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 U.S. Court of Appeals for the Fifth Circuit

Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Conservative Legal Defense and Education Fund ("CLDEF") is a nonprofit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3). CLDEF seeks, *inter alia*, to participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. It has filed or joined 120 *amicus* briefs in the U.S. Supreme Court, which are available on its website.

SUMMARY OF ARGUMENT

As sought by Petitioners (Brief for Petitioners at 14), these *amici* also urge the Court to overrule Roe v. Wade, 410 U.S. 13 (1973), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), because each decision is fundamentally flawed and has contaminated and distorted the jurisprudence of the Court. Unlike this Court's equally controversial decision in Brown v. Board of Education, 349 U.S. 294 (1954), which was the product of an unanimous Court and unchallenged by subsequent Court decisions, the holding and rationale of a divided Roe Court have been persistently questioned and modified, most pointedly in Casey.

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[1] It is hereby certified that counsel for the parties have filed blanket consents; that no counsel for a party authored this brief in whole or in part; and that no person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Roe was fashioned from whole cloth, not from any examination of the text, context, or history of the Fourteenth Amendment's Due Process Clause. If a person's "liberty" can be interpreted by a Court to allow him or her to destroy human life, we have adopted a principle that has no limits. Indeed, the logic of a "right" to an abortion undermines the claim of any right to respect because it violates the intrinsic dignity of every human being. Since "life" comes from our Creator, it is not a privilege bestowed upon us by government, and government has a duty to protect it. Beyond question, government has no power whatsoever to authorize the taking of innocent human life.

Moreover, the foundation of Roe is built on sand in every key aspect. Roe misrepresented the common law regarding abortion. It assumed based on skewed data that abortion was as safe as delivering a healthy baby. It erroneously assumed that abortion statutes enacted by States were not intended to protect the life of the preborn. Roe fabricated a Constitutional right to destroy life that is not anywhere supported by Constitution based on lies that now have been exposed.

It is time that the impact of the racist Eugenics Movement on abortion jurisprudence be acknowledged and repudiated. Abortion's disproportionate killing of black unborn children by the tens of millions is a disgraceful legacy of Roe. Americans have waited 47 years for the horror of abortion to be brought to an end. If not now, when?

ARGUMENT

I. THIS COURT SHOULD OVERRULE ITS RIGHT TO ABORTION PRECEDENTS.

A. Roe Is Fundamentally Flawed.

This Court's decision in Roe has been the subject of persistent criticism by judges, scholars, and commentators since the day it was announced on January 22, 1973. Employing the rubric of substantive due process, the Roe Court expanded the so-called right of privacy announced eleven years before in Griswold v. Connecticut, 381 U.S. 479 (1965), to find a right to abortion in the Fourteenth Amendment's Due Process Clause. Roe never claimed that the text or history of the Fourteenth Amendment contemplated or authorized a right to abort one's preborn child.[2] *See* Roe at 152-53. Indeed, the Court's creation of such a "right" to abort is in conflict with the very idea of unalienable rights. In the process, the Court arrogated to itself the authority to make policy judgments that the Constitution assigns to the people and their elected representatives — certainly not to the judiciary.

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[2] As Harvard Law Professor Laurence Tribe has explained: "One of the most curious things about Roe is that, behind its own verbal smokescreen, the substantive judgments on which it rests are nowhere to be found." Quoted in Senator Sam Brownback comments, Senate Judiciary Committee Nomination Hearing, Judge Samuel Alito, January 9-13, 2006, 109th Cong., 2d Sess., Serial No. J–109–56, at 464.

Roe established a class of individuals — unborn children — who were deemed by this Court to be undeserving of protection under the Constitution. There is absolutely no Constitutional support for such a position. Indeed, its Preamble demonstrates that the Constitution was intended to "secure the Blessings of Liberty to ourselves and our Posterity" — not to sacrifice and destroy our Posterity.

Such a right to abort cannot be found in any legitimate exegetical search for the meaning of the word "liberty" in the Fourteenth Amendment, but only in a lawless act of judicial eisegesis. If the word "liberty" grants a license to a woman to abort her pre-born child for any reason or for no reason, what are the limits of that rule? A neonate is not "viable" under the standard of Roe and Casey, in the sense that it can survive on its own. Neither is an infant. Neither is an elderly person near the end of his or her life or a disabled person. Although today this may sound impossible, before Roe, it was impossible to believe that a woman had a constitutional right to kill her unborn child. Who is to say what the limits of such a free-floating interpretative method truly are? According to Roe, it was irrelevant that the Framers of the Fourteenth Amendment never intended that result. The decision interpreting "liberty" was made by nine unelected lawyers wearing robes, based on their personal feelings, and thereafter pressed on the People as being the final word on the subject.

