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'S 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 CONNIE WEISKOPF AND KRISTINE L. BROWN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

For decades since *Roe v. Wade*, 410 U.S. 113, 159 (1973), this Court has been asked by a variety of parties and *amicus* to overturn *Roe* and its progeny. While the overturn is necessary, *amici* would like to bring a forgotten but better precedent to the Court's attention: *Levy v. Louisiana*, 391 U.S. 68 (1968). *Levy* provides a powerful, simple, three-prong test to determine whether an individual – in this case, a preborn child – should be included in the Fourteenth Amendment's Equal Protection Clause. If the preborn child passes the *Levy* test, *Roe* and *Casey* necessarily collapse. The *Levy* standard allows this Court to pivot from *Roe* and *Casey* to a wiser, already-existing precedent that would provide uniform guidance.

As an attorney focused on the constitutional rights of the preborn child, Kristine L. Brown, has been involved with multiple briefs before this Court in prior cases, is an associate scholar with the Charlotte Lozier Institute (a research and education institute, committed to bringing the power of science, medicine, and research to bear in order to promote a culture and polity of life), and has aided non-profit organizations, state legislators, and ballot initiative campaigns in working to advance legal protection for vulnerable

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[1] All parties have consented to the filing of this *amicus* brief through the filing of blanket consents pursuant to Rule 37.3(a). 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 *amici* or their counsel made a monetary contribution intended to fund the preparation and submission of this brief.

human beings, including the preborn child. Connie Weiskopf is the executive director of a pregnancy resource center in Colorado and works to protect the lives and rights of preborn children every day. *Amici* are filing this brief in their personal capacities.

By bringing the *Levy* standard to this Court's attention, *amici* hope to highlight an avenue for the Court to reject the unconstitutional precedents of *Roe* and *Casey*, as Petitioner requests, while also affirming the next frontier in civil rights: equal protection under the law for all human children.

SUMMARY OF ARGUMENT

This Court has been beholden to *Roe* and its progeny for decades, denying equal protection under the law to a vulnerable class of human beings. The sophistry at the heart of *Roe* is that the beginning of human life was ever a subject for speculation. More than a century before *Roe*, the Fourteenth Amendment affirmed the fundamental rights of equal protection and due process for all persons. *See* Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harv. J. L. & Pub. Pol'y 539 (2017). There was no doubt at the time of the Fourteenth Amendment as to whether the common definition of "person" included *preborn* persons. One-hundred and fifty years since, medical science has overwhelmingly confirmed this commonly understood inclusion of preborn persons in legal personhood. *See* Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and Terminology Revisited*, 8 UST. J. L. & Pub. Pol'y 44 (2013).

Citing *Harris v. McRae,* 448 U.S. 297, 325 (1980), Petitioners recall the Court's own acknowledgment of the fact that no other so-called constitutional right involves the "the purposeful termination of a potential life." Yet even in *Harris*, we see the poison of *Roe* in the qualifier "*potential*." In fact, a newly conceived human being's true *potential* is to be held in her mother's arms; for she is a living, human person at the instant she is conceived.

Amici offer an argument that supplements the State of Mississippi's bold defense of preborn human rights. By choosing *Levy v. Louisiana*, 391 U.S. 68 (1968) as the test for legal personhood, this Court can reach a new milestone in the advancement of human rights. By replacing *Roe* and *Casey* with *Levy*'s clear standard, this Court can revive its credibility as an institution that protects human rights, and pivot to a wiser, already-existing precedent.

Levy's Three-Pronged Personhood Test

In 1968, five years before *Roe*, this Court held that "illegitimate" children whose lives began outside of wedlock should not be treated unequally compared to children whose lives began during their parents' marriage. *Levy* ruled that under the Fourteenth Amendment's Equal Protection Clause, illegitimate children may not be legally classed as "non-persons," setting forth a simple three-prong test to demonstrate the legal personhood of illegitimate children. The Court started from the premise that "illegitimate children are not 'nonpersons,'" insofar as they are "**humans, live, and have their being**." *Levy* 391 U.S. *at 70* (emphasis added). Thus *all* children who 1)

are human, 2) are living, and 3) are in being, are "**clearly**" persons under the Equal Protection Clause. *Id*. (emphasis added).

Without a doubt, preborn children met this three-pronged test in 1968 when *Levy* was decided, in 1973 when *Roe* was decided, and in 1992 when *Casey* was decided. And more than fifty years later, the advance of medical science has crystalized and confirmed our knowledge that preborn children are, manifestly, living human beings.

The reversal of *Roe* was built into its fabric. In *Roe,* Justice Blackmun said the holding would collapse "if the suggestion of personhood [for preborn children] is established." *Roe* at 156. But *Levy* (a ruling that predates Blackmun's tenure on the Court) had already laid the foundation for and implicitly established the personhood of all children, including the preborn child. Today, when she is viewed through the lens of numerous advances in modern science, the admissions of those who commit abortions, and the window into the womb provided by innovation and technology, the preborn child easily meets the *Levy* standard, collapsing *Roe* in the process.

