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 JONATHAN ENGLISH IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

Having studied and written[2] about the very question presented in this case, the undersigned *amicus curiae* is uniquely positioned and obligated perhaps to offer insight insofar as possible. As neither a lower court judge nor counsel for a specific interest group, the *amicus curiae* maintains a level of impartiality and independence that allows freedom from the perceived (but now out of date) status quo on abortion that has lingered zombie-like after *Roe v. Wade*. Thus, the undersigned *amicus curiae* is able to charitably reread *Roe* as well as draw analogies to the Court's Eighth Amendment jurisprudence protecting human life and dignity. Paradoxically, blind loyalty to an outdated status quo has produced failure in our fidelity to the reasoning of *Roe*.

SUMMARY OF THE ARGUMENT

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[1] Pursuant to Rule 37.3, this brief has been filed with the (blanket) consent of all parties. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

[2] *See* Jonathan English, *Abortion Evolution: How* Roe v. Wade *Has Come to Support a Pro-Life & Pro-Choice Position*, 53 CREIGHTON L. REV. 157 (2019).

The reasoning of *Roe v. Wade*, the Fourteenth Amendment of the Constitution, and natural justice not only permit restriction of abortion before viability but actually require protection of new human life well before viability.

Notably, in *Roe*, the Court found insufficient consensus, in 1973, on when human life begins to enable recognition of a right to life in the womb, particularly before viability. Under the Court's national consensus analysis, clear consensus now exists in law that human life begins well before viability. This consensus requires protection of new human life before viability.

Even apart from a consensus analysis, the Court's dignity analysis, also evidenced in Eighth Amendment jurisprudence, calls for recognition and protection of new human life and its dignity from at least the moment of quickening. Failure in this regard would be destructive of human life and dignity. In the modern world, quickening arguably is detectable at the beginning of the heartbeat or, at a minimum, at the beginning of fetal brainstem activity.

ARGUMENT

I. Sufficient consensus on the beginning of human life has developed since *Roe*,

requiring protection of agreed upon human life before viability.

A. *Roe* relied on the absence of consensus on the beginning of human life.

In *Roe*, the Court recognized that "[i]f this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[3] However, at that moment in time, in 1973, the Court did not conclude that a fetus is a person under the Fourteenth Amendment.[4] Notably, apart from apparently inconclusive usage of the term "person" in the Constitution, the Court relied on insufficient consensus on when human life begins. The Court explained, "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

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[3] Roe v. Wade, 410 U.S. 113, 156-57 (1973).

[4] *Id.* at 158; *but see* Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539 (2017) (providing compelling argument based on then-existing language and law that the word "person" in the Fourteenth Amendment was understood to include all human beings, including human beings in the womb).

answer."[5] In a fact- and time-sensitive move, the Court left open the possibility that if a sufficient consensus about the beginning of human life emerged, the parameters of abortion rights would have to shift with this consensus to protect human life in the womb. While the consensus that has developed since *Roe* technically overturns *Roe's* "central holding," protection of agreed upon human life and of a right to life would vindicate and implement the reasoning of *Roe* affirming that consensus on the presence of human life early in development would require protection of agreed upon human life.

This consensus analysis is similar to the Court's consensus analysis employed to identify cruel and unusual punishment and protect human dignity. Under that consensus analysis, a majority consensus[6] of state laws[7] has been enough to signal

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[5] *Roe*, 410 U.S. at 159 (emphasis added).

[6] Atkins v. Virginia, 536 U.S. 304 (2002) (finding "a national consensus against the death penalty for the mentally retarded" where 30 states prohibited the death penalty for such individuals); Roper v. Simmons, 543 U.S. 551 (2005) (finding a national consensus against the death penalty for juveniles under eighteen where 30 states prohibited the death penalty in such circumstances).

[7] "The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." *Roper*, 543 U.S. at 564; *accord Atkins*, 536 U.S. at 312 ("We have pinpointed that the 'clearest and most reliable objective

that a harsh form of punishment departs from the dignity owed to fellow human beings, rendering it unconstitutional. After considering national consensus, the Court then engages in its own analysis as to whether the punishment "accord[s] with the dignity of man" or instead is excessive and violates that dignity.[8] Both steps are relevant to a consensus analysis under *Roe*.