B. Roe Declares Some to Be Nonpersons.

Roe's declaration that the preborn are not fully human under the law is a dangerous notion against which history should have warned the Court. *See* Roe at 157. America has already suffered through the consequences of declaring that some human beings are only 3/5 persons. *See* Art. I, Sec. 2, cl. 3. The German Chancellery in 1939 mandated, with the concurrence of medical experts, that disabled children and others should be terminated because they have a "life unworthy of living."[3] This logic was a direct precursor of the Holocaust.

By deeming unborn children to be non-persons beyond legal protection, the Roe Court considered the supposed interests of pregnant women only, while completely ignoring the interests of unborn children. Putting aside for a moment the inherent immorality of abortion, the resolution of such competing interests, much less entirely cancelling the interests of a class of persons, is emphatically not a judicial, but a legislative, responsibility. Any policy choices that must be made in those situations certainly must be made by elected representatives who are accountable to the people, not by judges.

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[3] *See* M. Berenbaum, "T4 [Euthanasia] Program," Britannica Encyclopedia ("In October 1939 Hitler empowered his personal physician and the chief of the Chancellery of the Führer to kill people considered unsuited to live." This included the "incurably ill, physically or mentally disabled, emotionally distraught, and elderly people.").

The Roe Court's focus on the interests of pregnant women while refusing to consider the interests of unborn children, distorted the analysis and led, predictably, to an unbalanced conclusion. The Roe decision gives every indication that the Court's analysis did not lead it to its conclusion, but its conclusion dictated its analysis. The resulting decision to establish a pregnant woman's right to terminate the life of her unborn child has left the Court open to questioning of its neutrality and fairness, which is ultimately destructive of the public's confidence in the integrity of the judicial process.

As the Roe Court before it, the Casey Court chose not to adopt the view of Justice Harlan in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 543 (1961) that "liberty ... broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."

C. Casey Is Also Fundamentally Flawed.

This Court's decision in Casey is also fundamentally flawed. If possible, Casey's impact has been even more corrupting than Roe. For example, it involved the same type of legislating by judicial decree as in Roe when the Casey Court modified the point of gestation at which abortion can be prohibited. The treatment of *stare decisis* in Casey represents the most extreme example of this Court's arrogation of arbitrary power that cannot be allowed to stand as the rule applicable to uphold or reverse this Court's precedent.

In Cooper v. Aaron, 358 U.S. 1 (1958), the Court announced by unanimous decision that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land." *Id.* at 18. In elevating its own opinions to the level of constitutional text, this Court unmistakably declared that it was the final authority on the meaning of the Constitution. Justice Frankfurter concurred, but acknowledged the error the Court was making:

> Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even **this Court** has the last say only for a time. Being composed of **fallible** men, it **may err**. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decision, **and this has been done successfully again and again throughout our history**. [Cooper at 23 (Frankfurter, J., concurring) (emphasis added).]

Casey rejected Justice Frankfurter's view and concluded that even a plainly erroneous decision must be upheld to maintain respect for the rule of law. Casey at 857. By "respect for rule of law" the Court really was demanding, "respect for the decrees of this Court." The *stare decisis* standard established in Casey insulates the most indefensible and corrosive decisions of the Court from appropriate review and overruling, as Justice Frankfurter acknowledged has been done repeatedly by the Court successfully.

Strangely, it may be the *stare decisis* aspect of the Casey decision that is the most constitutionally offensive. It manifests a bald arrogation of judicial power in its perverse refusal to correct a profoundly flawed precedent, purportedly so as not to undermine public confidence in the integrity of the Court's decision-making. No agency or government official can be allowed to set the bounds of its power as beyond accountability. Yet by holding that its decisions, regardless of how flawed, must not be overruled, the Court has accomplished the very result it claimed to be avoiding by so holding. Rather than build public confidence, it has given the public reason to lose confidence in the Court's decision-making.

