" *Id*. at 721. In this case the respondents assert a claimed liberty interest to terminate a life of an unborn child. But such a claimed liberty interest is not rooted in our history or traditions. Justice Thomas noted that the standard proposed by the plurality opinion in *Casey* "has no historical or doctrinal pedigree." *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting). The Court's decisions finding a right to abortion—that is, a "right to terminate the life of another human being—do not rely on text or tradition "but upon what the Court calls 'reasoned judgment.'" *Casey*, 505 U.S. at 1000 (Scalia, J., dissenting).

There is nothing in the "nation's history and traditions" supporting a claimed liberty interest allowing the intentional destruction of human life. To the contrary, our history is one that is focused on the protection of life – including the life of unborn children. Since the protection of life is textually explicit, Mississippi has a compelling interest in the protection of an unborn child's life.

II. The Doctrine of Stare Decisis Cannot Support Continued Adherence to Erroneous Interpretations of the Constitution

In *Casey*, seven members of this Court "acknowledged that States have a legitimate role in regulating abortion and recognized the State's interest in respecting fetal life at all stages of development," thus rejecting much of what the Court had ruled in *Roe v. Wade*, 410 U.S. 113 (1973). *Stenberg*, 520 U.S. at 981 (Thomas, J., dissenting). Nonetheless, the Court upheld what it called the "central holding" that "*Roe's* concept of liberty" included a right to kill an unborn child – at least until some undefined point in the pregnancy that the Court called "viability." *Casey*, 505 U.S. at 860-61. Although no opinion in *Casey* commanded a majority of this Court, the lead joint opinion staked out the ground for continuing to abide by "*Roe's* concept of liberty" even though time had "overtaken some of *Roe's* factual assumptions. *Id*. at 860. According to the lead opinion, the Court had to stick with the holding in *Roe* not because its ruling was rooted in the text or history of the Constitution, but rather because "the Court's legitimacy depends" on its rulings being "sufficiently plausible to be accepted by the Nation." *Id*. at 866. Thus, the doctrine of *stare decisis* compelled the Court to continue to adhere to its ruling in *Roe*. In *Roe*, the Court had sought to resolve a "divisive issue of government power." *Id*. at 868-69. Although it was plainly unsuccessful in this endeavor, *see, e.g.,* John C. Eastman, *The One-Way Ratchet and Other Problems of Stare Decisis for Conservatives*, in Bradley Watson, ed., THE COURTS AND THE CULTURE WARS 127, 134 (Lexington Books, 2002), the Court feared that the correction of the ruling in *Roe* would cause damage to the

"Court's legitimacy" and to the "rule of law." *Id.* at 869.

The Court has neither protected its legitimacy nor preserved the rule of law by continued adherence to the decision in *Roe*. Justice Blackmun correctly surmised that the confirmation process in the future would focus on whether to continue with the constitutional innovation initiated in *Roe* or to return to the text and history of the Constitution. *Id.* at 943 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Yet one doubts that he foresaw just how bitter confirmation battles would become – costumed protestors, invented allegations of misconduct, and a circus-like atmosphere that makes the most heated election contest look civil by contrast. Justice Blackmun's prescience was correct not because there is a national debate over constitutional interpretation. Rather it is because this Court's abortion rights jurisprudence is "policy-judgment-couched-as-law." *Stenberg*, 530 U.S. (Scalia, J., dissenting).

The lead opinion in *Casey* claimed that the Court was bound by *stare decisis*: "the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding." *Casey*, 505 U.S. at 871 (Joint Opinion of O'Connor, Kennedy, and Souter). Although speaking to a different issue, Chief Justice Marshall's point is applicable here. "We must never forget that it is *a Constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis in original). The joint opinion in *Casey*, however, was more concerned with expounding the rights created in a prior decision rather than the rights explicitly protected in

the Constitution. And its view of *stare decisis* turned the doctrine on its head. "Rather than deferring to the considered judgment made by a predecessor court about the constitutionality of a particular action or statute, [the joint opinion's view of] *stare decisis* operates even where the predecessor court's holding is acknowledged to be wrong, and even when the predecessor court itself acknowledged that its ruling was rendered in spite of the Constitution, not in accord with it." Eastman, *The One-Way Ratchet, supra* at 133.