Recent consensus about protectable human life necessarily supersedes *Roe's* arbitrary viability rule, as a right to life, where it exists, supersedes a right to abortion, pursuant to *Roe*.[9] Indeed, the viability rule was always fragile, arbitrary fiat. Justice Blackmun acknowledged in his memorandum accompanying his second draft of the *Roe* decision that selecting viability as the critical moment would be as arbitrary as selecting (as he did in his second draft) the end of the first trimester as critical.[10] Selection of viability as

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evidence of contemporary values is the legislation enacted by the country's legislatures.'").

[8] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

[9] *See Roe*, 410 U.S. at 156-57.

[10] Justice Blackmun, *Cover Memorandum Accompanying 2nd Draft of* Roe v. Wade, (Nov. 21, 1972) (stating, "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") (on file with the Library of Congress, Blackmun Papers, box 151, folders 6 and 8), *quoted in* Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L.

determinative was a conclusory and circular choice. Given legal developments since then, the Supreme Court can do better. Indeed, cumulative consensus about the beginning of human life enables a non-arbitrary decision, one that would protect agreed upon human life from a non-arbitrary developmental moment.

B. *Casey* engaged in very limited review, but acknowledged that developments in facts or understanding of relevant facts could render *Roe's* central holding obsolete.

In 1992, the Supreme Court further developed this assessment of abortion law through its ruling in *Planned Parenthood of Southeastern*

REV. 713, 713, 722-23 (2007), and *quoted in* DAVID GARROW, LIBERTY AND SEXUALITY 580 (2005). Interestingly, while Justice Powell's memorandum of November 29, 1972, to Justice Blackmun suggests drawing the line at viability, stating that might "be more defensible in logic and biologically than perhaps any other time," Justice Powell provides no support for that proposition. *Memorandum from Justice Powell to Justice Blackmun*, (Nov. 29, 1972) (on file with the Library of Congress, Blackmun Papers, box 151, folder 8). Instead, the substance of his memorandum involves the assertion that making viability the critical moment would probably be more "generally accepted" and "generally understood" while other cutoff dates might be "more difficult to justify." *Id.* His claims are outdated, as will be seen, though they likely lacked validity at the outset.

Pennsylvania v. Casey.[11] The plurality opinion acknowledged that a "change in Roe's factual underpinning"[12] or a change in the "understanding of [the relevant] facts,"[13] could render "[*Roe v. Wade's*] central holding obsolete."[14] However, the opinion concluded that neither of those changes had occurred.[15] In reaching this conclusion, the Court engaged in a very limited review, noting only the factual developments that "advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973 . . . and advances in neonatal care have advanced viability to a point somewhat earlier."[16] The Court

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[11] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[12] *Casey*, 505 U.S. at 860; *see also id.* at 864 (noting that "changed circumstances may impose new obligations").

[13] *See id.* at 862-63 (citing *Brown v. Board of Education*, 347 U.S. 483 (1954) (analogizing a change in understanding of segregation, and the ramifications of this change evidenced in *Brown v. Board of Education*).

[14] *Id.* at 860. The plurality opinion also conceded that if the relevant factual landscape changed, or assessment of the factual landscape changed, the strength of the state interest in protecting the developing embryo or fetus could increase. *Id.* at 858. With a sufficient increase then, the strength of that state interest could rise to the level of a compelling governmental interest in protecting new human life, supporting restriction of abortion. *See id.* at 858.

[15] *Id.* at 864.

[16] *Id.* at 860. Ironically, while the *Casey* plurality opinion focused on the importance of *stare decisis*, it departed somewhat from *Roe* by emphasizing an "undue burden" standard—in place of *Roe's* trimester framework—which

thus reiterated the dependence of the parameters of abortion rights on factual development and our understanding of the relevant facts; yet at the same time, the Court still held to the shifting moment of viability as the moment when the government may restrict abortion. The unexplored developments in the decades since *Roe* and since *Casey* now merit attention.[17]

C. Consensus has developed since *Roe* that human life begins early in development, well before viability.

In the abortion context, consensus has become clear that human life begins well before viability.[18] Most states now protect new human life through fetal homicide laws or wrongful death statutes well before viability. The Court relied on

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allows for more significant regulation of abortion practice, even before viability. *Id.* at 874.