D. The Corrosive Effect of the Court's Abortion Jurisprudence Cannot Be Ignored.

When this Court and lower courts are confronted with a decision that is predicated on reasoning that is fundamentally flawed, the adverse consequences for subsequent judicial decision-making are unavoidable. *See* M. Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003). In several opinions of members of this Court, examples of such adverse consequences produced by "abortion jurisprudence" have been described. *See, e.g.*, June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2142 (2020) (Thomas, J., dissenting); *id.* at 2153 (Alito, J., dissenting); McDonald v. Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring); Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting); *id.* at 980 (Thomas, J., dissenting).

The Court's refusal in Casey to re-examine the errors and unauthorized policy determinations in Roe served to undermine the people's confidence in the Court as a dispassionate arbiter of legal disputes. The argument that adherence to previous decisions despite their flaws was necessary to preserve the integrity of the Court and the rule of law rings hollow. The Constitution does not grant the Court the power to invent and mandate its own moral code, as the Court conceded in Casey (at 850), but that is precisely what the Court has done in Roe and Casey. The Court's expansive construction of the term "liberty" has no logical limit. *See id.* at 850-51. Its decisions can remove from legislative restriction any choice or activity it deems central to its notion of liberty. It is utterly inconsistent with essential principles of our form of government that a bare majority of unelected Justices can decree our nation's moral code.

Most striking, the "right" to an abortion championed by contemporary abortion jurisprudence is at war with the very notion of unalienable rights that, while protected by the Constitution, are not a gift from government, but have an objective standing arising from the intrinsic dignity of every person. Indeed, the safeguards of the Constitution have value only because each individual has intrinsic worth and has claims to liberty or safety that others are obliged to respect, even if there were no Constitution.

Professor Hadley Arkes correctly explained that the "right" to an abortion is truly "a right that virtually extinguishes itself." H. Arkes, Natural Rights & the Right to Choose (Cambridge U. Press:

2004) at 180. That is, it is a right founded on the view that an unborn child has no rights that we are obliged to respect when they conflict with our interests. The logic of a "right" to an abortion thus does not arise from the intrinsic worth of a human being. It is a right that is conferred by those who rule because it is viewed as consistent with their interests or convenience. But such a "right" can "readily be qualified, restricted, even canceled outright, if it were no longer thought to be consistent with the convenience or interests of others." *Id*. Such a contingent privilege is no right at all. And decoupling the law's understanding of "rights" from any objective standing grounded in the intrinsic worth of the human person — solely to allow the destruction of a dependent human person — sets loose a logic that deprives us of any proper defense of any right, save for pathetic appeals to the interests of those who rule.

E. *Stare Decisis*, Properly Applied, Is No Basis for Declining to Overrule Roe and Casey.

The doctrine of *stare decisis* is no bar to correcting what has been a period of confusion and judicial legislating. Roe and Casey have not found the type of support that would justify establishment of either as a fixture in the Court's jurisprudence. Roe embraced the right of privacy constructed in Griswold on the rationale of a penumbra of rights emanating from the Bill of Rights — a view which only a plurality in Griswold adopted. Roe chose to restore the concept of substantive due process as the basis for creating a woman's right to destroy her unborn child, instead of the penumbra rationale.

Casey reaffirmed Roe on a plurality vote but also substituted a different test — the "undue burden" test — and a different point in the gestation period — "viability" — at which a State can regulate abortion. The Casey decision has proven exceedingly difficult to apply.

It is the treatment of the doctrine of *stare decisis* in Casey in particular that warrants overruling. The arrogation of power by the Court is evident in its refusal to reexamine and overrule an admittedly flawed Roe decision while contending that the rule of law and public confidence required respect for Roe.

Since Roe, the Court has struck down numerous legislative enactments on abortion by various States and Congress. This has prompted many Americans to question the Court's willingness to respect the rule of law and restrict itself to the limited powers granted in by Article III of the Constitution. The institutional integrity of the Court depends on public confidence in the perceived fairness and evenhandedness of its decisions. Refusing to overrule Roe and Casey carries the certainty of the public losing even further respect for the institution — from the 44 percent disapproval rating just announced by Gallup.[4] A willingness to admit when the Court is fundamentally wrong, and a restoration of the appropriate balance between the Court and the States — as well as between the Court and Congress — is necessary to restore that confidence.

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[4] *See* D. Cole, "Gallup Poll: Supreme Court approval rating falls to 49% after hitting 10-year high in 2020," CNN (July 28, 2021).

