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* PROFESSOR STEPHEN G. GILLES IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

Professor Stephen Gilles teaches constitutional law and has published several articles about this Court's abortion jurisprudence. This brief draws on that scholarship to address the fundamental question presented in this case: whether this Court should repudiate the constitutional right to elective abortion.[1]

SUMMARY OF ARGUMENT

Fidelity to the Constitution requires this Court to overrule its holdings, in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), that there is a fundamental right to elective abortion prior to fetal viability.

The case for overruling is compelling because the right to elective abortion has no foundation under *either* of the approaches to implied fundamental rights that this Court has at times employed since *Roe*. *Roe*'s error is readily apparent under the "established method" employed in *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997), which requires that an implied fundamental right be "objectively, 'deeply rooted in this Nation's history and tradition.'" The dissenting opinions in *Roe* and *Casey* made unanswerable arguments that the right to elective abortion had no such standing in our tradition.

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1. No counsel for a party authored any part of this brief, nor did any person or entity, other than amicus, contribute money for preparing or submitting this brief. Both parties have filed blanket consent to the submission of amicus briefs. The arguments presented in this brief do not represent the views of Quinnipiac University School of Law.

Nonetheless, *Roe* and *Casey* refused to treat history and tradition as controlling, instead relying on the Court's own judgments about the competing interests at stake. Under the *Glucksberg* test, *Roe* and *Casey* are clearly wrong in method and result.

It is equally true – if less obvious -- that the right to elective abortion is insupportable under the "reasoned judgment" approach employed in *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015), according to which "[h]istory and tradition guide and discipline th[e] inquiry but do not set its outer boundaries." That approach is premised on the understanding that the traditional judicial virtues of reasoned, knowledgeable, and consistent decision-making provide a sufficient safeguard against the risk that the Justices of this Court will enact their own policy preferences into law in the form of implied fundamental rights. Both *Roe* and *Casey* fall far short of those standards in ways that fatally undermine the core propositions on which the right to elective abortion rests.

First, *Roe*'s history of Anglo-American abortion law drew the wrong conclusions regarding the unbroken legal tradition recognizing the States' authority to prohibit abortions throughout pregnancy. Although not dispositive under the "reasoned judgment" approach, that history reveals that *Roe* nullified an enduring legal consensus protecting fetuses once they were known to be alive.

Roe also ignored what our legal tradition regarding abortion implies about the original meaning of the Fourteenth Amendment. The *Roe* Court assumed that its holding that "the unborn" are not "persons" within the meaning of the Amendment, 410 U.S. at 158, implied that the Amendment itself posed no obstacle to

recognizing a fundamental right to elective abortion. In historical context, however, the omission of the unborn from constitutional personhood necessarily preserved the traditional authority of the States to confer legal rights on the unborn, including protection from abortion. The Amendment used the fact of birth to prohibit the States from denying legal personhood to any human being who has been born, not to deprive the States of their authority to treat the unborn as human beings whom their laws should protect.

A central and decisive feature of "reasoned judgment" in *Obergefell* was the Court's insistence on consistency in the application of constitutional principles. See 576 U.S. at 665 ("the reasons [opposite-sex] marriage is fundamental under the Constitution apply with equal force to same-sex couples"). Both *Roe*'s fundamental-rights analysis and its holding that the State has no compelling interest in protecting pre-viable fetuses are sorely lacking in that principled consistency. *Roe* analogized the right to elective abortion to other implied fundamental rights, but abortion differs radically from any of them – including contraception -- because abortion alone "involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). Both *Roe* and *Casey* erred by assuming that the existence of the fetus only mattered in determining the extent of the right to elective abortion, rather than defeating the case for recognizing the right.

Even if elective abortion were prima facie a fundamental right, abortions could still be prohibited if the State can assert a compelling interest in protecting fetal life throughout pregnancy. For two reasons, *Roe*'s insistence that the state's interest only becomes compelling at viability fails to qualify as a reasoned judgment. First, it

is fully reasonable for the State to classify the pre-viable fetus as a "human being," or alternatively to protect its life because it will naturally become a "human being" if not aborted. Second, *Roe* and *Casey* fail to reckon with their own recognition that the State can assert an overriding interest in protecting viable fetuses from elective abortion. Because there is no material difference between the State's interests in protecting the fetus before and after viability, principled consistency under *Obergefell* requires the conclusion that the State's interest is compelling throughout pregnancy.

Because *Roe* and *Casey* are flatly inconsistent with the *Glucksberg* test, and fail to qualify as reasoned judgments under *Obergefell*, both decisions lack *any* foundation in this Court's jurisprudence for determining implied fundamental rights. This brief does not address the other factors this Court considers when deciding whether to overrule an erroneous constitutional precedent. Instead, it demonstrates that the threshold requirement for overruling – that the decision be inconsistent with established principles – is plainly satisfied by *Roe*'s and *Casey*'s failure to satisfy either of the Court's tests. The prima facie case for overruling the right to elective abortion is therefore as powerful as possible.