[17] Indeed, a panel of the Court of Appeals for the Eighth Circuit has recently called on the Supreme Court to reevaluate its jurisprudence on abortion, noting that "the facts underlying Roe and Casey may have changed" and "the Court's viability standard has proven unsatisfactory." MKB Mgmt, Corp. v. Stenehjem, 795 F.3d 768, 773-76 (8th Cir. 2015), *cert. denied,* 136 S. Ct. 981 (2016).

[18] Amazingly, this consensus has developed even while some ignorance of relevant facts lingers, as media, lawyers, and citizens are trapped in status quo thinking, ignorant of developing facts and law. The teaching function of the law and the Supreme Court's decision in this case can help to remedy any lingering ignorance.

the absence of such recognition in *Roe v. Wade.*[19] It cannot do so now. Likewise, the federal Unborn Victims of Violence Act (UVVA) of 2004 recognizes and protects new human life from certain criminal harm throughout human development.[20] In addition, well established definitions of death that crystallized after *Roe v. Wade* allow for identification of human life well before viability. Finally, worldwide, only a few nations are so extreme as to allow abortion without restriction as to reason or specific justification as late in development as viability. United States law after *Roe* has been an aberration, both from prior U.S. history and from worldwide legal norms and justice. The Court should unanimously recognize and remedy this injustice.

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[19] *See Roe*, 410 U.S. at 161 (stating, "[i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth"). Likewise, in *Doe v. Bolton*, the 1973 companion case to *Roe*, Justice Douglas's concurring opinion specifically noted that "[n]o prosecutor has ever returned a murder indictment charging the taking of the life of a fetus" (adding, further, "[t]his would not be the case if the fetus constituted human life"). Doe v Bolton, 410 U.S. 179, 218 (1973) (J. Douglas concurring). Given our evolving standards of decency, this is no longer the case. Justice Douglas recognized that such protection and prosecution indicates societal consensus that human life is indeed present.

[20] 18 U.S.C. § 1841.

1. Fetal homicide laws and other similar laws now protect new human life in most states throughout human development.

Since *Roe* was decided, a majority of states has enacted fetal homicide laws[21] to protect new human life from criminal harm before viability.[22] Thirty states extend this protection throughout human development.[23] (Or if Virginia's law is interpreted to begin protection only after the embryonic stage, then twenty-nine.) Six additional states extend their protection of unborn children prior to viability.[24] Thus, a total of thirty-six states—almost three-quarters of all states (72%)—protect unborn children through fetal homicide laws prior to viability.[25] Two states, including California and Montana, protect human life starting at the end of the embryonic stage—the end

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[21] *See* Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R. 5th 671 (1998); Nat'l Conf. of St. Legis., *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women,* (May 1, 2018), http://www.ncsl.org/IssuesResearch/Health/FetalHomicideLaws/tabid/14386/Default.aspx.

[22] Nat'l Right to Life Comm., *St. Homicide Laws that Recognize Unborn Victims* (May 3, 2018), http://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302.

[23] *See id.*

[24] *See id.*

[25] *See id.*

of week seven or eight of development.[26] Three additional states protect human life at quickening,[27] when fetal movement can first be felt in the womb, which has been recorded as early as week thirteen gestational age (week eleven of development).[28] This level of consensus has been sufficient, under the Court's analogous national consensus analysis elsewhere, to protect from application of the death penalty various categories of individuals.[29]

While these laws often provide that they do not apply to an abortion elected by the woman (avoiding direct conflict with *Roe*), they provide a powerful message recognizing the dignity of the human life being protected. First, almost invariably such laws explicitly define a term like "person" or "unborn child" as encompassing the new human being at any stage of development in the womb. Second, these laws typically impose severe punishments for harm to the fetus, punishments

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[26] *See id.*
[27] *See id.*
[28] American Pregnancy Association, "First Fetal Movement: Quickening," https://americanpregnancy.org/healthy-pregnancy/pregnancy-health-wellness/first-fetal-movement/.
[29] *See, e.g.,* Atkins v. Virginia, 536 U.S. 304 (2002) (finding "a national consensus against the death penalty for the mentally retarded" where 30 states prohibited the death penalty for such individuals); Roper v. Simmons, 543 U.S. 551 (2005) (finding a national consensus against the death penalty for juveniles under eighteen where 30 states prohibited the death penalty in such circumstances).