II. ROE RELIED ON MISREPRESENTATIONS ABOUT HOW COMMON LAW VIEWED ABORTION.

Justice Blackmun relied heavily on the work of New York University law professor Cyril H. Means (citing it seven times) to support his questioning whether "abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." Roe at 136. Professor Means was an abortion advocate, whose view of the common law was based on two 14th century case reports which he called "The Twinslayer's Case" and "The Abortionist's Case." Catholic University Law Professor Robert A. Destro reviewed the Means analysis, which he asserts "was written with the express intention of influencing the outcome of *Roe* and *Doe*...." R. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," 63 CALIF. L. REV. 1250, 1268 (1975). Professor Destro observed:

> Contrary to the conclusion of Professor Means, *The Twinslayer's Case* is not precedent for a "common law freedom" of abortion.... [T]he Means analysis of this early common law report gives an erroneous impression of early common law attitudes toward the killing of the unborn.... [A] conclusion contrary to that of Professor Means — that abortion was indeed a common law crime as early as 1327 — seems well supported. [*Id*. at 1268-69.]

Indeed, Professor Destro's 102-page law review article makes a compelling case that the treatment of abortion at common law claimed by Roe is grounded in a fabrication. By introducing doubt and confusion about whether abortion constituted a common law crime, Justice Blackmun was able to argue that there has been no consistent historical protection of the unborn. Thus, it appears that Professor Means' article had its intended effect in allowing Justice Blackmun to manipulate history, but a close look at the "scholarship" of Roe undermines its foundations and conclusions.

III. ROE'S FLAWED ASSUMPTIONS UNDERSTATING THE MATERNAL RISK FROM ABORTION.

Justice Blackmun identified three possible justifications for a State to criminalize abortion. Roe at 148-52. He quickly dismissed the notion that a State could have a legitimate interest in discouraging "illicit sexual conduct" as an antiquated "Victorian social concern." *Id*. at 148. Justice Blackmun largely dismissed a third reason — the State's interest in protecting the human life of the preborn — and the errors in his conclusion there are discussed in the next section.

The second rationale for State regulation was the health of the mother. He speculated that "[w]hen most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." *Id*. at 148. He found this rationale no longer convincing because of "medical data indicating that abortion ...

prior to the end of the first trimester, although not without its risk, is now relatively safe." *Id*. at 149. He went so far as to assert that the mortality rates for lawful, early abortions "appear to be as low as or lower than the rates for normal childbirth [and thus] any interest of the State in protecting the woman ... has largely disappeared." *Id*. For this claim he offered a string cite containing some highly questionable data. The majority of the studies were authored by famed abortion advocate and Planned Parenthood advisor Christopher Tietze, M.D.

An analysis of the data available to the Roe Court in 1972 was published recently as the lead article in *The Human Life Review,* written by long-serving Virginia State Delegate Robert G. Marshall. His documented analysis demonstrates the serious flaws in Blackmun's assumptions and reasons to doubt his work, as well as other data sources on maternal risk.

No stickler for the truth, in 1964, Dr. Tietze counseled against telling women the truth about how intrauterine devices ("IUDs") work. Tietze was concerned that if women understood that the IUD "prevents implantation of a fertilized egg in the uterus," resulting in the death of the fertilized egg, they might not use IUDs even though they should. Deception was essential, so as not to "'disturb those people for whom this is a question of major importance.'" R.G. Marshall, "Abortion, Women, and Public Health: Getting the Whole Truth," *The Human Life Review*, Vol. 46, No. 2 (Spring 2020) at 10-11. For his work in supporting abortion rights, in 1973, Dr.

Tietze was awarded the Margaret Sanger Award by Planned Parenthood Federation of America.

Justice Blackmun's other source about U.S. maternal health statistics was the U.S. Public Health Service. Marshall points out that public health officials have not been neutral on the issue of abortion, and "[f]or nearly a decade in the 1980s, the chief of the CDC's Abortion Surveillance Branch was Dr. David Grimes, who has been an abortionist for 40 years," assisted by Judith Rooks Bourne, who, along with her husband, were plaintiffs in Doe v. Bolton, 410 U.S. 179 (1973). The Marshall study illustrates the problem with CDC data.[5]

> From the 1970s to 1988, most states followed CDC guidance in collecting abortion complication information. During those years, the USPHS instructions for filling out the U.S. Standard Report of Induced Termination of Pregnancy form provided: "If no complications have occurred at the time the report is completed, check 'none'.... This item will provide data regarding the risk of induced termination [emphasis in original].' Often, abortionists are unaware of complications

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[5] Statistics about live births following abortions are likewise concealed. Willard Cates, M.D., then Chief of the Abortion Surveillance Branch at the CDC was quoted as describing self-reporting of live abortions: "It's like turning yourself in to the IRS for an audit.... What is there to gain?" *See* Liz Jeffries and Rick Edmonds, "The Dreaded Complication," reproduced in Congressional documents.

