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* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONERS

Scott W. Gaylord, Ph.D
201 North Greene Street
Greensboro, NC 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS[1]

CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to promoting a Culture of Life, believing that "[t]he ultimate test of [a Nation's] greatness is the way [it] treat[s] every human being." Pope John Paul II, Farewell Message at the Detroit Airport, September 19, 1987 (available at https://www.priestsforlife.org/magisterium/87-09-19 popejohnpaulusa.htm). Given its educational mission and its focus on the dignity of the human person, CVEF is concerned about the Court's ongoing reliance on viability, a wholly arbitrary and varying developmental marker, to divest States of their authority to prohibit abortion pre-viability. As Justice White explained in *Thornburgh*, "[t]he State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting). *Roe* and its progeny "neglect[ed a] restrained conception of the judicial role … [and] seize[d] for [the Court] a question the Constitution leaves to the people, at a time when the people [were] engaged in a vibrant debate on that question. And [they] answer[ed] that question based not on

---

[1] Each party consented to the filing of this amicus brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

neutral principles of constitutional law, but on [their] own" understanding of when human life begins. *Obergefell v. Hodges*, 576 U.S. 644, 687-88 (2015) (Roberts, C.J., dissenting). CVEF, therefore, comes forward to support the right of States to restrict abortion pre-viability.

SUMMARY OF ARGUMENT

In *Casey*, the plurality acknowledged that "a decision without principled justification would be no judicial act at all." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865 (1992). The Court confirmed this view in *Knick v. Township of Scott*, where the Court overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) because that decision "was not just wrong. Its reasoning was exceptionally ill founded…." 139 S.Ct. 2162, 2178 (2019).

A detailed reconstruction of the majority's reasoning in *Roe v. Wade*, 410 U.S. 113 (1973) reveals that its central argument in favor of viability is predicated on at least seven informal fallacies and one formal fallacy. Such defective reasoning does not logically support the Court's contentious conclusion—that the Constitution precludes States from prohibiting abortion prior to viability. Thus, this Court should return the authority to regulate abortion to the States because *Roe*'s defense of viability is "no judicial act at all." *Casey*, 505 U.S. at 865.

ARGUMENT

Given the ongoing controversy surrounding abortion, *Roe* remains one of the most divisive

decisions in the Court's catalog of privacy cases. Just the mention of *Roe* stirs deep-seated political, religious, and moral reactions from those on all sides of the abortion debate. Among other things, *Roe* introduced a novel framework into the Constitution and the Court's privacy cases—trimesters, viability, and a sliding scale of interests subject to different levels of scrutiny at different points during gestation. Because none of these concepts was express in the architecture of the Constitution or the Court's precedents, the majority fashioned an ad hoc argument for its holding in *Roe*. The protracted series of premises and sub-conclusions, which span 17 pages in the U.S. Reports, was meant to prove that the Constitution prohibits States from banning abortion pre-viability.

The Court's argument does not accomplish its desired end. In what follows, CVEF reconstructs *Roe*'s central argument, critically analyzing the main premises and conclusions in the order set out in the majority's opinion. This detailed review demonstrates that *Roe*'s argument is predicated on multiple fallacies that do not logically support the viability standard. Given the errors in the majority's line of reasoning, *Roe* is properly viewed as an act of force or will, not legal judgment. *See* The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (explaining that the judiciary has "neither FORCE nor WILL but merely judgment"). It is a decision "without principled justification" and should be rejected, returning the abortion debate to the States. *Casey*, 505 U.S. at 865.

1. Roe claims the right to choose an abortion at any stage of pregnancy. *Roe*, 410 U.S. at 129, 153.

This is a factual premise. Roe asserts that the Constitution protects a broad right to abortion, one that leaves the decision to the woman throughout the pregnancy.

After introducing this premise, the Court provides an overview of the history of abortion regulations. This history of abortion, which starts with the Persians and Greeks, is meant to inform the reader "that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage … deriv[ing] from statutory changes effected, for the most part, in the latter half of the 19th century." *Id.* at 129. The extensive criticisms of this historical account are not explored here because the Court's history, which (even if correct) would support state bans from at least quickening, does not drive the Court's legal argument supporting its novel viability standard.