that are warranted in degree only if the fetus is understood to be a human life, not just a potential, future human life.[30] Third, these laws establish a separate offense for harming the fetus, rather than simply enhancing the penalty for an offense against the woman.[31] Thus, it is acknowledged that the definitions, the identification of a separate victim, and the penalties provided for in such laws protecting unborn children reflect a judgment that it is human life being protected, not just some pre-

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[30] Others have noticed the implications of the UVVA in particular, noting that "[w]hile the Act disclaims its power to affect abortion rights, the substance of the UVV[A] appears to contradict the fundamental premises of abortion law—that the Fifth and Fourteenth Amendments do not include fetuses in the definition of 'person'—by punishing violence against fetuses by third parties as harshly as violence against human beings." Tara Kole & Laura Kadetsky, *Recent Developments: The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 235 (2002).

[31] The ACLU concluded that "[b]y creating a 'separate offense' for injury to a fetus," the UVVA would "dramatically alter the existing legal framework by elevating the fetus to an unprecedented status in federal law." According to the ACLU, this "would undermine the principles underlying the right to reproductive choice." ACLU, *Legislative Analysis of the Unborn Victims of Violence Act*, Feb. 18, 2000, https://www.aclu.org/other/legislative-analysis-unborn-victims-violence-act (analyzing S. 1673/H.R. 2436 "The Unborn Victims Of Violence Act," a version of the UVVA prior to the Congress in which it was ultimately enacted).

human organism, unworthy of independent human value or dignity.[32]

2. The federal Unborn Victims of Violence Act of 2004 protects new human life throughout human development.

The Unborn Victims of Violence Act (UVVA) of 2004 protects children before birth by imposing criminal penalties on someone who causes the death of, or bodily injury to, a child in the womb at any stage of development.[33] Notably, the UVVA uses the term "unborn child" and explicitly defines "unborn child" as "a member of the species homo

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[32] *See, e.g.,* Jon O. Shimabukuro, CONG. RESEARCH SERV., RS 21550, THE UNBORN VICTIMS OF VIOLENCE ACT OF 2003, 2-3 (2004) (noting that "[i]f personhood could be established for a fetus or embryo, such entities' right to life under the Fourteenth Amendment would seem to be guaranteed"); Amanda K. Bruchs, Note, *Clash of Competing Interests: Can the Unborn Victims of Violence Act and Over Thirty Years of Settled Abortion Law Co-exist Peacefully?*, 55 SYRACUSE L. REV. 133, 141, 148, 151 (2004) (stating that "as written, the Unborn Victims of Violence Act is in direct contradiction with over thirty years of settled law since the Supreme Court's ruling in *Roe v. Wade* because it expressly grants legal personhood to both pre-viable and viable fetuses," and further arguing that "the interests sought to be protected under 'Laci and Connor's Law' [i.e., the UVVA] and those sought to be protected under abortion law are in conflict with one another, and that the two laws cannot possibly co-exist indefinitely without one acting as a detriment to the other").

[33] 18 U.S.C. § 1841.

sapiens, at any stage of development, who is carried in the womb."[34] As for punishment, with the exception of the death penalty, the penalties imposed for harming an unborn child correspond to the penalties imposed for harming a more mature human being.[35] And the UVVA explicitly identifies harm to the unborn child as a separate offense.[36] The significance of these features of the UVVA has been discussed above. Its significance is even greater, as it was enacted at a national level, in the face of opposition by abortion rights proponents who recognized potential long-term conflict with a right to abortion.