ARGUMENT

Because Mississippi's statute prohibits all elective abortions well before any fetus is currently viable, it infringes the right to elective abortion announced in *Roe* and reaffirmed in *Casey*. For the reasons that follow, the Court should reexamine those decisions and hold that there is no constitutional right to an elective abortion.

I. The Court Should Overrule *Roe* and *Casey* Because They Fail Both The *Glucksberg* And *Obergefell* Tests For Identifying Implied Fundamental Rights.

Roe was wrongly decided, and *Casey* erred in reaffirming *Roe*'s central holding. Those decisions should be overruled because they are erroneous under both tests the modern Court has used in deciding whether to recognize an implied fundamental right. There is no fundamental right to elective abortion under either *Glucksberg*'s "deeply rooted in our legal tradition" test or *Obergefell*'s "reasoned judgment" standard.

Under the *Glucksberg* test, *Roe* and *Casey* are manifestly erroneous. What was deeply rooted in our legal tradition was not abortion liberty, but laws prohibiting abortions from the time when the fetus could be known to be alive. *Roe* did not claim that the right was deeply rooted (although it claimed support in our tradition). Instead, *Roe* assumed that the Court is authorized to "deem[]" certain "personal rights . . . implicit in the concept of ordered liberty" even in the absence of longstanding tradition, because of their special importance in the lives of persons who seek them. 410 U.S. at 152.

Casey rejected the "deeply rooted" test, asserting that it is this Court's responsibility – regardless of tradition – to make a "reasoned judgment" about which "interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." 505 U.S. at 848-49 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting on jurisdictional grounds)). Implicitly acknowledging the unreliability of *Roe*'s history, and in the face of the dissent's reliance on "the historical traditions of the American people," id. at 952 (Rehnquist,

J., dissenting), *Casey* ignored history altogether, and reaffirmed *Roe* based on "the explication of individual liberty we have given combined with the force of stare decisis." Id. at 853. Because that "explication" runs counter to our legal tradition, it fails the *Glucksberg* test.

Consequently, both *Roe* and *Casey* were unquestionably wrong under the "deeply rooted in tradition" test, which "many other cases both before and after [*Glucksberg*] have adopted." *Obergefell*, 576 U.S. at 698 (Roberts, C.J., dissenting). If it could still be said that the *Glucksberg* test is the Court's unequivocally "established method of substantive-due-process analysis," *Glucksberg*, 521 U.S. at 720, the case for overruling would be overwhelming: *Roe* and *Casey* would be rogue decisions in radical conflict with the Court's settled test for implied fundamental rights.

Roe and *Casey*, however, do not stand alone in rejecting the *Glucksberg* test and applying some version of the "reasoned judgment" approach. *Obergefell*, this Court's most recent decision in the field of unenumerated fundamental rights, described its approach as "exercis[ing] reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." 576 U.S. at 664. Under that method, "[h]istory and tradition guide and discipline th[e] inquiry but do not set its outer boundaries." Id. *Obergefell* declined to use the *Glucksberg* test, which it found "inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy." Id. at 671.

If *Roe* and *Casey* were rightly decided under the "reasoned judgment" approach, this Court's decision about whether to overrule them would presumably depend on

whether the Court viewed that test or *Glucksberg*'s as more appropriate in the context of abortion. But as Part II will show, *Roe* and *Casey* were *not* rightly decided under the "reasoned judgment" approach as described and applied in *Obergefell*. The right to elective abortion was adopted and reaffirmed on the basis of specious arguments, question-begging assumptions, and inconsistent reasoning, not reasoned judgment. Consequently, the case for overruling is overwhelming after all: the right recognized in *Roe* (and entrenched in *Casey*) is without foundation in either of the competing approaches that have recently commanded the support of majorities of this Court.[2]

II. There Is No Fundamental Right To Elective Abortion Under The Reasoned-Judgment Test.

Roe and *Casey* fail the "reasoned judgment" approach.[3] By requiring consistency, careful reasoning,

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2. This brief does not address all the factors this Court considers in deciding whether stare decisis warrants adhering to a constitutional decision that the Court concludes is erroneous. See *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448, 2478-79 (2018). The failures of "reasoned judgment" in the *Roe* and *Casey* opinions described herein, however, are highly relevant to one of them: "the quality of [the precedent's] reasoning." Id. at 2478. Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (that a constitutional precedent is "grievously or egregiously wrong" may provide "special justification" for overruling). For the reasons explained by Petitioners, Pet. Br. 19-36, the remaining stare decisis factors also support overruling. Consequently, although this brief does not present a complete stare decisis analysis, it concludes that *Roe* and *Casey* should be overruled.

3. Whereas *Roe* designated elective abortion as a fundamental right that can be overridden by a compelling State interest, 410

and honest appraisal of history, that approach attempts – in a different way than the *Glucksberg* test -- to deal with the problem of subjectivity inherent in freestanding judgments that balance individual liberty interests against the interests of society. Whether or not those requirements ensure "judicial restraint" as effectively as the *Glucksberg* test, they are surely constraining to a degree. *Roe* was the antithesis of reasoned judgment, and *Casey* preserved *Roe*'s rulings by invoking "the force of stare decisis" while refusing to provide a reasoned judgment on the merits. 505 U.S. at 853. The weight of "reasoned judgment," informed but not controlled by the history of abortion in our tradition, confirms that there is no constitutional right to elective abortion.