> while the woman is on the operating table or in the recovery room, so few if any immediate complications would be identified, thus making abortion appear to be "safe." Indeed, Washington State Public Health authorities acknowledge that, "The reporting of abortion complications is considered to be incomplete because follow-up care may be administered after abortion reports are filed, or by a second facility or physician." [R.G. Marshall, "Abortion, Women, and Public Health," at 11-12.]

Marshall convincingly demonstrated that not only did the CDC never develop a comprehensive and accurate method of recording and reporting maternal abortion-induced injuries and death, but also the systems it did develop were clearly designed to discourage the collection of such data so pro-abortionists could falsely make claims about the safety of abortion for women, which continues even to this day.

IV. ROE ERRONEOUSLY ASSUMED STATE ANTI-ABORTION LAWS WERE NOT WRITTEN TO DEFEND THE LIFE OF THE PREBORN.

The third reason which Justice Blackmun considered to justify allowing a State to regulate abortion was the State's interest in protecting the human life of the preborn. Roe at 150. Many might wonder why the preservation of the preborn's life would not be primary, but it was not treated that way.

Although Justice Blackmun grudgingly acknowledged that "at least potential life is involved" (*id.* at 151), here too, he made fundamental errors, more of law than of medicine. Justice Blackmun accepted the contention he attributed to those challenging abortion restrictions that these laws "were designed solely to protect the women" — not the preborn. *Id.* at 150. Here was the logic he followed: "in many States, including Texas, by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another." *Id.* at 151. He never acknowledged that many other State statutes clearly were written to protect the lives of the unborn.

As much as any other source, Justice Blackmun cited throughout his opinion a law review article by Eugene Quay, "Justifiable Abortion — Medical and Legal Foundations (pt. 2)," 49 GEORGETOWN L.J. 295 (1961). Quay was a curious authority to cite, as he was no supporter of abortion. Indeed, the Quay article cited by Justice Blackmun identified 17 State or territorial codes at the time of that article which criminally punished the abortionist and which classified abortion either as manslaughter or second degree murder. "The criminal abortion laws of New Mexico and Wisconsin held that human life began at conception and that a woman was pregnant from the point of conception to the birth of her child."[6] Such statutes were clearly designed to protect the preborn as a legal person — which undermined what Justice

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[6] R. G. Marshall, "Lies that keep Abortion Legal," *Human Life Review* (Spring 2021) at 37 (citing Quay at 498).

Blackmun needed to demonstrate to support abortion.[7] Since Blackmun found the Quay article highly reliable, citing it seven times in his opinion, it is a reasonable inference that he intentionally avoided citing those portions of the Quay article which would undermine his case. Such a practice employed by an advocate is troublesome; but as employed by Blackmun, it calls into question the foundations of Roe.

Lastly, supporters of abortion assert that the absence of prosecutions of women for homicide

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[7] These laws were fully consistent with an earlier view of the American Medical Association which in 1859 asserted, by unanimous consent: "Resolved, … the act of producing abortion, at every period of gestation, except as necessary **for preserving the life of either the mother or the child**, it has become the duty of the Association … publicly to enter an earnest and solemn protest against such unwarranted destruction of human life." American Medical Association, The Medical Profession on Criminal Abortion, May 3, 1859, City of Louisville, Report of the Committee on Criminal Abortion (emphasis added).

In 1940, the editors of a classic medical reference on Obstetrics boldly stated: "All doctors (except abortionists) feel that the principles of the sanctity of human life held since the time of the ancient Jews and Hippocrates and stubbornly defended by the Catholic Church are correct.… At the present time, when rivers of blood and tears of innocent men, women and children are flowing in most parts of the world … we, the medical profession, hold to the principle of **the sacredness of human life and of the rights of the individual, even though unborn**, is proof that humanity is not yet lost and that we may ultimately attain salvation. — editors." J. DeLee & J. Greenhill, The 1940 Yearbook of Obstetrics and Gynecology (The Year Book Publishers:1941) at 69 (emphasis added).