2. Texas alleges that it has a duty to protect the fetus, which is a human life. *Id.* at 150.

This is another undisputed factual premise. Texas contends that "a new human life is present from the moment of conception," thereby triggering its right and obligation to protect that human life. *Id.* Whereas the Court accepts the first premise without modification, the Court amends (and weakens) Texas's claim. Instead of addressing whether a fetus is a human life—a claim that the Court will later say is beyond the scope of human

knowledge—the Court substitutes "potential life" for "human life," treating the two terms as equivalent. The Court then uses its preferred term "potential life" (or "potential human life") throughout the rest of the opinion.

The Court's shift in terminology is subtle but significant. As is frequently the case with the fallacy of equivocation, the more subtle the shift in meaning, the more persuasive the informal fallacy. The Court suggests that it is doing Texas a favor, adopting the "less rigid claim" that Texas has an interest in potential life. The Court indicates that this change does not matter because either claim—that the fetus is a "human life" or only a "potential human life"—enables a State to "assert interests beyond the protection of the pregnant woman alone." *Id*. Yet the two terms are not the same, and the Court never justifies the shift in terminology. A potential human life is *not* an actual human life. The latter *is* human; the former *might be* human at some undisclosed point in time. This is why Texas claims a compelling interest in an actual human life while the Court affirms only a legitimate interest in a potential life.

The majority equivocates, taking similar words to be the same (even though they are not) and using its preferred term in different ways in the course of its protracted argument. While States may have an interest in both a potential human life and a human life, the fact that the State's interest in a potential human life is "less rigid" tilts the conceptual playing field in favor of the Court's ultimate conclusion—that the right of a pregnant woman outweighs Texas's interest in a potential human life. But, as discussed in step 8 below,

there is no scientific question concerning the status of the fetus for (as many *amici* demonstrate) the embryo, and *a fortiori* the fetus, is a unique human life. Thus, the Court's shift in terminology seeks to deny the humanity of the fetus by *ipse dixit*.

3. This case involves "these interests, and the weight to be attached to them." *Id.* at 152.

The Court frames the case through the lens of these competing interests, thereby requiring the Court to determine the proper weights of each. As noted, though, the Court does not start with the balance set to zero. Through its equivocation in step 2, the Court assumes that the fetus is only a potential human life without providing any argument about the humanity or potentiality of the fetus. This ensures that the calibration is off, that the scale is skewed in favor of the woman (an actual human life), which becomes evident throughout the rest of the opinion.

4. "The right of privacy [under the Fourteenth Amendment] … is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

The Court asserts that a woman has a right to choose based on its prior privacy cases. The strength of this conclusion rests on the strength of the analogy between abortion and these other privacy decisions. Although the majority simply proclaims this premise, it implicitly reasons as follows. The Constitution safeguards privacy in making specific decisions—marriage, procreation, contraception, family relationships, child rearing,

and education. These privacy precedents all involve personal, intimate decisions that, if not protected under the Constitution, would impose hardships on the individuals involved. Abortion also involves a personal, intimate decision that, if left unprotected, would impose a "detriment" that is "apparent." *Id.* The Court then lists some of the "specific and direct harm[s]" that threaten women if the Constitution does not protect abortion. *Id.* Thus, the Constitution also protects the abortion decision (at some level).

The problem is that the Court has relied on the ordinary language fallacy known as weak analogy. Because none of the Court's prior privacy cases involved the termination of another human life, the analogy between abortion and the privacy cases does not (without more) support the conclusion. As the Court subsequently acknowledges in passing, abortion is *sui generis*. *Id.* at 159. It involves the intentional termination of another human life. Consequently, even if the Court is correct about the harms to a woman who is precluded from choosing abortion, a fetus is killed. No such destruction of another human life is present in the marriage, procreation, contraception, child rearing, or education context. Thus, the Court's privacy cases do not *ipso facto* establish a right to terminate a pregnancy.

5. "[T]he right of personal privacy includes the abortion decision, but … this right is not unqualified and must be considered against important state interests in regulation." *Id.* at 154.

The Court rejects Roe's claim that the abortion right is absolute. Given that States "may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life, … these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.* At some point, "the state interests as to protection of health, medical standards, and prenatal life, become dominant." *Id.* at 155.

This premise provides the foundation for the court's trimester framework. The court asserts that the weighting of the competing interests varies as the pregnancy progresses. The Court, therefore, must specify (and justify) the particular points during gestation at which the relative interests shift. Given that *Casey* subsequently rejects the trimester structure but retains viability, the question presented in this case deals only with viability.

6. If the fetus is a person, "the appellant's case, of course collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." *Id.* at 156-57.