Moreover, stare decisis poses no justification for upholding *Roe*'s errors. Stare decisis aims to "promote[ ] the evenhanded, predictable, and consistent development of legal principles." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Levy* meets *Payne*'s criteria at a time when *Roe* and *Casey* fail to do so. Equal protection under the law must be evenhanded, predictable, and consistent, and *Levy* gives a steady and objective bright line. *Levy*'s three-

pronged test is measurable and protects every class of historically discriminated person. This test makes no exception based on a living human being's race, sex, religion, ethnicity, national origin, disability, mental capacity, or age, from conception until natural death: the entire period of time during which every individual human being is alive.

As Justice Gorsuch wrote in his *Ramos* concurrence, "stare decisis isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Ramos v. Louisiana*, 590 U.S. __, __ (2020) (slip op. at 23). We know it to be true that a prenatal child is a human child, entitled to equal protection of inherent rights under the law as all living human beings are. Justice Thomas wrote correctly in his *June Medical* dissent: "*Roe*'s reasoning is utterly deficient – in fact, not a single Justice today attempts to defend it." *June Med. Servs. v. Russo*, 591 U.S. __, __ (2020) (slip op. at 79).

Reliance on *Levy* emancipates this Court from the stark errors of *Roe* and *Casey*, to wit, permitting this Court to cast these decisions into the dustbin of history with *Dred Scott*, *Plessy*, and *Korematsu*. 60 U.S. 393 (1857); 163 U.S. 537 (1896); 323 U.S. 214 (1944).

ARGUMENT

I. *Levy v. Louisiana* Should Supersede *Roe* and *Casey* in Abortion Jurisprudence.

In *June Medical*, Justice Thomas wrote in his dissent that *Roe* and *Casey* "created the right to

abortion out of whole cloth, without a shred of support from the Constitution's text." *June Med. Servs.*, (slip op. at 63). *Levy* comes to the rescue with a simple and sound test for inclusion under the Equal Protection Clause: if one is 1) human, 2) lives, and 3) has her being, she is a person for equal protection purposes. *See Levy*, 391 U.S. at 70.

Where *Roe* and *Casey* are untethered to any part of the Constitution, *Levy*'s test fits squarely within the original meaning of the Fourteenth Amendment. The amendment was enacted after the Civil War to ensure America's shameful failure to respect the unalienable dignity and humanity of all human beings would not be repeated; its first design was to recognize in law the fundamental human rights of former slaves, but not to the exclusion of other marginalized classes of people. As explained *infra* by Craddock, the Fourteenth Amendment was originally crafted to guarantee equal protection to every member of the human race. Consequently, this Court has consistently relied on the Fourteenth Amendment's plain meaning of "persons" to affirm the fundamental civil rights of Native Americans, foreign nationals, immigrants, and women.

Without a doubt, the Court has also, unfortunately, engaged in inequality many times along the way since the amendment's ratification. Throughout the late 19th and early 20th centuries legal personhood was applied under the Fourteenth Amendment to corporations, while during the same era, Black Americans were subjected to a regime of "separate but equal." And it is worth noting that the sun only began to set on that shameful era in living

memory, with cases like *Brown v. Board of Education*, 347 U.S. 483 (1954).

What, then, does it mean to be a "person" under the law? Dictionary usage, common law precedent, state practice, and the intent of the Fourteenth Amendment's text all indicate that informed citizens understood the amendment applied to all members of the human race, without exception. *See* Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harv. J. L. & Pub. Pol'y 539 (2017) [hereinafter "Craddock"]. Indeed, the same Ohio legislative body that ratified the Fourteenth Amendment in 1867 enacted legislation criminalizing abortion, stating that abortion was "child-murder" and indicating the common understanding shared by many state legislatures at the time of the Fourteenth Amendment's passage and ratification that a preborn child was a human being worthy of equal protection. *Id.* at 558. A historical analysis demonstrates that such children were widely understood to be included in the definition of "persons" and protected in law as such. *See* James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L. J. 29 (1985), [concluding at 49: "[T]here can be no doubt whatsoever that the word 'person' referred to the fetus."]

The Fourteenth Amendment cannot reasonably be interpreted to exclude a subset of people who were considered legally protectable human beings at the time it was written. "[T]he history of the [Fourteenth] Amendment proves that the people were told that its

purpose was to protect weak and helpless human beings." *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black., J., dissenting).

> The Framers expected the Fourteenth Amendment to protect every member of the human species. The Amendment was carefully worded to "bring within the aegis of due process and equal protection clauses every member of the human race, regardless of age, imperfection, or condition of unwantedness." Senator Jacob Howard, who sponsored the Amendment in the Senate, declared the Amendment's purpose to "disable a state from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty and property without due process." Even the lowest and "most despised of the [human] race" were guaranteed equal protection. … Representative James Brown simply put it: "Does the term 'person' carry with it anything further than a simple allusion to the existence of the individual? The primary Framer of the Fourteenth Amendment, Representative John Bingham, intended it to ensure that "no state in the Union should deny to any human being . . . the equal protection of the laws." He described the Amendment as a remedy to the denial of basic human rights: "[B]y putting a limitation expressly in the Constitution . . . so that when . . . any other State shall in its madness or its folly refuse to the gentleman, or *his children or to me or to mine*, any of the

> rights which pertain to American citizenship or to common humanity, there will be redress for the wrong through the power and majesty of American law."