A. The Lessons Of History And Tradition Support A Judgment That There Is No Fundamental Right To Elective Abortion.

The reasoned-judgment method, as described in *Obergefell*, "respects our history and learns from it without allowing the past alone to rule the present." 576 U.S. at 664. Under that approach, if *Roe*'s history had been accurate, our tradition might have provided some support for a right to elective abortion early in pregnancy. But "[h] istory and tradition" cannot "guide and discipline th[e]

U.S. at 155, the *Casey* Court avoided the language of fundamental rights, and instead employed an interest-balancing framework. See, e.g, 505 U.S. at 846. The arguments made throughout this brief are couched in terms of *Roe*'s fundamental-right/compelling-state-interest framework, but also apply to *Casey*'s interest-balancing method. See Stephen G. Gilles, *Why the Right to Elective Abortion Fails* Casey*'s Own Interest-Balancing Methodology – and Why it Matters*, 91 Notre Dame L. Rev. 691 (2015).

inquiry," as *Obergefell* requires, id., unless the Court's history is reliable and the inferences drawn from it are cogent. Measured by these criteria, *Roe* erred egregiously. See Joseph W. Dellapenna, Dispelling the Myths of Abortion History 672-95 (2006).

Without claiming that a right to elective abortion was deeply rooted in our legal tradition, the *Roe* Court asserted that there was considerable support for such a right in Anglo-American abortion law. See 410 U.S. at 140-41. It claimed that until the latter half of the nineteenth century, "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States [in 1972]." Id. at 140. This assertion relied heavily on the fact that quickening had generally been an element of the common-law abortion offense prior to the nineteenth century. Id. at 138. But the woman's supposed "opportunity" to choose a pre-quickening abortion, id. at 140-41, was illusory in practice. Prior to the development of pregnancy tests in the early twentieth century, no woman could be sure whether she was pregnant before quickening. Dellapenna 191. Even if a woman suspected she was pregnant, every available abortion method was life-endangering and highly unreliable. Id. 32-56.

Nor did the common law make quickening an element of the offense because living fetuses were thought unworthy of legal protection early in pregnancy. The rule stemmed from uncertainty about when the fetus began to live, and difficulty proving that it had been alive. See Dellapenna 191, 274. Even after the discovery of human conception in the early nineteenth century, many people (other than scientists or physicians) believed that fetal life began when the fetus began to move, and its mother could

feel its movements. Dellapenna 257-60. For centuries, there had been a consensus that, as Blackstone put it, "life . . . begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 William Blackstone, Commentaries *129.

The common law, "like many institutions, has made assumptions defined by the world and time of which it is a part," *Obergefell*, 576 U.S. at 665, and abortion is a case in point. Beginning around 1840, some States began to replace the common law with statutes criminalizing abortions throughout pregnancy. Dellapenna 315. The primary impetus for these statutes was increasing awareness that fetal life begins long before quickening, fueled by the early nineteenth-century discovery that conception marks the beginning of a new, biologically human life. This new knowledge triggered the movement, led by physicians, to criminalize pre-quickening abortion. In 1857, an AMA Committee on Criminal Abortion included among the reasons why expanded criminalization was necessary "a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening," and "the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being." *Roe*, 410 U.S. at 141 (quoting 12 Trans. of the Am. Med. Ass'n. 75-76 (1859)). By the time of the adoption of the Fourteenth Amendment, this new awareness had found expression in laws making abortion a crime throughout pregnancy in most states. In *Obergefell*'s words: on the basis of "a better informed understanding" of human development, these laws extended the right to life – long "fundamental as a matter of history and tradition," 576 U.S. at 671-72 – to all the unborn, before and after quickening.

A secondary objective of the restrictive nineteenth-century laws was to protect women from the grave health dangers of abortions in an age without antibiotics or antiseptics. But contrary to Roe's intimation that maternal health was the legislation's dominant if not sole purpose, see 410 U.S. at 151-52, its proponents "always advanced the protection of fetal life as the primary reason for the statutes." Dellapenna 297. The design of those statutes – which contained numerous provisions that can only have been intended to protect fetal life -- confirms that this was their purpose. See James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985). Indeed, these statutes presupposed that fetal life overrides even maternal health, for they authorized abortion only when necessary to save the mother's life. Id. at 45-46. Numerous state courts "expressly affirm[ed] that their nineteenth-century statutes were intended to protect unborn human life." Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 St. Louis Univ. Pub. L. Rev. 15, 110 (1993).

When the Fourteenth Amendment was adopted, the campaign to enact restrictive state abortion laws had already succeeded. As then-Justice Rehnquist noted in his *Roe* dissent, there were "at least 36 laws enacted by state or territorial legislatures limiting abortion," 410 U.S. at 175, yet "[t]here apparently was no question concerning the validity of [the Texas] provision or of any of the other state statutes when the Fourteenth Amendment was adopted." Id. at 177. Throughout the remainder of the nineteenth century, many States added new restrictions and penalties to their already strict abortion laws. Id. at 139 (majority opinion).