This premise is important to the Court's analysis because Texas contends that the fetus is both a person and a human life. As the Court

notes, if established, the personhood of the fetus would be dispositive. The Fourteenth Amendment guarantees due process to persons. If the fetus is a person, then the Fourteenth Amendment extends due process protection to the fetal life, and abortion is unconstitutional. The Court responds in two ways. First, as discussed in step 7 below, the Court contends that the fetus is not a person for Fourteenth Amendment purposes, thereby implying that abortion is constitutional. Second, the Court ultimately concludes that abortion is constitutional, which means that (if the Court's argument is sound, which it is not) the fetus is not a person via *modus tollens* (if A, then B; not B; therefore, not A). Although the majority never expressly completes the *modus tollens* argument in its opinion, it follows necessarily from this premise and the Court's conclusion that the Constitution safeguards the abortion decision.

7. The fetus is not a person. *Id.* at 158.

Recognizing how important the preceding premise is to the overall argument, the majority proffers three reasons why it does not believe the fetus is a person under the Fourteenth Amendment. At the end of the majority's discussion of personhood, the Court acknowledges that even if it could prove that the fetus is not a person, that by itself would not establish that abortion is constitutional. *See id.* at 159 ("This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations."). The fact that a particular sufficient condition for a conclusion is false does not mean that the conclusion is false. There may be

another sufficient condition that is true and that supports the conclusion.

Yet the Court spends several pages trying to convince the reader that the antecedent is false (*i.e.*, to prove that the fetus is not a person). The Court's arguments against fetal personhood are rhetorically powerful and are designed to reinforce the Court's holding that abortion is constitutionally protected. Denying the antecedent, however, is a formal fallacy and *does not* establish the Court's conclusion that abortion is constitutional. Moreover, the Court's arguments relating to the personhood of the fetus are not persuasive.

> **7a.** "**[A]ppellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.**" ***Id.*** **at 157.**

This one-sentence observation is meant to cast doubt on the personhood of the fetus. Without more, however, the observation does not support either party. This concession tells us, at most, that prior to *Roe* the Court had not decided the issue. The Court notes that more recent lower court "results are divided" regarding the constitutionality of abortion regulations. *Id*. at 155. But all this does is confirm that the issue remains unresolved. And any suggestion that the lack of a case holding that a fetus is a person supports the Court's conclusion introduces another informal fallacy—an appeal to ignorance—implying a definite conclusion (that the fetus is not a Fourteenth Amendment person) based on the fact that something has not

yet been proven (the lack of cases finding that the fetus is a person). Whatever conclusions lower courts have reached, it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Court must argue to its conclusion, not simply cite to lower court cases (or the absence of such cases) that reach a particular result.

The lack of court cases, therefore, does not resolve the question to be decided. The Court's observation suggesting the contrary is neither inductively strong (because there are no Supreme Court cases resolving the prenatal personhood issue) nor deductively valid. This probably explains why the Court turns from this observation to the text of the Constitution and past practice.

7b. The Court contends that "person" does not include a fetus because, as used in various provisions in the Constitution, the term "has application only postnatally." *Roe*, U.S. at 157.

The Court concedes that its quick excursion into constitutional interpretation does not conclusively resolve the personhood issue: "None [of these constitutional provisions using 'person'] indicates, *with any assurance*, that it has any possible prenatal application." *Id.* (emphasis added). Of course, none of the provisions the Court cites conclusively establishes that the fetus is not a person or that the Constitution as originally enacted even attempted to address the status of the fetus. The seven Articles of the Constitution established and limited the federal government.

The lack of safeguards for individual rights was addressed through the Bill of Rights, restricting the federal government's exercise of its authority and reserving other powers to the States. *See* The Federalist No. 45, at 292 (J. Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."). *Roe*'s own abortion history reveals that States took these reserved powers to include the authority to regulate and even ban abortion. Connecticut banned abortion after quickening in 1821 and extended the ban to non-quick fetuses in 1860. *Roe*, 410 U.S. at 138. In 1828, New York prohibited the termination of the fetus at any stage but imposed differing penalties depending on whether the fetus was quick. Texas enacted the precursor to the law at issue in *Roe* in 1857, and "[b]y the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion." *Id.* at 174-75 (Rehnquist, J., dissenting). After ratification of the Fourteenth, many more States passed legislation banning or restricting abortion, such that "[b]y the end of the 1950's a large majority of the jurisdictions banned abortion … unless done to save or preserve the life of the mother." *Id.* at 139.