Craddock at 559-60 (internal citations omitted).

In line with this original constitutional meaning, *Levy* recognizes innate, equal dignity for all living human beings. Contrarily, *Roe* and *Casey* encapsulate what O. Carter Snead refers to as "*contingent* dignity, because they do not ascribe equal worth to all living members of the human species, but only to those individuals who have met a certain threshold criterion (e.g., birth)." O. Carter Snead, *Human Dignity and the Law, in* HUMAN DIGNITY IN BIOETHICS: FROM WORLDVIEWS TO THE PUBLIC SQUARE 142, 148 (Stephen Dilley & Nathan J. Palpant ed.), (1st ed. 2013) (emphasis in original). Snead defends a definition of justice that conceives of "an *intrinsic* conception of dignity – one that applies regardless of an individual human being's age, location, size, condition of dependency, usefulness, or value as judged by other…" *Id.* at 148-49 (emphasis in original).

A view based in the Fourteenth Amendment's original meaning would decry "[t]he idea that one human being is entitled to kill another because he or she adjudged that life to be unwanted, burdensome to others, not worth living, or an obstacle to one's full participation in social and economic life" as "contrary to the principle of equality on which the nation was founded." *Id.* at 50.

Justice Gorsuch has detailed the underpinnings of the Fourteenth Amendment:

> Perhaps the most profound indicium of the innate value of human life, however, lies in our respect for the idea of human equality. The Fourteenth Amendment to the U.S. Constitution guarantees equal protection of the laws to all persons…This profound social and political commitment to human equality is grounded on, and an expression of, the belief that all persons *innately* have dignity and are worthy of respect without regard to their perceived value based on some instrumental scale of usefulness or merit. We treat people as worthy of equal respect because of their status as human beings and without regard to their looks, gender, race, creed, or any other incidental trait — because, in the words of the Declaration of Independence, we hold it as "self-evident" that "all men [and women] are created equal" and enjoy "certain unalienable Rights," and "that among these are Life."
>
> If one were to start from a different premise about the value of human life, assuming perhaps that different human lives bear different value depending on their instrumental worth to society or other persons, a critical rationale for equal protection would wither if not drop away altogether. … [T]he belief that human life is inherently valuable and worthy of protection "is the cornerstone of law and of social

> relationships. It protects each one of us impartially, embodying the belief that all are equal."

Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* 159 (2006) (internal citations omitted) (emphasis in original).

> Since the word 'person' in the Fourteenth Amendment is capable of being interpreted liberally in an objective manner consistent with the rule of law to include all human beings, not to do so violates the spirit of the Declaration of Independence, natural law, and the core liberal ideals of equality and human dignity.

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). The Fourteenth Amendment laid the foundation for the legal application of equality in natural, inherent rights to all human persons, and *Levy* properly laid out a constitutionally sound test that brings all human children under the Equal Protection Clause. *Levy* is a keystone in the interpretation of the Fourteenth Amendment, as it marked a fundamental change in how the Court viewed children's rights. Still today, it propels forward the individual equality of children, unique in their own persons.

"Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the

duty of safeguarding it." *Steinberg v. Brown*, 321 F. Supp. 741, 747 (N.D. Ohio 1970). In fact, this Court has already cited *Levy* to apply the Equal Protection Clause to a preborn child, in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). In *Weber*, the State attempted to limit the workman's compensation owed to the two illegitimate children of a decedent. One of the two was preborn at the time of the decedent's death, and yet the Court applied *Levy* to protect the rights of both illegitimate children, without distinguishing their treatment based on whether they were born or preborn.

Similarly, no arbitrary, involuntary milestone ought to attach to preborn children's realization of their right to equal protection under the law, or to their substantive due process rights to life and bodily integrity -- inherent rights shared by all members of the human family in these United States.

A. *Levy*'s Three-Prong Equal Protection Test

The *Levy* test is simple, self-evident, and, unlike the unworkable concoctions of *Roe* and *Casey*, easily applied. Naturally, any individual who is a living member of the human species qualifies.

This simple test hails back to what the primary framer of the Fourteenth Amendment, Representative John Bingham, referred to when he spoke of the amendment as a method of protecting "the rights which pertain…to common humanity" and is a recognition of what Representative James Brown stated in the Congressional debate on the Fourteenth

Amendment: "Does the term 'person' carry with it anything further than a simple allusion to the existence of the individual?" Craddock at 559-60.

1. She is human.

Those who are most integrally involved in the abortion procedure acknowledge – repeatedly – the human nature of the children whose lives they take.[2] In interview and testimonies, these former abortion doctors give detailed explanations of the brutality of abortion. These doctors,[3] some of whom have performed thousands of abortions, no longer speculate about when life begins. And yet this Court has not fully embraced the scientific reality[4] and medical knowledge -- including facts revealed by doctors and nurses who have spent the years since *Roe* and *Casey* working in abortion facilities[5] -- that

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[2] *See* Carole Novielli, Legalized evil: An abortionist's own words reveal the barbarity of abortion (May 21, 2021), available at https://www.liveaction.org/news/legalized-evil-abortionist-words-barbarity-abortion/.