Thus, allowing for changes as society's understanding of fetal development improved, our unbroken legal tradition was always that the criminal law should protect the fetus once it is known to be alive. In the mid-twentieth century, when abortions became much safer, roughly one-third of the States liberalized their abortion laws to some degree. See *Roe*, 410 U.S. at 140 & n.37. But only four of those states enacted statutes permitting abortions for any reason in the first months of pregnancy. Id. The great majority adopted the Model Penal Code's approach, which continued to criminalize abortions throughout pregnancy, but supplemented the traditional maternal-life exception with others for maternal health, severe fetal defect, and rape or incest. Id. The legal consensus that emerged in the United States during the decades before the adoption of the Fourteenth Amendment – that the States should protect fetal life by prohibiting elective abortions throughout pregnancy -- remained mostly intact until it was abruptly overthrown by this Court in *Roe*.[4]

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4. *Roe* falsely claimed that "[i]n areas other than criminal abortion," such as tort and property, "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 161-62. For decades before *Roe,* American courts had been increasing the rights of the unborn. *Roe* itself conceded that "the traditional rule of tort law," which denied claims for prenatal injuries even if the child was born alive, "has been changed in almost every jurisdiction." Id. at 161. This fetal-protective trend has continued: in legal contexts other than abortion, "[t]he overwhelming majority of states now recognize the unborn child as a human being whose rights are protected without regard to whether the child has attained some arbitrary stage of development such as quickening or viability." Paul Benjamin Linton & Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of* Roe v. Wade*? A Critique of* Planned Parenthood v. Casey, 70 Case W. Res. L. Rev. 283, 326 (2019).

Under *Obergefell*'s "reasoned judgment" approach, that legal consensus is not ipso facto conclusive, as it is under *Glucksberg*. But it constitutes irrefutable evidence that the law traditionally prohibited elective abortions in order to protect the value and dignity of prenatal human life. As will next be shown, *Roe*'s distortions of our history and tradition were bound to, and did, distort the Court's understanding of the Fourteenth Amendment's implications concerning fetal life.

B. *Roe* Ignored The Implications Of Our Legal Tradition Regarding Abortion For The Original Meaning Of The Fourteenth Amendment.

Roe held that although the right to elective abortion is fundamental, it can be overcome by a compelling state interest. 410 U.S. at 155. Blackstone had taught generations of American lawyers that every fetus "able to stir in the mother's womb" was entitled to "a person's legal and uninterrupted enjoyment of his life." 1 William Blackstone, Commentaries *129. While acknowledging that the State would be obligated to protect fetuses from abortion if they are constitutional persons, 410 U.S. at 156-57, *Roe* held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Id. at 158.[5] But having misunderstood the import of our legal tradition regarding abortion at the time of the Amendment, *Roe* failed to consider what this holding

5. Texas' argument that "the fetus is a person within the language and meaning of the Fourteenth Amendment," *Roe*, 410 U.S. at 157, was at least plausible as an original matter. See Michael S. Paulsen, *The Plausibility of Personhood*, 74 Ohio St. L.J. 14 (2012). This brief, however, assumes that *Roe*'s contrary holding is correct.

implies about the States' authority to confer legal rights on the unborn, including protection from abortion.

In light of our legal tradition criminalizing abortion, the rule that no one becomes a Fourteenth Amendment person until born alive cannot possibly mean that in 1868 the American people thought we only become human beings at birth. Nor can it possibly mean that the American people thought that each individual woman should have a constitutional right to decide for herself when the fetus she is carrying becomes a human being. As the increasingly restrictive abortion statutes passed before (and after) the Amendment show, it would never have been adopted if the public had any inkling that it would "withdraw from the States the power to legislate with respect to this matter." *Roe*, 410 U.S. at 177 (Rehnquist, J., dissenting). The word person in the Amendment would not have been accepted as narrower in meaning than the word "person" in Blackstone unless it was also understood that decisions about the legal rights of the unborn would remain subject to the authority of the States. Omitting the unborn from Fourteenth Amendment personhood could not have meant *depriving* them of eligibility for legal protection under State law.[6]

Roe's own analysis inadvertently confirms this conclusion. In construing the word "person" in the Amendment, *Roe* relied heavily on the fact that, if it includes the unborn, "the fetus' right to life would then

6. Analogously, even if (contrary to this Court's holding in *Santa Clara County v. Southern Pacific R. Co.,* 118 U.S. 394, 396 (1886)) corporations were not "persons" entitled to the protection of the Equal Protection Clause, a State would remain free to confer legal rights and protections on them.

be guaranteed specifically by the Amendment." 410 U.S. at 157. But *Roe* overlooked the historical significance of that fact for the original meaning of the Amendment. Had it been understood that the Amendment compelled the States to protect the unborn, one would expect anti-abortion forces to have invoked the Amendment in their continuing nineteenth-century campaign for increasingly severe abortion laws. Conversely, had it been understood that by omitting the unborn from its protections the Amendment curtailed the State's authority to enact laws protecting them, one would expect opponents of more stringent legislation to have invoked the Amendment as an obstacle. Instead, no one seems to have drawn any connection whatsoever between the Amendment and proposals to alter state abortion laws. That is exactly what one would expect if it was generally understood that omitting the unborn from the Amendment left undisturbed each State's traditional authority to determine the extent to which their lives would be protected.