Stare decisis, however, "is 'not at inexorable command.'" *Janus v. American Federation of State, County, and Mun. Employees*, 138 S. Ct. 2448, 2478 (2018). Were it otherwise, the nation would still be laboring under the erroneous decisions in *Plessy* and *Korematsu*. *Plessy v. Ferguson*, 163 U.S. 537 (1896), (overruled by *Brown v. Board of Ed. of Topeka*, 347 U.S. 483, 692 (1954)); *Korematsu v. United States*, 323 U.S. 214 (1944) (overruled by *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018)). This Court has recognized that the doctrine of *stare decisis* "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling … prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). This is exactly the point made by President Lincoln in his criticism of the Court's ruling in *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, ... the people will have ceased to be

> their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

A. Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, p. 139 (1989), *quoted in Casey*, 505 U.S. at 997 (Scalia, J., concurring in the judgment in part and dissenting in part).

By focusing on *stare decisis* and the perceived legitimacy of the *Casey* Court, the joint opinion sought to "irrevocably fix" its decision in *Roe* (or at least that portion of *Roe* that the joint opinion called its "central holding"), robbing the people of their ability to set policy. *See Casey*, 505 U.S. at 922 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

The Court's recent decision in *Janus* provides some guidance for when *stare decisis* should not bind future courts. As the *Janus* Court noted, the doctrine of *stare decisis* is especially weak in cases involving constitutional interpretation. *Janus*, 138 S. Ct. at 2478. Of the factors discussed in *Janus*, the quality of the reasoning is the one on which the Court should focus here.

In *Roe* and *Casey*, the Court relied on a "liberty" interest that does not reasonably or historically fall within the text of the Constitution – the liberty to terminate the life of an unborn child. CITES. Not only is there no textual support for such a constitutional right, the Court had to ignore the foundational right to life that is textually explicit in the Constitution, the common law history of holding abortion to be a crime, and the founding era claim that the life protected by

natural law (and thus the Constitution) includes the life of the unborn child.

The Court in *Roe* and *Casey* attempted to denigrate the States' interests in protecting the unborn child by referring to the child as a "potential life." *See Casey*, 505 U.S. at 852 (joint opinion of of O'Connor, Kennedy, and Souter). Yet the child is most certainly "alive" by any definition of that term while he or she is still in the womb. This was the view at common law, the view of the founders, and it is the view of medical science. Abortion ends a human life. *See Stenberg*, 530 U.S. at 980 (Thomas, J., dissenting).

More concerning is the reasoning of the Court in *Casey* where the joint opinion appeared to argue that *Roe* (or at least what the joint opinion argued was its "central holding") was meant to "resolve" an "intensely divisive controversy." *Casey* at 866. It is not the role of the Court to "decide a case in such a way as to resolve" divisive controversies – especially where the resolution is not dictated by the text of the Constitution. Even if that were the role of the Court, its decision in *Roe* was a massive failure in that regard.

> Not only did *Roe* not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided. … *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the

> selection of Justices to this Court in particular, ever since.

Casey, 505 U.S. at 995-96 (Scalia J., concurring in the judgment in part and dissenting in part).

It seems clear, at least from the perspective of the public, that the Court's decisions in *Roe*, *Casey*, and their progeny made a policy decision rather than a constitutional one. If courts are available for the making of policy, then one should expect the current poisonous atmosphere of confirmation hearings to continue. Dirty tricks common to political campaigns will continue to be used as advocates for particular polices seek to defeat the nomination of judicial officers that they view as opposed to their policy choices. The judiciary just becomes one more political branch – one without democratic legitimacy.

Stare decisis is no barrier to overruling *Roe*, *Casey*, and their progeny.

CONCLUSION

The Court needs to return to first principles. Whether or not there is a "liberty" interest at stake in an abortion regulation, there most certainly is a *life* interest. The state legislators who approved the Fifth and Fourteenth Amendments to the Constitution knew that life included yet-to-be-born children. They knew that abortion was a crime at common law and more recently by statute, and there is no evidence that they intended the Fourteenth Amendment to usurp the State's interest in protecting the life of unborn children.

As Justice Scalia pointed out, *Casey* (and *Roe*) are not law, but policy masquerading as law. *Stenberg v.*

Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting). Far from settling a "national controversy," *Casey*, 505 U.S. at 867, this Court's abortion edicts have instead poisoned the process for selection of justices to this Court, *Stenberg*, 520 U.S. at 956 (Scalia, J., dissenting). Senate confirmation hearings have turned into circus events with salacious accusations, character assassination, and costumed protestors play-acting for the cameras – all to keep the policy decision of whether a state should permit abortion and if so, how it should be regulated out of the hands the state policy makers. In the words of Justice Scalia, at the very least: "If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed." *Id*. (emphasis in original)

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Respectfully submitted,

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