[3] *See* Live Action, Abortion Procedures: What You Need to Know available at https://www.abortionprocedures.com. (In this video series, Dr. Anthony Levatino, a former abortionist, describes abortion's effects on human beings in detail.) *See also* Live Action, Investigation: The Abortion Corporation available at https://www.youtube.com/watch?v=qtgqxvaV-8U&list=PLRCroccSjXWQ8GnImp2CLHSuhsI9j6_TC. (In Video 12, former abortion center manager Sue Thayer reveals that facility workers understood and discussed the humanity of the children they were aborting.)

[4] *See* Live Action, The First 10 Weeks of Human Life, available at https://www.youtube.com/watch?v=cpdY97GOK2I.

[5] Many former abortionists have gone on video record to detail what they know about the humanity of preborn children and what abortion does to a human child. For example, Dr. Patti

makes clear the humanity of children in the womb. These facts lead to a crystal-clear conclusion that *Levy* must supersede and, by application, overturn *Roe* and *Casey*.

Under the standards of *Roe* and *Casey*, preborn children of all ages – viable and nonviable – have been classed as property; "non-person" entities without rights or recourse; beings to be disposed of at will. This is particularly egregious since the federal government and the majority of states can and do prosecute anyone other than a mother or abortion worker for intentionally taking the life of a preborn child. Fetal homicide laws in the U.S. Code and 38 states[6] treat preborn children – viable and nonviable

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Giebink acknowledges: abortion is "killing your baby." Former Abortionist Becomes Pro-Life - A Conversation with Patti Giebink, available at https://www.youtube.com/watch?v=UZd3eHZhlmY. Dr. Anthony Levatino admits: "I ripped out a baby's arm;" "All I could see was somebody's son or daughter." A Conversation with a Former Abortionist: What changed your mind?, available at https://www.youtube.com/watch?v=TYia8SrfqQk. Dr. Leroy Carhart explains: "We would try to induce you to just deliver the baby" [after a shot of poison to the baby's heart], but if anything goes wrong, "then we have to take them out in pieces." Inhuman: Undercover in America's Late-Term Abortion Industry - Carhart, available at https://www.youtube.com/watch?v=GIlYXmG287g. Dr. Kathi Aultman testified: "I realized that the baby was the innocent victim in all of this, and the fact that it was unwanted was no longer enough justification for me to kill it." Abortion no more: Dr. Kathi Aultman shares why she became pro-life, available at https://www.youtube.com/watch?v=nfWLEKa1AqM.

[6] *See*, for instance: Ala. Code § 13A-6-1 (2006); Ariz. Rev. Stat. Ann. § 13-1102, § 13-1103, § 13-1104 and § 13-1105; Idaho Code § 18-4001, § 18-4006 and § 18-4016 (2002); Ill. Rev. Stat. ch. 720 § 5/9-1.2, § 5/9-2.1 and § 5/9-3.2; Kan. Stat. Ann. § 21-5419; Mich.

– as unique human beings who are protected against another human being's taking of their life. But, for purposes of abortion only, due to this Court's jurisprudence, these same children are discriminated against and treated differently from all other human beings. There is no other group of humans whose lives may indiscriminately, intentionally, and violently be taken by a certain other group of humans.

Prior to *Roe* and *Casey*, federal courts understood the humanity of the preborn child. "From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as human being, but as such from the moment of conception which it is in fact." *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D.D.C.1946). Judicial recognition of due process rights in preborn children was recognized by this Court not long after the ratification of the Fourteenth Amendment, both in *McArthur v. Scott*, 113 U.S. 340 (1884) and also in *Union Pacific R. Co. v. Botsford*, 141 U.S. 250 (1891). In *Botsford*, this Court ruled that the death penalty could not be carried out on a pregnant woman until after her child was born, due to the child's own inherent, natural right to life as a human being.

Since *Roe* and *Casey*, many states and the federal government have enshrined into law the scientific reality of when human life begins. For example, Oklahoma defines an "unborn child" in 63 Oklahoma Statutes § 63-1-730(A)(4) as: "the unborn offspring of

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Comp. Laws Ann. § 750.322; Miss. Code Ann. § 97-3-37; Pa. Cons. Stat. Ann. tit. 18. § 2601 et seq.

human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus." Kentucky defines an unborn child as "a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency." Ky. Rev. Stat. § 507A.010. Pennsylvania defines "unborn child" and "fetus" as one and the same: "Each term shall mean an individual organism of the species homo sapiens from fertilization until live birth." 18 Pa. C.S. S. 3203. According to a section of United States Code entitled "Protection of unborn children," an unborn child is "a member of the species homo sapiens, at any stage of development, who is carried in the womb." 18 U.S.C. § 1841 (d).