Moreover, prior to the adoption of the Fourteenth Amendment, the medical understanding of the fetus changed significantly, as the 1859 report of the AMA Committee on Criminal Abortion demonstrated. *Id.* at 141. Thus, contrary to *Roe*, one might contend that the shift toward greater protection of the fetus in the

nineteenth century was embodied in the Fourteenth Amendment. At a minimum, though, the "lack of any assurance" does not establish that the fetus is not a person, especially given that the Court does not undertake any effort to determine what the term 'person' meant at the founding or at the ratification of the Fourteenth Amendment.

To strengthen its position, the majority suggests in a footnote that Texas's argument (that the fetus is a person) confronts a "dilemma." *See id.* at 157 n.54. If the fetus is a person, then there are two persons affected by the decision to terminate a pregnancy, and both are entitled to due process. A life exception, like the one granted in Texas, permits a mother whose life is endangered to choose her life over that of the fetus. The Court rhetorically asks whether "the Texas exception appear[s] to be out of line with the Amendment's command." *Id.* The Court also wonders why "the woman [is] not a principal or an accomplice" and whether "the penalties [for abortion may] be different" from the penalties for murder. *Id.*

These are difficult and important questions that highlight the *sui generis* nature of abortion. In the Court's hypothetical, two persons are impacted directly by the abortion decision. The life of one of those persons is in jeopardy. If nothing is done, one or both of the persons will die. The Constitution does not speak to the issue. Instead, Texas and other States provide a life exception, which may be justified in various ways. For example, under double effect reasoning, Texas may believe that it cannot choose between the two (innocent) lives at issue. Given that one will die, the State leaves the decision—whether to pursue treatment to preserve

the mother's life or to carry the baby to term—to the mother. In such a situation, the intent is not to kill the unborn child; the goal is to save the mother's life. That painful and complex decision carries with it an unintended consequence—the death of the child. Double effect reasoning gets its name from there being these two effects, one intended and one not. Under this ethical theory, the death of the unborn person may be permitted provided it is not willed, and the good effect (saving the mother's life) must be sufficiently important to counterbalance the bad effect.

The Court may disagree with this form of ethical argument and believe that a "dilemma" remains. But a Constitution that does not decide between the economic theories of Adam Smith and John Maynard Keynes, would not seem to mandate a particular ethical theory, whether Millian consequentialism, Kantian deontological ethics, or Thomistic natural law. *See Lochner v. NewYork*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."); *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) ("Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."). Consequently, given that there are different ethical theories for addressing the unique moral issues that arise in the abortion context, the Court presents Texas with a difficult problem but a false dilemma. An actual dilemma arises only if the Court adopts an ethical theory that does not permit

a health exception, a theory that Texas does not share and that the Constitution does not mandate.

7c. The fetus is not a person for constitutional purposes because "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." *Id.* at 158.

The majority's use of nineteenth century legal abortion practices is nothing if not innovative. The majority relies on an unbroken pattern from 1821 through 1973 of States enacting abortion regulations (which were more restrictive than *Roe*'s trimester structure) to support a constitutional interpretation that would invalidate most (if not all) of the abortion bans and regulations that States enacted during this 152 year period. Even the Court's preferred period from the early to mid-1800s saw bans on abortion both pre- and post-viability and, therefore, does not support imposing greater restrictions on state abortion regulations through an entirely new, Court-created trimester framework. To the extent that history bears on the abortion question, it strongly suggests that the States had the authority to regulate abortion. *See New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) ("[A] page of history is worth a volume of logic.").

Furthermore, the Court's historical account indicates that the more permissive abortion regulations up through the middle of the nineteenth century were based on a false estimation of when human life begins. By the time the States ratified the Fourteenth Amendment, the

medical understanding of fetal life had changed dramatically. As the Court notes, the AMA Committee's 1859 Report on criminal abortions rejected the earlier common law view that human life began at quickening because it was based on "a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening." *Roe*, 410 U.S. at 141. These earlier beliefs about the fetus were "based, and only based, upon mistaken and exploded medical dogmas" that failed to acknowledge "the independent and actual existence of the child before birth, as a living being." *Id*. As the erroneous nineteenth century assumptions about the fetus were replaced, States adopted more restrictive abortion regulations, providing greater protection for the independent, prenatal human life. Regardless of whether those ratifying the Fourteenth Amendment viewed a fetus as a person, States retained and exercised their authority to regulate abortion.

8. A "pregnant woman cannot be isolated in her privacy" because at some point a State can determine that "another interest, that of health of the mother or that of potential human life, becomes significantly involved." *Id.* at 159.