There is a further implication for abortion: we have no reason to think that the Amendment's birth line was meant to define what it means to be a human being. Rather, it provided a clear, bright-line rule making the newly-expanded protections of the Federal Constitution inapplicable to a traditional state domain. No State may deny legal personhood to any human being who has been born, but each State may decide whether (and which) unborn human beings should be treated as persons for purposes of its laws.

The first sentence of the Amendment confirms this jurisdictional interpretation: "All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the state wherein they reside." U.S. Const. Amdt. XIV. The Amendment uses the *fact* of birth to determine constitutional personhood, and the *place* of birth to determine whether a person is a citizen or an alien in need of naturalization. Both uses of birth simply apportion legal authority. The exclusion of non-naturalized aliens assumes that they may have citizenship in another country, and the exclusion of the unborn assumes that each State can determine the extent to which they should be treated as persons for purposes of its laws. Because the Amendment, in drawing the line at birth, demarcated the spheres of State and Federal responsibility with regard to personhood, the inference is inescapable that a State may treat any unborn individual member of our species – that is, any fetus -- as a legal person, whether or not it is viable.

C. *Roe*'s Extension Of Procreative Liberty From Contraception To Elective Abortion Lacks Any Basis In Reasoned Judgment.

Under the "reasoned judgment" approach, analysis of whether the right to an elective abortion is fundamental begins with the familiar principle that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Carey v. Population Servs., Int'l*, 431 U.S. 678, 687 (1977). That principle initially led the Court to recognize the right of married couples to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and to extend that right to unmarried persons, *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The Court in *Roe* expanded procreative liberty from the right to *prevent* pregnancy by contraception to the right to *terminate* it by abortion.

Obergefell is instructive on how *Roe*'s expansion of procreative liberty should be evaluated. In addressing whether States could adhere to the traditional understanding that only opposite-sex couples have the fundamental right to marry, *Obergefell* asked whether "the basic reasons why the [traditional] right to marry has long been protected" by the Court's decisions "apply with equal force to same-sex couples." 576 U.S. at 665. The Court's holding that same-sex marriage is constitutionally required rested on its finding that each of the "essential attributes" of the right to marry applies to same-sex couples. Id. In applying reasoned judgment to *Roe*'s essential holding, therefore, the first question is whether the reasons supporting the right to contraception apply with equal force to the right to elective abortion.

It is true that women who use contraception and pregnant women seeking an abortion both wish to be spared the burdens of pregnancy, childbirth, and motherhood. But that similarity overlooks an essential difference: "One cannot ignore the fact . . . that the decision to abort necessarily involves the destruction of a fetus." *Casey*, 505 U.S. at 952 (Rehnquist, C.J., dissenting). Unlike contraception, every abortion has at least one victim -- the fetus whose life it ends.

Roe and *Casey* paid lip service to this fundamental dissimilarity. *Roe* conceded that "[t]he pregnant woman cannot be isolated in her privacy," because "[s]he carries an embryo, and later, a fetus." 410 U.S. at 159. *Casey* admitted that "[a[bortion is a unique act . . . fraught with consequences . . . for the life or potential life that is aborted." 505 U.S. at 852. But neither opinion explained why it is not fully reasonable for the State to conclude that

the destruction of a living fetus removes abortions from "[the] realm of personal liberty which the government may not enter." Id. at 847. Instead, both *Roe* and *Casey* treated the existence of the fetus as relevant only to the *extent* of the right. See 410 U.S. at 159 ("The [pregnant] woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly."); 505 U.S. at 871 (plurality opinion) (discussing the state's interest in protecting fetuses only in connection with the viability line).

Under *Obergefell*, this was error. However broadly *Obergefell*'s "assertion of the 'harm principle,'"576 U.S. at 705 (Roberts, C.J., dissenting), was meant to reach, to declare that no cognizable harm is done when the life of a pre-viable fetus is deliberately extinguished would be stretching that principle beyond recognition. See *Obergefell*, 576 U.S. 679 (same-sex marriages between "two consenting adults . . . would pose no risk of harm to themselves or third parties"). The crucial question then becomes whether saving the life of the pre-viable fetus justifies the State in removing elective abortion from the woman's reproductive choices. Answering that question requires careful attention to an issue *Roe* dealt with by *ipse dixit* and *Casey* refused to address: the intrinsic worth and dignity of human fetuses.