3. Well-established post-*Roe* definitions of death enable detection of death, and new human life, early in development.

Since *Roe v. Wade* was decided, a supermajority of states have adopted the Uniform Determination of Death Act (UDDA).[37] This

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[34] 18 U.S.C. § 1841(d).
[35] 18 U.S.C. § 1841(a)(2)(A).
[36] 18 U.S.C. § 1841(a)(1).
[37] Unif. Determination of Death Act (available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=341343fa-1efe-706c-043a-9290fdcfd909&forceDialog=0); Uniform Law Commission (or National Conference of Commissioners on Uniform State Laws), *Determination of Death Act*,

legislation provides that death may be determined by "either (1) irreversible cessation of circulatory and respiratory functions or (2) irreversible cessation of all functions of the entire brain, including the brain stem".[38] The corollary principle is that if either (1) the circulatory or respiratory functions or (2) any part of the brain, including the brainstem, is active, then human life is deemed to be present. This definition implies that human life begins early in development, during the first trimester, well before viability. Regarding circulatory function, fetal cardiac activity or heartbeat begins a regular rhythm during week four or five of development (week six or seven of gestation).[39] Once fetal cardiac activity or heartbeat has begun, the UDDA indicates that human life is present.

Regarding brain death, the UDDA identifies brain death as the "irreversible cessation of all functions of the entire brain, including the brainstem."[40] Note that the damage must be irreversible, and the entire brain must cease

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https://www.uniformlaws.org/committees/community-home?CommunityKey=155faf5d-03c2-4027-99ba-ee4c99019d6c (listing jurisdictions which have adopted the UDDA).

[38] *Id.* at § 1.

[39] MedlinePlus, "Fetal Development," https://medlineplus.gov/ency/article/002398.htm (listing gestational age rather than developmental age).

[40] Unif. Determination of Death Act, § 1.

activity, not just a part of the brain. Using these criteria to identify human life, human life appears to be present based on brainstem activity by the end of week six or by week seven of development, about when initial brainstem function begins.[41]

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[41] Katrina Furth, *Fetal EEGs: Signals from the Dawn of Life*, CHARLOTTE LOZIER INSTITUTE, ON POINT No. 28, Nov. 2018, https://s27589.pcdn.co/wp-content/uploads/2018/11/Fetal-EEGs-Signals-from-the-Dawn-of-Life.pdf (describing the historic research detecting brain activity through EEGs at 45 days or 6.5 weeks of development and concluding that human life, and death, are detectable at this stage); John M. Goldenring, *The Brain-Life Theory: Towards a Consistent Biological Definition of Humanness*, 11 J. OF MED. ETHICS 198, 199-200 (1985) (concluding that after eight weeks gestation, a fetus is a human life based on brain activity); Michael J. Flower, *Neuromaturation of the Human Fetus*, 10 THE J. OF MED. AND PHIL. 237, 240-41, 245-46, 248 (1985) (reporting electrical brain activity arising from the brainstem at 6.5 weeks); Carol Tauer, *Personhood and Human Embryos and Fetuses*, 10 THE J. OF MED. AND PHIL. 253, 255, 258, 262-63 (1985) (identifying the beginning of personhood at about 6.5 weeks developmental age at which point electrical brainstem activity has been detected, citing Flower [Tauer incorrectly refers to gestational age, where Flower apparently was referring to developmental age—see his footnote 1] and stating, "I suggest that the human fetus attains significant personhood by the second half of the first trimester, and that from this time on, it ought to be given full moral status", adding, "Such a standard would parallel the present criterion for the determination of whole brain death. In requiring a level of integrated activity, other authors . . . appear to be asking more than the whole brain death standard requires."); Thomasine Kushner, *Having a Life Versus Being Alive*, 10 J. OF MED. ETHICS 5, 5-6 (1984) (arguing "that the initiation of brain activity is the most reasonable time at which to fix the start of life, not because there is some empirical argument

Electrical activity within the brainstem has been recorded at 6.5 weeks, while whole body reflex responses facilitated by the brainstem occur at eight weeks.[42] From that point, under the UDDA, death may be measured, and life is present. The precise moment specific brainstem development occurs may be subject to discussion, but logically the UDDA supports the conclusion that human life is present once heartbeat or brainstem activity begins.