Although the Court did not mention that abortion is *sui generis* in step 4 above, here the Court acknowledges that its other privacy cases are "inherently different" from *Roe*. *Id*. The unique nature of abortion is what caused the analogy to the Court's privacy cases to be weak, but it is not

until six pages later that the Court recognizes the flaw in that reasoning. Yet instead of trying to strengthen the analogy, the Court shifts its focus back to the weight to be given to the competing interests, avoiding any explication of these inherent differences.

Texas argues that, regardless of the personhood question, human life begins at conception such that the State has a compelling interest in protecting the prenatal human life from that point forward. If the fetus is a human being from conception forward, then there are two human beings affected by the abortion decision. Texas knows that one of the two (the fetus) will be terminated through the abortion procedure and claims a compelling interest in protecting that life (while allowing an exception when the mother's life is in danger so that at least one of the two lives at risk may be saved). Given the State's interests in the health of both the woman and the fetus, the majority concedes that "[t]he pregnant woman cannot be isolated in her privacy." *Id.* To reach the conclusion that abortion is constitutionally protected, though, the Court must explain why the fetus is not a human being such that the States' interest in the fetal human life does not become compelling until viability.

Unfortunately, the Court never answers that critical question. Instead, the Court disclaims the ability to know when human life begins:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive

> at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Id. According to the Court, all that is required, what "should be sufficient," is "to note briefly the wide divergence of thinking on this most sensitive and difficult question." *Id.* at 160.

This response is troubling (and inadequate) for several reasons. First, the Court already equivocated, substituting "the less rigid claim" that the fetus is a "potential life." Throughout its opinion, the majority uses the term "potential life," but the majority imbues its preferred term with at least two meanings. At certain points, the Court suggests that "potential human life" and "human life" are the same, which is why the reader is not supposed to be concerned with the substitution in step 2 above. At others, the potential human life is viewed as a "less rigid" position, as something that is not actually, but only potentially, human. Accordingly, this shift in nomenclature is important because it directly affects the weighting of interests. To properly weigh the competing interests in the abortion context, the Court must determine whether there is an actual human life and then value that life (as well as the State's interest in that life), something the Court never does.

Second, when human life begins is no longer a "difficult question" and does not require the Court "to speculate as to the answer." *Id.* at 159. Science has confirmed what the AMA Committee Report announced in 1859: human life begins at

conception. *See*, *e.g.*, American College of Pediatricians, "When Human Life Begins," March 2017 ("The predominance of human biological research confirms that human life begins at conception—fertilization. At fertilization, the human being emerges as a whole, genetically distinct, individuated zygotic living human organism, a member of the species Homo sapiens, needing only the proper environment in order to grow and develop. The difference between the individual in its adult stage and in its zygotic stage is one of form, not nature.") (available at https://acpeds.org/position-statements/when-human-life-begins); Signorelli et al., *Kinases, phosphatases and proteases during sperm capacitation*, CELL TISSUE RES. 349(3):765 (Mar. 20, 2012) ("Fertilization is the process by which male and female haploid gametes (sperm and egg) unite to produce a genetically distinct individual."); Keith L. Moore, *The Developing Human: Clinically Oriented Embryology* (7th ed.), at 16 (Saunders 2003) ("Human life begins at fertilization, the process during which a male gamete or sperm (spermatozoon) unites with a female gamete or oocyte (ovum) to form a single cell called a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual.").

Third, even if "when life begins" remains an open question—one that medical doctors, philosophers, and theologians disagree on—there is no basis for *the Court* to wade into the fray and answer the question. In fact, in answering this inscrutable question against the backdrop of such uncertainty, the majority once again commits the informal fallacy of appeal to ignorance—reaching a

particular conclusion (that Texas is wrong to assert that human life begins at conception) based on the premise that no one can "resolve the difficult question of when life begins." *Id*. at 159. (The error in reasoning is the same as concluding that astrology is nonsensical based on the premise that people have attempted to provide conclusive proof of the veracity of astrology for hundreds of years without success.) If no one can or does know when life begins, then the Court cannot and does not know whether the fetus (at conception or some other point) is an actual or potential human life. To claim otherwise leaves one to wonder along with Chief Justice Roberts in *Obergefell*, "[j]ust who do we think we are?" *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

In fact, much of what the Chief Justice said in *Obergefell* applies to *Roe*'s analysis of abortion:

> The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent.... [A]s this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." Accordingly, "courts are not concerned with the wisdom or policy of legislation." The majority [in *Roe*] neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people [were] engaged in a vibrant debate on that question.