First, however, it is necessary to know which framework should be used in examining that issue. *Casey* described a balancing of the State's interest in fetal life against the woman's interest in choosing abortion. See 505 U.S. at 871 (plurality opinion). *Roe*, by contrast, required the Court to make a judgment about when the State's interest in fetal life becomes compelling, not to

balance interests. 410 U.S. at 163. This Court should reject *Casey*'s novel interest-balancing and conduct a standard compelling-state-interest inquiry. Difficult as it can be for courts to determine whether a state interest is compelling, it is far more difficult for the judiciary to balance the woman's liberty interest in an elective abortion against the State's interest in the life of her fetus. Indeed, speaking of these same interests in the context of *Casey*'s "undue burden" test for abortion regulations, Chief Justice Roberts has observed that "[t]here is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *June Medical Services L. L. C. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring). *Casey*'s approach "would require [the Court] to act as legislators, not judges." Id.[7]

Notably, *Obergefell* did not adopt *Casey*'s interest-balancing framework. *Obergefell* rejected the State's justification for excluding same-sex couples from the right to marry -- harm to the institution of marriage -- because the States had "not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe." 576 US at 679. That is tantamount to a ruling that the State failed to show that same-sex marriages would adversely affect its compelling interest in that institution. Because elective abortions undeniably impair the State's ability to protect pre-viable fetuses, the crucial question should be whether the State

7. If this Court nevertheless uses *Casey*'s interest-balancing approach, the "reasoned judgment" case for resolving that balance in favor of the State's interest in protecting fetal life is presented in Gilles, *supra*, 91 Notre Dame L.R. at 720-36.

can assert a compelling state interest in protecting their lives.

D. Even If The Right To Elective Abortion Were Prima Facie Fundamental, The State Has A Compelling Interest In Protecting Fetal Life Throughout Pregnancy.

Roe's undervaluation of the State's interest in protecting pre-viable fetal life constitutes another critical departure from "reasoned judgment." Even if the right to elective abortion were prima facie a fundamental right, the State could prohibit abortions to advance its compelling interest in protecting fetal life.

1. *Roe* And *Casey* Ignored The Evidence From Which The State Can Reasonably Conclude That A Fetus Is A Human Life From Conception.

Roe arbitrarily rejected the State's argument that "[human] life begins at conception, and that, therefore, the State has a compelling interest in protecting that life from and after conception." 410 U.S. at 159. In support of that contention, Texas presented the Court with a thorough account of "the well-known facts of fetal development." Id. at 156. *Roe* accepted that conception marked the beginning of "prenatal life," and acknowledged that the State could assert a "legitimate interest" in protecting this life. Id. at 151. But without explanation, *Roe* described the human fetus as "potential human life" or simply "potential life." Id. at 156. "'[R]easoned judgment' does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is

protecting is the mere 'potentiality of human life.'" *Casey*, 505 U.S. at 982 (Scalia, J., dissenting) (quoting *Roe*, 410 U.S. at 162).

Attempting to justify that assumption, the *Roe* Court claimed that it could not decide when human life begins, relying on the lack of consensus among physicians, philosophers, theologians, and lawyers. 410 U.S. at 159. After describing competing answers including live birth, viability, quickening, and conception, *Roe* held that Texas could not invoke its preferred "theory of life" as beginning at conception. Id. at 162. But the Court then contradicted itself by postulating that the State may claim a compelling interest at viability, thereby imposing on the States its own theory: at the earliest, fetal life becomes *human* life at viability. Id. at 163-64.

In so doing, the *Roe* Court failed to address what "the well-known facts of fetal development" reveal about the character of the State's interest in protecting fetal life. "[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007). Consequently, "[h]owever one answers the metaphysical or theological question whether the fetus is a 'human being' or the legal question whether it is a 'person' as that term is used in the Constitution, one must at least recognize . . . that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting). Provided the fetus

obtains "the resources needed by all organisms, namely nutrition and a reasonably hospitable environment," its growth and development will continue. Robert P. George & Christopher Tollefsen, Embryo: A Defense of Human Life 41 (2008). Although only its mother can provide the life-support it needs, the pre-viable fetus "contains within itself the 'genetic programming' and epigenetic characteristics necessary to direct its own biological progress." Id. This self-directed biological development does not end when the fetus becomes viable, or when it is born: it continues through infancy and beyond.

Moreover, the pre-viable fetus is the same living organism that it will be after it becomes viable and is born. The fetus's nature, identity, and "potential" to develop inhere in it however long it lives. Although reasonable persons can disagree over whether these characteristics suffice to make the fetus a "human being," it is fully reasonable for the State to conclude that it is, and to protect its life as such. Alternatively, the State may reasonably assert a compelling interest in protecting the fetus throughout pregnancy on the ground that it is indisputably a new human organism that will naturally develop into a "human being." Whether a caterpillar is better understood as a "potential butterfly" or "a butterfly at an early stage of its development," if the State had a compelling interest in protecting butterflies it would have a compelling interest in protecting them at the caterpillar stage.