And yet, because of *Roe* and *Casey*, these same states -- while also uniformly treating the preborn as "persons under criminal, tort, and property law"[7] -- cannot equally protect a preborn child from abortion, whether the legislatures attempt to provide protection like Mississippi, or even when a parent attempts to raise the preborn child's rights. In *Doe v. Hunter*, a preborn child's father raised an equal protection claim on his daughter's behalf, asking for a declaratory judgment that the child has the right to remain alive and prevent an abortion from stripping her of that right. *See Doe v. Hunter*, No. 19-5005 (10th

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[7] *See* Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 Issues L. & Med. 185, 186 (2010); Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, 33 Wm. Mitchell L. Rev. 766 (2007).

Cir. 2019).[8] The State of Oklahoma agreed that "Baby Jane" was a human being, but asserted it was compelled against its will, by *Roe* and *Casey*, to uphold the right to abortion above the preborn child's right to be protected from intentional killing and loss of bodily integrity. *See* Brief for Appellees Mike Hunter and Kevin Stitt, *Doe v. Hunter*, No. 19-5005 (10th Cir. 2019), Document: 010110156144 at p.1, 3, available at https://ecf.ca10.uscourts.gov/n/beam/servlet/TransportRoom (last visited July 26, 2021) Ironically, the Tenth Circuit found a lack of Article III standing for Baby Jane to defend her right to life under the Fourteenth Amendment; whereas this Court last year continued to allow abortion corporations like Planned Parenthood to have standing on behalf of their patients to uphold constitutionally-dubious abortion rights. *See June Med. Servs. v. Russo,* 591 U.S. __ (2020).

It is almost too obvious to recall, again, that dark era from *Plessy* to *Lochner* when corporations were treated by this Court with greater human dignity than living human beings.

Roe and *Casey* not only defy basic humanity, but also basic science. *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773-74 (8th Cir. 2015). The Eighth Circuit spoke of the "advances in medical and scientific technology [that] have greatly expanded our

[8] The decision in *Doe* was marked by the Tenth Circuit as "not binding precedent," and is available at https://cases.justia.com/federal/appellate-courts/ca10/19-5005/19-5005-2019-12-06.pdf?ts=1575666114).

knowledge of prenatal life," citing *Hamilton v. Scott,* 97 So.3d 728, 742 (Ala.2012) (Parker, J., concurring specially). *MKB Mgmt. Corp.*, 795 F.3d at 774. Each preborn child is *human* from her earliest creation, inside the womb of her mother.[9] Science – and common sense – informs us that a human mother can only conceive other members of the human species in her womb. The unique human being mothers and fathers meet in the delivery room, is the same human being who previously lived and grew within the protective walls of her mother's womb, and she is fully human at each moment.

2. She is alive.

The second prong of *Levy* is a clear determination: the Fourteenth Amendment's Equal Protection Clause applies to human beings who are living.

3. She has her being.

The third prong of the *Levy* test is perhaps the easiest to meet for the preborn child. Under common law, a "life in being" means one who is in existence for the purpose of establishing legal rights and privileges. In 1885, this Court held in *McArthur v. Scott*, 113 U.S. 340 (1885) that preborn children *in utero* are "in being" under the rule against perpetuities, and therefore may be entitled to

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[9] South Dakota Task Force to Study Abortion, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), available at http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf.

inheritance. *See* Craddock at 567. We discussed *supra* how the majority of states recognize that preborn children have legal recognition, rights, and privileges in criminal, property, and tort law. The federal government also recognizes this, particularly in the Unborn Victims of Violence Act. *See* 18 U.S.C. § 1841 and 10 U.S.C. § 919(a).

Moreover, to have one's "being" means to be a unique individual; to be an original, made of unrepeatable DNA. The nature of "being" is inherent in every human being.

In 2005, The South Dakota Task Force on Abortion submitted a report to their governor and legislature, extensively detailing the scientific proof of the humanity and separate, unique life of preborn children. *See* South Dakota Task Force to Study Abortion, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), available at http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf. Based on testimony from expert geneticists and embryologists, the Task Force agreed, "[t]here can no longer be any doubt that each human being is totally unique from the very beginning of his or her life at fertilization." *Id*. at 25.

The Task Force quoted extensive testimony from Dr. David Fu-Chi Mark,[10] a nationally celebrated molecular biologist. Dr. Mark testified:

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[10] Dr. Mark has patented various polymerase chain reaction (PCR) techniques, been awarded Inventor of the Year in 1986

> A] human being at an embryonic age and that human being at an adult age are naturally the same, the biological differences are due only to the differences in maturity. Changes in methylation of cytosine demonstrate that the human being is fully programmed for human growth and development for his or her entire life at the one cell age.

Id. at 22.

After reviewing the report of the South Dakota Task Force, the Eighth Circuit agreed that laws dealing with a preborn child as a separate, unique, living human being are scientifically accurate. *See Plan. Parent. Minn. v. Rounds*, 530 F.3d 724, 737 (8th Cir. 2008). Decades ago, this Court recognized the "law is presumed to keep pace with the sciences and medical science…" *Bonbrest*, 65 F. Supp. at 143.

Though science precisely shows the reality that preborn children are unique, unrepeatable, human individuals in and outside the womb, judicial precedent has not kept up, constantly citing *Roe* and *Casey* as barriers to the equality of all human persons.