Id. at 687-88 (citations omitted). The vibrant debate over abortion has remained despite *Roe*'s

constitutionalizing the issue, with States continuing to enact abortion regulations that test the limits of this Court's fractured and confusing abortion precedents. Compare *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (connecting an undue burden with regulations that "prohibit any woman from making the ultimate decision to terminate her pregnancy") (internal punctuation and citations omitted) with *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309 (2016) (taking the undue burden test to require that "courts consider the burdens a law imposes on abortion access together with the benefits those laws confer") and *June Medical Services LLC v. Russo*, 140 S.Ct. 2103, 2133 (2020) (Roberts, C.J., concurring) ("I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided."). In addition, outside the abortion context, many States have expanded the protections afforded prenatal human life, moving away from viability toward a broader recognition of the humanity of the fetus. *See Hamilton v. Scott*, 97 So.3d 728, 737-40 (Ala. 2012) (Parker, J., concurring specially).

This Court, therefore, should take Justice Scalia's admonition in *Casey* and "get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." *Casey*, 505 U.S. at 1002 (Scalia, J., dissenting); *Id.* at 979 (Scalia, J., dissenting) ("The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.").

Finally, the Court states that "[i]t should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question" but does not tell us for what end this "divergence" is "sufficient." *Id*. at 160. The Court invokes the Stoics, certain Jewish denominations, "a large segment of the Protestant community, insofar as that can be ascertained," the common law, some undisclosed number of "[p]hysicians and their scientific colleagues," people in the Middle Ages and Renaissance in Europe, and the Catholic faith. *Id*. at 160. But the question is not whether people have disagreed about the status of the fetus or the onset of human life; the question is when does human life begin (and possibly whether the Court has the authority or competence to make that determination). If the Court's appeal to the views of a variety of people is meant to support its position, it is an appeal to popular opinion, another type of informal fallacy. The fact that various groups have differing views about when life begins does not address the constitutional question: whether a State can ban abortion pre- or post-viability. The Court presents its weighing of interests as a compromise between and among these competing views, yet the Court never explains the weight that should be given to fetal human life or to the States' interest in that life.

9. But "the unborn have never been recognized in the law as persons in the whole sense." *Id*. at 162.

Despite the fact that in 1973 Texas and a majority of other States banned abortion (except when necessary to save the life of the mother), *id*.

at 118 n.2, the Court concludes that the unborn have never been viewed as full or "whole" persons. The Court appeals to legal developments outside the context of criminal abortion to buttress this premise. The Court's alleged evidence, however, does not support its desired conclusion. For starters, the Court relies on certain areas of the law that take live birth to be critical. Yet the Court's own resolution of the abortion issue (viability and the now repudiated trimester framework) does not turn on live birth. Thus, historical practice is not dispositive. Moreover, as discussed above, state laws going back to 1821 banned and regulated abortion pre-viability, suggesting that States had the authority to legislate in this religiously, morally, and politically charged area of law.

Second, there is strong evidence that the Court relied on an inaccurate account of the relevant legal history. *See*, *e.g.*, Joseph Dellapenna, *Dispelling the Myths of Abortion History* 126 (Carolina Academic Press 2006) ("[T]he history embraced in *Roe* would not withstand careful examination even when *Roe* was written."); David Kadar, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639, 652 (1980) (describing how *Roe*'s account of prenatal death recovery "was perfunctory, and unfortunately largely inaccurate, and should not be relied upon as the correct view of the law at the time of *Roe v. Wade*."). Although a detailed study of that history goes beyond the scope of this amicus brief, the historical inaccuracies in *Roe* further undermine its claim that "the unborn have never been recognized in the law as persons in the whole sense." *Roe*, 410

U.S. at 162. *See also Hamilton*, 97 So.3d at 742 n.17 (Parker, J., concurring specially) (collecting authorities that discuss the historical inaccuracies in *Roe*'s legal history).