History indicates that medical ethics has deteriorated over the intervening period.

demonstrate that the life of the unborn was not protected by States. This is a *non sequitur*. Whenever an abortionist was prosecuted, the State would need the cooperation of the woman in order to make its case, and charging the woman would undermine that necessity. That truth continues to this day, and should this Court overturn Roe and Casey, it would not mean that prosecutions of women for abortion would commence. For example, in the case of the use of contraceptives which operate as abortifacients, there would be no evidence of a crime that could be used.[8]

V. THIS CASE GIVES THIS COURT AN OPPORTUNITY TO REJECT ITS HISTORICAL EMBRACE OF EUGENICS.

Concurring in the judgment below, Judge James Ho exposed the animus of the district court judge toward the legislation under review.[9] Without question, the district court's opinion "displays an alarming disrespect for the millions of Americans who

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[8] For a refutation of the policy arguments made by abortion supporters, *see* R.G. Marshall, "Lies that keep Abortion Legal," *supra*, refuting six common objections: 1. Women will be prosecuted if they use the Pill or IUD; 2. Women will be prosecuted as criminals for spontaneous miscarriage; 3. Women who abort will be prosecuted for capital murder; 4. Women who abort will be prosecuted and jailed; 5. Women will be prosecuted for self-abortion; and 6. Abortion does not kill a human being or person.

[9] Judge Ho felt duty bound to affirm the judgment, but not the opinion, of the district court, because of a circuit court's duty to follow Supreme Court precedent, no matter how wrong that decision is believed to be.

believe that babies deserve legal protection during pregnancy as well as after birth, and that abortion is the immoral, tragic, and violent taking of innocent human life." Jackson Women's Health Organization v. Dobbs, 945 F.3d 265, 278 (5th Cir. 2019) (Ho, J., concurring). In language more appropriate for politics than a balanced, reasoned court opinion, the district court accused proponents of HB 1510 of both sexism and racism. *See id.*

Rather than Mississippi exhibiting racism in protecting unborn life, Judge Ho's concurrence put on the table the "racial history of abortion advocacy as a tool of the eugenics movement." *Id*. at 284. Judge Ho relied heavily on Justice Thomas' recent concurrence in Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1782-93 (2019) (Thomas, J., concurring). Judge Ho explained that "[e]ugenics — the concept of improving the human race through control of the reproductive process — has frequently been associated with explicitly racist viewpoints."[10] Jackson Women's Health at 284. And, as Justice Thomas explained, "[f]rom the beginning, birth control and abortion were promoted as means of effectuating eugenics." Box at 1787 (Thomas, J. concurring).

Roe was not the first time that the "science" of eugenics has contaminated this Court's decisions. The

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[10] *See* C. Donovan & R. Marshall, "How Planned Parenthood Can Atone for Margaret Sanger," *Wall Street Journal* (Apr. 21, 2021). *See also* R. Marshall & C. Donovan, Blessed Are the Barren, Chapter Eleven, Planning for the Perfect: Planned Parenthood and Eugenics at 275, *et seq*. (Ignatius Press: 1991).

roots of abortion in eugenics shares a dark history with some decisions that have issued from the chambers of this Court. Justice Oliver Wendell Holmes, Jr. put this Court on record on the side of the "science"[11] of eugenics. Putting aside the issue of the likely fabrication of the facts of the case,[12] the Supreme Court affirmed the constitutionality of the forced sterilization of a supposedly feeble-minded woman. Justice Holmes elevated the interests of the State over the individual:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon **those who already sap the strength of the State** for these lesser sacrifices, often not felt to be such by those concerned, in order to **prevent our being swamped with incompetence**. [Buck v. Bell, 274 U.S. 200, 207 (1927) (emphasis added).]

Then, calling upon his considerable skill to turn a phrase, he added yet another ringing justification for sterilization:

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[11] Holy Writ contains a warning about deferring to contemporary wisdom and bogus science: "O Timothy, keep that which is committed to thy trust, avoiding profane and vain babblings, and oppositions of science falsely so called...." 1 Timothy 6:20 (KJV).