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for patenting Human Recombinant Interleukin-2 Muteins, which treats kidney and skin cancer, has developed an internationally marketed drug to treat Multiple Sclerosis, and is known for his work in DNA cloning, in vitro modification of DNA, and DNA sequencing.

B. *Roe* and *Casey* collapse under *Levy*.

Roe and *Casey* collapse as they fail the powerful test of *Levy* that would otherwise "protect each one of us impartially, embodying the belief that all are equal" "because of their status as human beings" and enshrine as a cornerstone of law "the belief that human life is inherently valuable and worthy of protection." *See* Gorsuch at 159.

To be a person – as distinguished from being a citizen – for purposes of the Equal Protection and Substantive Due Process Clauses of Fourteenth Amendment, is to be a living, human being; to be a unique individual who belongs to the human race. Nothing more is required, but only this Court can make the legal reality clear by affirming that *Levy* confirms the inherent rights of all human children.

In *Roe*, this Court insisted that *if* "[the] suggestion of personhood is established, [Jane Roe's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." *Roe*, 410 U.S. at 156-157.

Indeed it does collapse under the straightforward test of personhood set forth in *Levy*. *Levy* is founded on clear judicial thinking that actually stretches back much earlier than *Roe* to Chief Justice Marshall's pre-Fourteenth Amendment holding in *United States v. Palmer*, 16 U.S. 610 (1818), which affirmed "person or persons" was broad enough to include "every human being" and "the whole human race." *Id.* at 631-32.

C. *Levy* is "Evenhanded, Predictable, and Consistent."

Levy's three-prong test affirms that human rights are not conditioned on a person's age or physical status. Instead, being both inherent and unalienable, basic rights recognized by the Fourteenth Amendment attach to every human being at the earliest moment of her existence. As the Declaration of Independence states, men [and women] are "created equal," not born equal. To be created equal is at the root of every American story; a silver thread we each can trace, but one that this Court must clearly recognize as *Levy* lays out in its simple, three-prong test.

Levy ensures that our nation evenhandedly embraces the core of the Equal Protection Clause: every living human being is protected equally under the law. Every human being's life is protected against all, not only against some. *Levy* is the predictable "rule of law" and not "the rule of the strong" decried by this Court in *McGirt v. Oklahoma*, 591 U.S. __, __ (2020) (slip op. at 28).

Recognizing *Levy* as the best precedent in abortion jurisprudence and the precedent that underlies the foundation of what it means to be a person for purposes of the Equal Protection Clause will resolve national confusion and draw a bright line standard that will prevent innumerable cases on the issue of abortion from constantly clogging up the judiciary. Abandoning *Roe* and *Casey* is the right course of action, but adopting *Levy* clears a path to walk forward. *Levy*'s simple, objective standard for

personhood provides a sanctuary of equal protection under the Fourteenth Amendment for all children, born and preborn, born in wedlock or otherwise, and indeed for all living human beings regardless of their class, age, race, sex, ethnicity, or national origin. By adopting *Levy*, much-needed clarity, consistency, and uniformity will be brought to the contentious national issue of abortion.

D. *Levy* Ends Discrimination and is the Next Step Forward for a Civilized Society.

Levy struck down as unconstitutional state laws that burdened or disadvantaged children. Decades after *Roe* and *Casey*, preborn children are routinely disadvantaged in law and targeted for discrimination. In similar circumstances, when a class of human beings is consistently treated as "less than" and in a blatantly inequal manner, this Court has overruled former precedent that allows such treatment. No better example stands than that of *Brown v. Board of Education*, 347 U.S. 483 (1954).

As Mississippi contends, *Roe* and *Casey* are egregiously violative of constitutional rights and original meaning. We strongly agree. These precedents target a discrete class of human beings, preborn children, as unqualified for, and undeserving of equal protection. Alternatively, *Levy* affirms that all living human beings have the equal right to life and bodily integrity.

After overturning *Roe* and *Casey*, this Court will have the opportunity to give lower federal courts a

roadmap for equally applying the inherent rights of personhood. In an unpublished opinion in *Doe v. Hunter*, the Tenth Circuit recognized that an equal protection violation exists when the law denies equal treatment to a human being. *See Doe*, No. 19-5005 at p. 10 [link available in n.8]. Yet, though the court agreed the preborn child, "Baby Jane," had successfully asserted an equal protection injury, it simultaneously held that the injury could not be traced to the government because the government was following *Roe* and *Casey*: "it is apparent that Doe's real quarrel is with *Roe* and *Casey*." *Id.* at p. 11. This denial of standing left Baby Jane with no opportunity to remedy her rights or reach a ruling that she had the right to remain alive.

Neither arbitrary milestones nor developmental and age requirements should mar the justice of law that demands every human being inherently possesses her own natural right to life. No judicial precedent should grant another human being the ability to strip life and bodily integrity from another innocent individual at will. The protection of innocent human life is the basis of countless laws in the United States and of all 50 states' criminal codes. Yet this general foundation of just law has been subverted by decades of applying *Roe* and *Casey*, which force states to treat children who are preborn as a separate class of human beings who cannot be protected equally.