In addition, in the wake of *Roe* state laws relating to prenatal injury, wrongful death, and fetal homicide have moved away from *Roe*'s viability standard toward greater protection of the unborn. *See id.* at 737-40 (discussing how States have expanded the protections for fetal human life). With regard to fetal homicide statutes, "[a]t least 38 states have enacted fetal-homicide statutes, and 28 of those statutes protect life from conception." *Id.* at 738 (citing *State v. Courchesne*, 998 A.2d 1, 50 n.46 (Conn. 2010)). To take only one example, in 1975, Alabama amended its homicide statute "to include protection for 'an unborn child in utero at any stage of development, regardless of viability.' " *Mack v. Carmack*, 79 So.3d 597, 611 (Ala. 2011) (quoting Ala. Code § 13A-6-1(a)(3) (1975)). In interpreting this statute, the Alabama Supreme Court directly addressed *Roe*'s viability standard and concluded that the law should fully protect an unborn child at every stage of development:

> [I]t is an unfair and arbitrary endeavor to draw a line that allows recovery on behalf of a fetus injured before viability that dies after achieving viability but that prevents recovery on behalf of a fetus injured that, as a result of those injuries, does not survive to viability…; instead "logic, fairness, and justice" compel the application of the Wrongful Death Act to circumstances where prenatal injuries have caused death to a

> fetus before the fetus has achieved the ability to live outside the womb.

Id. *See also Eich v. Town of Gulf Shores*, 300 So.2d 354, 355 (Ala. 1974) ("Logic, fairness and justice compel our recognition of an action, as here, for prenatal injuries causing death before a live birth.").

Third, the Court concludes this section of its argument by eliding the distinction between "human being" and "person." Section IX.B began with the Court disclaiming anyone's ability to determine when human life begins but ends with the Court's asserting that "the unborn have never been recognized in the law as persons in the whole sense." *Roe*, 410 U.S. at 162. Texas made two separate arguments—that the fetus is a person under the Fourteenth Amendment and that the fetus is a human life. This section of the opinion deals only with the latter, yet the Court draws a conclusion about the former without any argument establishing that "person" and "human life" are the same. Consequently, neither the history of States' criminalizing abortion pre-*Roe* nor the subsequent history of state laws outside the criminal abortion context supports this premise.

10. Thus, given the uncertainty surrounding when human life begins, Texas cannot "override the rights of the pregnant woman" simply "by adopting one theory of life." *Id.*

As noted in step 3, the Court emphasizes that this case concerns "the weight to be attached to the" woman's right to choose an abortion and the

States' interests in the health of the mother and the potential human life. Given the lack of consensus about the status of the fetus, the Court claims that Texas cannot stack one side of the balance simply by adopting a particular theory of human life.

The problem is that that Court does exactly that. Despite the same uncertainty regarding the status of the fetus, the Court adopts a specific position, namely, that the fetus is only a potential human life. The Court does not explain why it has unique competence to decide this inscrutable question, which it takes to be dispositive up until at least viability. The majority provides no sound, valid argument for this holding, relying on the informal fallacies discussed above. In fact, the majority begs the question about the status of the fetus—whether it is a person and/or a human life. The Court states (without any argument regarding what it is to be a "person") that the fetus is not a person and admits that no one can decide when human life begins. Yet without an understanding of personhood—what it is to be a "person"—there is no way to determine whether (1) the fetus is or is not a "whole" person or (2) it is appropriate for the majority to equate potential human life and non-whole personhood.

Having assumed that the fetus is not a "whole" person and is only a potential human life, weighting the competing interests is straightforward for the Court. The woman (a whole person and a human being) has a constitutionally protected privacy right; the potential human life has no inherent protections under the Constitution. States must assert an

interest in the potential life, which interest intensifies throughout the pregnancy. Thus, the woman's right to terminate her pregnancy is weightier and must be respected at least during the first and second trimesters. As the Court puts the point, during this early stage of pregnancy "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." *Id*. at 163.

11. Although a woman's privacy right is absolute during the first trimester, each of the States' interests "grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' " *Id*. at 162-63.

The Court's sliding scale of interests serves as the foundation for its (much maligned) trimester framework. The trimester structure does not follow directly from the Court's premises, which leads *Casey* to reject that framework. In its place, *Casey* excises and retains what it takes to be the "essential holding" of *Roe*—viability. Because *Casey* largely adopts *Roe*'s argument for viability, a few points about *Roe*'s argument for viability are important to note. *See Casey*, 505 U.S. at 870 (noting that *Roe*'s articulation of the viability standard "was a reasoned statement, elaborated with great care").

First, as Professor Ely has made clear, the Court's analysis is circular. The Court defines viability as the point at which "the fetus … presumably has the capability of meaningful life

outside the mother's womb." *Id*. at 163. The Court then claims that viability is the critical point at which the States' interest in the potential life becomes compelling because this is when the fetus is able to live outside the womb. The Court's premise and conclusion say the same thing. To see why, one need only substitute the definition of "viability" for the term itself: the time the fetus is capable of meaningful life outside the mother's womb is the critical point because that is when the fetus can live meaningfully outside the womb. As Professor Ely explained, "the Court's defense seems to mistake a definition for a syllogism." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 925 (1973).