However, the UDDA may in fact support a conclusion that human life begins even earlier. Arguably, the principle behind the act's *irreversible* cessation requirement is that as long as heartbeat

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that establishes it as such, but because (a) it is among the options that are available and (b) because of the connection of brain activity with the possibility of consciousness and the connection of this with what we take to be *valuable* about the notion of 'life'."); Kirsten Rabe Smolensky, *Defining Life from the Perspective of Death: An Introduction to the Forced Symmetry Approach*, 2006 U. CHI. LEGAL F. 41, 42 (2006) (concluding that acceptance of the whole brain death definition, contained in the UDDA, leads to acceptance of initiation of brain activity as the beginning of human life, and stating "if absence of electrical activity in the brain stem means that a person is legally dead for the purposes of organ donation, then the forced symmetry approach dictates that brain birth I [i.e., the beginning of brainstem activity] should be the legal definition of life."); BARUCH BRODY, ABORTION AND THE SANCTITY OF HUMAN LIFE 100-116 (approving the brain life theory and arguing it successfully establishes that human life must begin by at least sometime between the sixth and twelfth week of development, i.e. after conception).

[42] Furth, *supra* note 41; Flower, *supra* note 41, at 245.

or brain function may return or arise in the future, the human being is alive and must be protected. Under this reading, it would not be necessary that the heart or brain had *already* begun functioning; it would be sufficient that the heartbeat and brain function are on their way. Applying this standard in contemplating the beginning of human life, one would conclude that if the individual *Homo sapiens* in the womb will develop a heartbeat or brain activity in the future, he or she is not dead or nonhuman, but rather is a human life, because the UDDA's "irreversible cessation" requirement has not been met.

Either way, support for the UDDA is nearly universal.[43] It was approved by the American Medical Association in 1980 and by the American Bar Association in 1981.[44] The UDDA definition has been adopted in most states. According to the National Conference of Commissioners on Uniform State Laws (or "Uniform Law Commission"), thirty-seven states have adopted the act, as well as the District of Columbia and the U.S. Virgin Islands.[45]

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[43] *See, e.g.,* Smolensky, *supra* note 41, at 45-46.

[44] Unif. Determination of Death Act.

[45] *See* Uniform Law Commission (or National Conference of Commissioners on Uniform State Laws), *Determination of Death Act*, https://www.uniformlaws.org/committees/community-home?CommunityKey=155faf5d-03c2-4027-99ba-ee4c99019d6c (listing jurisdictions which have adopted the UDDA). Aside from D.C. and the U.S. Virgin Islands, this includes Alabama, Alaska, Arkansas, California, Colorado,

The first state to adopt a brain death standard, Kansas, did so in 1970.[46] By 1981, the Indiana Supreme Court stated this "concept of 'brain death' has gained virtually universal acceptance in the medical profession."[47]

Beyond the UDDA, the Department of Health and Human Services has issued regulations providing an alternative specific definition for death of a fetus: "Dead fetus means a fetus that exhibits neither heartbeat, spontaneous respiratory activity, spontaneous movement of voluntary muscles, nor pulsation of the umbilical cord."[48] The regulation further provides that "Fetus means the product of conception from implantation until delivery," [49] indicating that "Dead fetus" may be determined at any time following implantation—before week seven or eight of development, an alternative definition of "fetus." Thus, this definition likewise suggests that human life begins quite early in development, well before viability.

Delaware, Georgia, Idaho, Indiana, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, Wyoming. *Id.*

[46] Smolensky, *supra* note 40, at 46.

[47] Swafford v. State, 421 N.E.2d 596, 598 (Ind. 1981).

[48] 45 C.F.R. § 46.202(a).

[49] *Id.* at § 46.202(c).

4. Worldwide, only a handful of the world's nearly 200 nations permit abortion without restriction as to reason as late in development as viability.

Internationally, America's status quo on abortion is a somewhat extreme outlier as well. This aberration of American law is a fourth indicator that it deviates from consensus. Only seventeen of 199 countries worldwide, counted by the Center for Reproductive Rights, permit abortion without restriction as to reason beyond week twelve of development (week fourteen gestational age).[50] That is only 8% of the world's

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[50] *See* CTR. FOR REPROD. RIGHTS , *The World's Abortion Laws*, REPRODUCTIVERIGHTS.ORG (2014), https://reproductiverights.org/wp-content/uploads/2020/12/AbortionMap2014.pdf. The Center for Reproductive Rights (the "Center") refers, in its fact sheet, to gestational age. According to its fact sheet, "Gestational limits are calculated from the first day of the last menstrual period, which is considered to occur two weeks prior to conception." The discussion of the data in the text above converts to age from conception, i.e. developmental age. The *number* of nations deciding the issue, reflected in the data from the Center, represents useful guidance. While it does not show the popular will of the world's people, it is important to remember that even attempting to factor in the population of the respective countries could not do so either because many countries are not democracies—and therefore political decisions may or may not reflect the will of the people—and

nations. Oddly, the Center inaccurately counts Puerto Rico separately from the United States, though it falls under U.S. jurisdiction and constitutional law. (To see the duration of a right to unrestricted abortion, look at the footnotes to Box IV of the Center's chart in the linked page.)