In *Doe*, the Tenth Circuit opened the spigot of sound reasoning by finding something *Roe* and *Casey* deny: a preborn child, as a member of the human family, is covered under equal protection jurisprudence. While the Tenth Circuit denied *Doe*'s

appeal due to the traceability issue rooted in *Roe* and *Casey*, the Court wrote: "Doe's averments that she is being discriminated against and denied the same protections as born human beings and other unborn human beings sufficiently allege an injury in fact." *Id*. at p. 10. This Court must turn the faucet on full-blast and contend with the unworkable and costly standards of *Roe* and *Casey* still applied by the Tenth Circuit to deny Baby Jane standing in *Doe*. Justice cannot allow a child to be injured through a deprivation of her equal protection rights and yet have no recourse.

This Court has consistently shown its willingness to choose justice over tired, unworkable precedent as it overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896) sixty years later, *Bradwell v. The State*, 83 U.S. 130 (1872) nearly 100 years later, and *Apodaca v. Oregon*, 406 U.S. 404 (1972) 48 years later, even despite this Court's consistent reaffirmation of *Apodaca* for decades, as Justice Alito laid out in his *Ramos* dissent. *See Ramos v. Louisiana*, 590 U.S. __, ___ (2020) (slip op. at 67-68). "[T]he magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, 591 U.S. __, __ (2020) (slip op. at 38), and this is even more true when the legal wrong daily leads to death for helpless human children. "To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *Id*. at 42. As Justice Gorsuch wrote in *Ramos* "[i]t is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right." *Ramos*, 590 U.S. (slip op. at 29).

This Court has consistently been willing to both strike down government discrimination against a particular class of human beings and overturn its own precedent that discriminated against a particular class. *See Brown v. Board of Education*, 347 U.S. 483 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Korematsu v. United States*, 323 U.S. 214 (1944); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hernandez v. Texas*, 347 U.S. 475 (1954). Just as *Plessy* was scrutinized under the bright light of original Constitutional intent, new evidence, and modern sensibilities brought to it by *Brown*, so too must *Roe* and *Casey* be scrutinized.

Roe and *Casey* can only continue if this Court is prepared to say, as it once did in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), that some groups of human beings are outside the moral, protected community of all other human beings; that some classes of humans amount to nothing more than "property" under the Constitution. *See id.* at 395.

Roe and *Casey* are irreconcilable with equal protection jurisprudence. Their overturn would be a watershed civil rights victory in the making of *Brown*. When it is discovered that a precedent allows targeted and continued discrimination against a class of human beings, this Court overrules, almost without fail. "[W]e have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Levy*, 391 U.S. at 71 (internal citations omitted).

And indeed, human beings have been discriminated against and viewed as "non-persons" throughout history, usually based on characteristics beyond their control. Dr. William Brennan, a doctor of sociology and a professor in the St. Louis School of Social Service, has researched seven specific "victimized groups," selected due to the historic record of extensive oppression committed against them -- generally by governments -- and he conducted an analysis explaining how each group was subjected to "a universal set of dehumanizing designations," including "non-person." *See* William Brennan, *Dehumanizing the Vulnerable: When Word Games Take Lives* (1995). Here is a portion of the list Dr. Brennan compiled:

> African Americans: "A subordinate and inferior class of beings" (U.S. Supreme Court, 1857); "The negro is not a human being" (Bucknor Payne, Publisher, 1867); "The negro is one of the lower animals" (Professor Charles Caroll, 1900); "They are parasites"(Dr. E.T. Brady, 1909); "Free blacks in our country are… a contagion" (American Colonization Soc., 1815-30); "A negro of the African race was regarded… as an article of property" (U.S. Supreme Court, 1857); "The negro race is… a heritage of organic and psychic debris" (Dr. William English, 1903); "In the eyes of the law…the slave is not a person" (Virginia Supreme Court decision, 1858).
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> Dependent Discards: "A life… devoid of those qualities which give it human dignity"

(Assessment of a child with disability, Dr. Harry Hartzell, 1978); "No newborn human should be declared human until it has passed certain tests" (Dr. Francis Crick, 1978); "Until a living being can take conscious management of life… it remains an animal" (Prof. George Ball, 1981); "That's a real parasite" (Medical staff characterization of a debilitated patient, 1989); "New-born humans are neither persons nor even quasi-persons" (Philosopher Michael Tooley, 1983).

Native Americans: "An Indian is not a person within the meaning of the Constitution." (George Canfield, Am. Law Rev., 1881); "Indians [are] inferior to the Anglo-Saxon." (Henry Clay, Sec. of State, 1825); "The Indian…is an untamable, carnivorous animal." ((Dr. Joseph Nott, 1847).

Soviet Enemies: "Unpersons who had never existed." (Designation for people purged by the Soviet government); "[Gulag slave laborers are] raw material." (Author Maxim Gorsky, 1934).

European Jews: "Jews are undoubtedly a race, but not human." (Adolf Hitler, 1923);"The Reichsgericht itself refused to recognize Jews…as 'persons' in the legal sense." (German Supreme Court, 1936).

Women: "The statutory word 'person' did not in these circumstances include women." (British voting rights case, 1909).