Casey's treatment of the strength of the State's interest in protecting the fetus adds new errors to *Roe*'s. After invoking the judicial tradition of "reasoned judgment," the *Casey* Court described the deeply personal

nature and great importance to women of the choice to have an abortion. 505 U.S. at 849-852. The Court then announced that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of stare decisis." 505 U.S. at 853. *Casey* thereby exacerbated the difficulties of balancing the incommensurable individual and State interests in this context by summarily including stare decisis as another factor to be weighed in the balance. When stare decisis is used properly, it "'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.'" *Ramos*,140 S.Ct. at 1411 (Kavanaugh, J., concurring in part) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Using it as a thumb on the scales, as *Casey* did, subverts that purpose.[8]

Casey's treatment of the State's interest is also marred by its insistence on reaffirming *Roe* without addressing the merits of the argument that the State's interest in protecting fetal life throughout pregnancy is overriding. Invoking stare decisis, the plurality declined "to say whether each of us . . . would have concluded, as the *Roe* Court did, that its weight is insufficient to justify

8. *Casey*'s elaborate treatment of stare decisis argued, *inter alia*, that there was no "special reason over and above the belief that [the] prior case was wrongly decided" for overruling *Roe.* 505 U.S. at 864. But the "reasoned judgment" approach relies on the requirement of thoughtful reason-giving to constrain judicial power and ensure that the Justices will not impose their own policy preferences on the nation. Under that approach, a conviction that a prior case was wrongly decided because its reasoning was utterly inadequate *is* a "special reason." Cf. *Obergefell*, 576 U.S. at 675 (overruling *Baker v. Nelson*, 409 U.S. 810 (1972)).

a ban on abortions prior to viability even when it is subject to certain exceptions." 505 U.S. at 871 (plurality opinion).[9] That evasion belies *Casey*'s assurance that "courts may not" adopt "lines which appear arbitrary without the necessity of offering a justification." Id. at 870 (plurality opinion). *Casey* adds nothing to *Roe*'s conclusory denial that the State may reasonably assert a compelling interest in protecting pre-viable fetal life.

2. There Is No Principled Basis For *Roe*'s Disparate Treatment Of Pre-Viable Fetuses, Viable Fetuses, And Newborn Infants.

A second line of analysis independently justifies the conclusion that the State may assert a compelling interest in protecting pre-viable fetal life. Under *Obergefell*, the viability line is erroneous if "the basic reasons" underlying the State's compelling interest in protecting the lives of viable fetuses (and newborns) "apply with equal force" to pre-viable fetuses. 576 U.S. at 665. That question requires a comparison of the attributes of pre-viable fetuses, viable fetuses, and newborns – and of the differing treatment each group is accorded by the *Roe*/*Casey* regime.

Roe and *Casey* effectively mandate a three-stage theory of human life and personhood: at stage one – conception – a biologically human organism is created,

9. One can deduce, from the peculiar way in which the *Casey* plurality took shelter in stare decisis, that at least one of the Justices in the plurality agreed with the four dissenters that *Roe* was wrongly decided as an original matter. See Gilles, *supra*, 91 Notre Dame L. Rev. at 717-720. That is further evidence of *Roe*'s invalidity.

but it is only "potential human life." *Roe*, 410 U.S. at 150. Even so, the State now has an interest of a kind it would not have in promoting the union of sperm and egg: "[a] legitimate interest[] from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. Yet although this interest is "important," *Roe*, 410 U.S. at 162, even "profound," *Casey*, 505 U.S. at 878 (plurality opinion), the State must permit the pre-viable fetus to be killed at its mother's request for any reason.[10]

At stage two – viability – the fetus achieves what *Casey* calls an "independent existence," 505 U.S. at 870, and the State may claim a compelling interest in protecting it as a new human life (though *Roe* continues to refer to it as "the potentiality of human life"), 410 U.S. at 164. That interest justifies the State in prohibiting elective abortions if it so chooses, although the viable fetus may still be aborted if continued pregnancy would endanger the mother's life or health.

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10. The right to elective abortion is at odds with the criminal law protecting fetuses from persons who kill them without the woman's consent. At common law, the attacker was guilty of homicide only if the child was born alive and subsequently died of its injuries. By the time of *Roe*, ten states had abolished the born-alive rule, and this trend continues: thirty-eight states have abolished the rule, and twenty-eight treat killing a fetus at any stage of pregnancy as homicide. Clarke D. Forsythe, Abuse of Discretion: The Inside Story of *Roe v. Wade* 284-285 (2013). How can the Constitution require the State to treat the pre-viable fetus as unprotected "potential human life" vis-à-vis its mother while permitting it to treat the fetus as a human being vis-à-vis all others?

At stage three, the fetus is born alive, and becomes a "person" within the meaning of the Fourteenth Amendment. Now, so long as it criminalizes other homicides, the State *must* use the criminal law to protect its life from infanticide by its mother or anyone else.