Further, only nine of 199 countries permit abortion without restriction as to reason beyond week sixteen of development (week eighteen gestational age).[51] Or only eight, not counting Puerto Rico separately.[52] That amounts to only 4% of the world's nations. Certainly, America's status quo on abortion—guaranteeing abortion up to viability for any reason—is out of line with consensus.

II. Consideration of the claims of human dignity, even apart from any consensus analysis, requires protection of likely human life once indicia of human life are detectable.

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even in those that are, the decision may not be made democratically, as in the United States, where the decision was rendered initially by the Supreme Court. Instead, the numbers cited represent the number of times deliberative entities have reached one conclusion rather than another, a worthwhile consideration.

[51] *See id.*

[52] *See id.*

Finally, while consensus analysis requires protection of agreed upon new human life, arguably it is unseemly and unjust to subject the right to life to a mere majority vote. History shows that minority rights are sometimes sacrificed to majority will.[53] Further, as in the Court's Eighth Amendment jurisprudence, the Court should undertake its own consideration of the protection due to the dignity of new human life, even apart from any potentially transitory consensus.[54] Thus, it would only be just for the Court to recognize, as it should have years ago, that (even apart from consensus analysis) the right to human life arises at least at the moment of quickening, as was understood under the common law. William Blackstone, in his revered *Commentaries on the Laws of England*, wrote that "[l]ife is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the

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[53] Majority will can be fickle unfortunately as well. As Jonathan Swift once wrote, "Falsehood flies, and the Truth comes limping after it," which apparently morphed over time into the saying, "A lie can travel halfway around the world before the truth can get its boots on." *See* Quote Investigator, "A Lie Can Travel Halfway Around the World While the Truth Is Putting On Its Shoes," available at https://quoteinvestigator.com/2014/07/13/truth/.

[54] Gregg v. Georgia, 428 U.S. 153, 173 (1976) (providing for separate analysis as to whether a punishment "accord[s] with the dignity of man" or instead is excessive and violates that dignity).

mother's womb."[55] Further, quickening in the modern world arguably is evident at the beginning of the heartbeat or, at a minimum, the beginning of fetal brainstem activity. This is because the quickening of the new human life is detectable by each of these points.[56] Simply put, "[t]he principle of Blackstone's rule was that 'where life can be shown to exist, legal personhood exists.'"[57] Moreover, having reached this stage of development, the new human life will naturally progress to a successful childbirth, absent unusual circumstances.[58]

CONCLUSION

This brief has offered only a concise summary presentation, given time constraints.

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[55] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125 (1765-69), available at http://www.gutenberg.org/files/30802/30802-h/30802-h.htm.

[56] Michael S. Paulsen explains the significance of quickening as follows: "For Blackstone, the unborn child was legally a person at the point that the existence of a new infant human life could be detected as actively alive in the womb." Michael S. Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 27 (2013) (further elaborating that "[i]n Blackstone's formulation, there is no distinction—no wedge, so to speak—between *biological* human life and *legal* personhood; Blackstone treated them as one and the same in his description of the rights of persons").

[57] Craddock, *supra* note 4 at 554-55.

[58] *See* David F. Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform*, 74 OHIO ST. L. J. 121, 140, n. 121-123 (2013).

However, the underlying law review article provides more complete analysis, more nuance, and more thoroughly addresses possible counterarguments.[59] The undersigned *amicus curiae* trusts the Court will avail itself of that article to delve more deeply into the discussion and arguments there. Given the state of the law discussed above, every Justice ought to be able to agree that agreed upon new human life is entitled to protection before viability. Human dignity demands it.

Respectfully submitted:

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[59] *See* Jonathan English, *Abortion Evolution: How* Roe v. Wade *Has Come to Support a Pro-Life & Pro-Choice Position*, 53 CREIGHTON L. REV. 157 (2019).