The argument is valid; if the premise is true, then the conclusion is necessarily true (because they are one in the same). But it is not at all clear that the argument is sound. The Court provides no independent reason to justify taking viability as *a* point, let alone *the only point*, when the States' interest in fetal human life becomes compelling. As Justice White noted in *Thornburgh*, "[t]he State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom." 476 U.S. at 795 (White, J., dissenting).

Furthermore, the majority asserts that viability "has both logical and biological justifications," but it never offers any such justifications. *Id*. The Court's perfunctory history of laws dealing with the unborn outside the abortion context focuses on quickening. The numerous States that banned abortion pre-*Roe* took conception to be the critical point. Some non-abortion-related laws depended,

at least in part, on live birth. Prior to the Court's decision in *Roe*, only prenatal-injury law invoked viability, but that trend started only in the 1940s and was dissipating by the 1960s. *See* Charles A. Lintgen*, The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. Pa. L. Rev. 554, 600 (1962). Despite (1) all of these different possibilities (and others like fetal pain, heart auscultation, and brain activity) and (2) the fact that the Constitution is silent on the matter, *Roe* asserts that viability is the pivotal point during gestation. The Court was wrong in 1973, and *Casey* simply perpetuated the mistake by adopting viability based on *stare decisis* instead of critically analyzing *Roe*'s fallacious argument.

Second, because the Court provides no independent basis for viability, the selection of viability as the critical juncture is wholly arbitrary. Justice Blackmun conceded the point in his Internal Supreme Court Memo: " 'You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.' " David J. Garrow, *Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade* 580 (1994) (quoting Justice Blackmun's "Internal Supreme Court Memo"). Justice O'Connor echoed this sentiment in her *Akron* dissent. If the fetus is only a potential human life, then it has that same potentiality—"capability" in *Roe*'s terms—before, at, and after viability:

> The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or

> afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," the Court chose the point of viability—when the fetus is *capable* of life independent of its mother—to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting). Selecting viability as the key moment is arbitrary because (even assuming that the fetus is only a potential human life) the capability of meaningful life outside the womb is inherent in the fetus at conception and every other stage of the pregnancy.

Finally, while the *Casey* plurality upholds the viability standard, it also implicitly confirms the arbitrary nature of choosing any specific point before, at, or after viability. *Casey*, 505 U.S. at 870 ("Any judicial act of line-drawing may seem somewhat arbitrary."). The plurality's defense of viability is lukewarm at best: "there is no line other than viability which is more workable." *Id.* To say that no line works better than viability is not to justify the line chosen as the proper or only line; rather, it intimates that all lines are arbitrary. Other standards may work just as well even if they do not work better. *Roe* and *Casey* needed to explain why this specific standard—viability—is constitutionally mandated. If it is merely one

among many equally workable alternatives, then the Constitution would seem to leave to the States the decision as to which standard (conception, heart auscultation, brain activity, fetal pain, quickening, etc.) is appropriate. The majority provides no basis for its choosing one line over others—other than the personal predilection of the Justices, which constitutes "an act of will, not legal judgment." *Obergefell*, 576 U.S. at 687 (Roberts, C.J., dissenting); *Adamson v. California*, 332 U.S. 46, 90 (1947) (Black, J., dissenting) (expressing concern over interpretations of the Constitution that "license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.").

CONCLUSION

The majority in *Roe* takes comfort in its "feel[ing]" that *Roe*'s holding "is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day." 410 U.S. at 165. What is most striking about this list is what it leaves out—the Constitution. Although *Roe* makes powerful points about "social policy and considerations of fairness," its "decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedents." *Obergefell*, 576 U.S. at 687.

The debate over abortion rages on; people of good will on both sides of the issue have staunchly

different views on the political, social, religious, and moral ramifications of abortion and abortion regulations. *Roe* attempted (unsuccessfully) to resolve that debate through an argument built on a protracted string of informal fallacies. Its "essential holding—viability—remains an arbitrary distinction that has no foundation in the Constitution or this Court's privacy cases. Accordingly, *Roe* lacks a "principled justification" and is "no judicial act at all." *Casey*, 505 U.S. at 865. This Court, therefore, should return the issue of abortion to the States.

Respectfully submitted,

Scott W. Gaylord, Ph.D.
201 North Greene Street
Greensboro, NC 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

Counsel for Amicus Curiae

July 29, 2021