> Unwanted Unborn: "The fetus, at most, represents only the potentiality of life" (U.S. Supreme Court, 1973); "Like… a primitive animal that's poked with a stick" (Dr. Hart Peterson on fetal movement, 1985); "The fetus is a parasite" (Professor Rosalind Pollack Petchesky, 1984); "The word 'person,' as used in the 14th Amendment, does not include the unborn" (U.S. Supreme Court, 1973).

Id. at 128-29.[11]

When this Court realizes that a class of human beings are not receiving the equal protection of inherent rights guaranteed by our Constitution to every human being, it extends the protection of the Constitution to them. That is what the Supreme Court can do today for preborn human children by applying the *Levy* standard and ending an invidious discrimination that has been perpetrated since 1973.

E. *Levy* is a Proper Interpretation of the Constitution That Can Be Equally Applied Across the Nation.

Justice Frankfurter explained, "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves v.*

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[11] A chart by Dr. William Brennan showcasing these and other terms of dehumanization is available online at www.issues4life.org/pdfs/languageofoppression.pdf.

New York ex rel. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring). Justice Douglas wrote that *stare decisis* in constitutional law is "tenuous" where a prior decision conflicts with the Constitution itself. William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949). Justice Black concluded, "A constitutional interpretation that is wrong should not stand." *Connecticut General Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting). Chief Justice Roberts similarly wrote that *stare decisis*' "greatest purpose is to serve a constitutional ideal – the rule of law." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 378 (2010) (Roberts, C. J., concurring). In a concurring opinion citing multiple decisions by this Court, Justices Souter and Kennedy wrote of the precedential support and "practical sense" of overruling some prior precedents: "In prior cases, when this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent." *Payne v. Tennessee*, 501 U.S. 808, 842-44 (1991) (internal citations and footnotes omitted).

Justice Kavanaugh explains it well:

> In constitutional cases…the Court has repeatedly said—and says again today—that the doctrine of *stare decisis* is not as "inflexible." The reason is straightforward: As Justice O'Connor once wrote for the Court, *stare decisis* is not as strict "when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling

> our prior decisions." The Court therefore "must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*." It follows "that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent."

Ramos v. Louisiana, 590 U.S. __, __ (2020) (slip op. at 39-40) (Kavanaugh, J., concurring in part) (internal citations omitted) (emphasis in original).

This Court is now in a position to abandon the errors of *Roe* and *Casey*, and to finally clarify that the Fourteenth Amendment prohibits any state from sanctioning the intentional killing of a living, human being. A recognition of *Levy* as better precedent recognizes the human dignity of all human beings; fulfilling the original meaning of the Fourteenth Amendment and limiting the breadth of individuals' choices only insofar as they damage another living human being's rights. As law always does, when one person's choice invades rights that belong to another human being, that choice must necessarily be limited.

As this Court has explained, the guarantee of "equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo*, 118 U.S. at 369. Equal Protection doctrine precludes states and the federal government from purposely excluding certain classes of humans from the basic protection of its laws, including the rights to life and bodily integrity,

and there should be no daylight between the judiciary, States, the federal government, and the Constitution when it comes to the equality of fundamental rights across the nation. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). No human person ought to be "locked in the limbo of uncompensable wrong" as the aborted preborn child is today. *Bonbrest*, 65 F. Supp. at 241.

Justice and equality are greater than precedent, especially when an erroneous precedent that is egregiously wrong can be replaced with one that is constitutionally sound and nationally uniform. *Roe* and *Casey* should be overruled because they are "manifestly absurd [and] unjust," and therefore, not "*bad law*" but "*not law*." 1 William Blackstone, *Commentaries on the Laws of England in Four Books*, 70 (1753) (emphasis in the original).

The original meaning of the Fourteenth Amendment included a recognition that unalienable rights should be equally protected for every living member of the human race throughout the nation. The framers set out not only to protect former slaves, but also to simultaneously create a framework that would dissolve the bands of oppression for any future class of human beings who would be invidiously discriminated against. If *Roe* and *Casey* continue to control in the face of modern scientific fact, new medical discoveries, basic humanity, and new law, "[t]he equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 542 (1942).

There is no constitutionally sufficient justification for continuing to deny the equal protection of the law and the substantive rights to life and bodily integrity to all human children. This innately belongs to them as members of the human race and must be guarded by a just government.

CONCLUSION

In this Court's most recent abortion case, *June Med. Servs v. Russo*, 591 U.S. __ (2020), three Justices wrote that Louisiana did not ask for a reassessment of *Casey*.[12] Mississippi has directly asked for a reevaluation and an overturn of *Casey* and *Roe*. *Amici* agree, asking this Court to choose *Levy* in their place.

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[12] Justice Kavanaugh in a footnote in his dissent: "The State has not asked the Court to depart from the *Casey* standard." *June*, 591 U.S. __ (2020) (slip op. at 137, n.30) Justice Alito in his dissent: "Unless *Casey* is reexamined—and Louisiana has not asked us to do that—the test it adopted should remain the governing standard." *Id.* (slip op. at 85). Chief Justice Roberts, concurring: "Neither party has asked us to reassess the constitutional validity of [*Casey*]." *Id.* (slip op. at 49).