The question before the Court is whether the State may protect the lives of the pre-viable unborn to the same extent that it may currently protect their lives at viability. The proof that *Roe* and *Casey* were wrong to deny the States that authority lies in comparing the pre-viable fetus with its viable self. *Roe* makes the unsupported claim that the State's "interest in protecting the potentiality of human life . . . grows in substantiality as the woman approaches term." 410 U.S. at 162-163. But if the previable fetus "is in some critical sense merely potentially human," *Casey*, 505 U.S. at 982 (Scalia, J., dissenting), that must be because it lacks capabilities that the more developed viable fetus now possesses – and that are essential to status as a human being. Neither *Roe* nor its defenders have identified any capabilities meeting that description.

Roe cryptically claims that viability is decisive "because the fetus then presumably has the capability of meaningful life outside the mother's womb," 410 U.S. at 163. But why is the life of an extremely premature but viable newborn more "meaningful" than the life of a non-viable newborn that lives for minutes after birth? The answer must be that the viable newborn may survive indefinitely and develop its human capabilities more fully. That fact, however, supports the State, which seeks to require the mother to continue gestating the non-viable fetus so it too may have an extended life outside the womb. The viability line creates an absurd anomaly: if

a State prohibits post-viability abortions, the woman is required to continue gestating her viable fetus, even though it would have "a realistic possibility" of surviving after birth, *Casey*, 505 U.S. at 870 (plurality opinion), because its prematurity would endanger it. The supposed "independent existence" of the viable fetus thus entitles it to remain exclusively *dependent* on the woman, whereas the pre-viable fetus, which needs her even more, can be aborted for any reason.

Attempting to make sense out of *Roe*'s explanation, *Casey* asserts that "the realistic possibility of maintaining and nourishing a life outside the womb" establishes "the independent existence of the second life." 505 U.S. at 870 (plurality opinion). This "independent existence" rationale is as incoherent as *Roe*'s "meaningful life" formulation. Because *Roe* includes "artificial aid" in its definition, 410 U.S. at 160, the viability line makes the strength of the State's interest "contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant." *Thornburgh*, 476 U.S. at 795 (White, J., dissenting). The same fetus that is viable in a state-of-the-art hospital may be pre-viable in an ordinary one – yet which hospital is used cannot possibly alter its status as a new human life.

Even if *Roe* had excluded "artificial aid" from the determination of viability, a fetus-cum-infant's ability to live outside the womb – in complete dependence on its caregivers -- is an arbitrary criterion for its "independent existence." As this Court has said, the status of the fetus as "a living organism while within the womb" does not turn on "whether or not it is viable." *Gonzales*, 550 U.S. at 147. Recognizing that, the nineteenth-century physicians

urging States to ban pre-quickening abortions relied on "the independent and actual existence of the child before birth, as a living being." *Roe*, 410 U.S. at 141 (quoting 12 Trans. of the Am.Med.Assn. 75-76). New knowledge since that time has confirmed their judgment. We now know that beginning at conception the fetus has an "independent" genetic makeup from the woman; that it has an "independent" circulation by the eighth week; and that its motions are "independent" of the woman's long before she can feel them. See Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 Hastings Const'l L.Q. 187, 221 (2016). The Constitution leaves it to the State, not this Court, to decide which type of "independent existence" gives it a compelling reason to protect the fetus by prohibiting elective abortion.[11]

The Fourteenth Amendment itself provides additional reason to reject any line that makes life-or-death consequences for fetuses turn on whether they have acquired some specific "capability" or reached some developmental milestone. By making "birth" the point of constitutional personhood, the Amendment rejected any

11. If the Court abolishes the right to elective abortion, it will need to reexamine, in an appropriate case, *Roe*'s unexplained holding that States must permit even post-viability abortions whenever necessary to preserve maternal life *or health*. 410 U.S. at 163-64. Unless that health exception is construed in accord with normal self-defense principles, it creates an unjustified disparity between the State's ability to protect newborn infants and its ability to protect viable fetuses, who differ from newborns only in location. Indeed, if interpreted broadly, the health exception would in practice license elective abortions throughout pregnancy. See Stephen G. Gilles, Roe*'s Life-or-Health Exception: Self-Defense or Relative-Safety?*, 85 Notre Dame L. Rev. 525, 554-558 (2010).

requirements of that kind. If a newborn is too premature to survive, it is nevertheless a person and no one – including its parents – can kill it. The Amendment does not make constitutional personhood contingent on a newborn infant's viability or the degree to which it has developed. Every human being – regardless of its capabilities or stage of development – qualifies as a constitutional person once it is born. See 1 U.S.C. § 8(a) (defining the terms "person," "human being," "child," and "individual," for all Acts of Congress, to "include every infant member of the species homo sapiens who is born alive at any stage of development"). Yet because fetal viability is contingent on factors such as lung development, the viability line impermissibly classifies on the basis of fetal development as well as fetal capability to survive outside the womb.

This Court should overrule the viability rule. "The 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. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh*, 476 U.S. at 795 (White, J., dissenting). Any other line would be similarly arbitrary. Obergefell's "reasoned judgment" test therefore requires the same conclusion as the *Glucksberg* test: the State may assert a compelling interest in protecting fetal life beginning at conception.

CONCLUSION

For the foregoing reasons, this Court should abolish the right to elective abortion and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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