[12] *See* A. Cohen, Imbeciles: Supreme Court, American Eugenics, and the Sterilization of Carrie Buck (Penguin Press: 2016) at 24-25, 296; *see generally* R. Cynkar, "Buck v. Bell: "Felt Necessities v. Fundamental Values?" 81 COLUMBIA L. REV. 1418 (1981).

> It is **better for all the world**, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are **manifestly unfit** from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough. [*Id.* (emphasis added).]

Here is revealed that the primary goals of eugenics are to justify the prevention of births to achieve a higher good: prevention of crime, avoidance of starvation, and improving the society and the world.

The weak may be sacrificed for the common good. Yet all of these reasons that undergird eugenics policies have now been rejected broadly by the American people. Although it is true that, in Skinner v. Oklahoma, 316 U.S. 535 (1942), this Court imposed an equal protection limitation on the power of States to classify crimes for which sterilization is allowed, that decision allowed the practice of forced sterilization to continue.[13] Neither Skinner nor Buck nor the Eugenic Principles they embrace has ever been overruled, but both deserve to be. To keep faith with

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[13] "Precisely because *Buck* was not overruled in *Skinner*, sterilization continued in asylums and welfare offices in America long after the case was decided...." V.F. Nourse, In Reckless Hands: *Skinner v. Oklahoma* and the Near Triumph of American Eugenics at 158 (W.W. Norton & Co.: 2008).

the American people, it is important that Courts admit mistakes when recognized. Buck v. Bell has stood for 91 years, but is indefensible and should be overruled. To paraphrase Justice Holmes, "Nine decades of eugenics is enough."

Forced sterilization is certainly distinguishable from unrestricted abortion, but this Court's abortion jurisprudence shares certain characteristics with Buck v. Bell and Skinner v. Oklahoma,

Forced sterilizations are carried out by the State against individuals targeted by the State. Abortions are carried out by abortionists who may or may not be paid by the State, and it is the mother, not the State, who decides which babies live and which die.[14] However, there is little question that abortion was adopted by eugenicists to provide a backup method to improve the gene pool, if birth control did not prevent the pregnancy. The introductory paragraphs of Justice Blackmun's opinion in Roe invoked the eugenic specter of "population growth, pollution, poverty, and racial overtones," which he said "tend to complicate and not to simplify the problem." Roe at 116.

Additionally, Justice Blackmun repeatedly cited Margaret Sanger biographer Lawrence Lader's 1966

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[14] This difference was set out: "If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or **eugenics**, for example." Casey at 859 (emphasis added).

book Abortion to support his arguments. Lader's later work Breeding Ourselves to Death (Ballantine: 1971) addresses many of the assumptions of the eugenics movement. And he repeatedly cited Glanville Williams, a Fellow of the British Eugenics society, and his book, The Sanctity of Life and the Criminal Law. One of the sentences from the book on which Justice Blackmun relied, but did not quote, constituted a ringing endorsement of eugenics:

> There is, in addition, the problem of eugenic quality. We now have a large body of evidence that, since industrialization, the **upper stratum of society** fails to replace itself, while the population as a whole is increased by excess births among the **lower and uneducated classes**. [Glanville Williams, The Sanctity of Life and the Criminal Law (emphasis added), quoted in P. Mosley, "Why the Hysteria Over *Roe*? Because it Would Strike a Blow to Eugenics," Family Research Council (July 6, 2018).[15]]

Whether the issue is approached from the standpoint of constitutional law, Christian morality, or even the same "Critical Race Theory" embraced by many Leftists today to evaluate public policy, Roe is clearly indefensible. This Court's abortion jurisprudence has disproportionately harmed persons of color, especially blacks and black families. Recently, an estimate was made that but for abortion, the black

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[15] *See* http://www.frcblog.com/2018/07/why-hysteria-over-emroeem-because-it- would-strike-blow-eugenics/.

population would be 48 percent greater than it is today.[16]

Thus, this Court should acknowledge and repudiate the racist roots of abortion in the Eugenics movement, and acknowledge — as Justice Thomas did in his dissent in Box — the disparate racial impact of abortion even today.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Fifth Circuit as being based on erroneous decisions of this Court in Roe and Casey which misconstrued the meaning of "liberty" in the Due Process Clause of the Fourteenth Amendment, as well as expressly overruling those two decisions.

Respectfully submitted,

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[16] See "Without abortion, the Black American population would be 50 percent higher," *California Catholic Daily* (June 13, 2016).

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