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* SCOTT PYLES IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Scott Pyles is an attorney and graduate student at University of Illinois Springfield and has handled and written about several fourth amendment and fourteenth amendment cases. This brief draws on that experience to address the fundamental question whether all pre-viability elective abortion prohibitions are unconstitutional. [1]

SUMMARY OF THE ARGUMENT

Although the case of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) are fundamentally flawed in their reasoning, the holdings of each case are correct as the decisions in each are supported by the fourth amendment right to be secure in their person from an unreasonable seizure.

The doctrine of substantive due process is a flawed theory for upholding claimed interests against governmental action. As both *Roe* and *Casey* relied on this doctrine for its reasoning, their rationale for reaching the result in each case is unsustainable.

However, the fourth amendment of the United States Constitution, which was relied on by the *Griswold v. Connecticut* 381 U.S. 479 (1965) court supplies the

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 the University of Illinois Springfield and are solely those of the amicus.

necessary doctrinal anchor to allow for protection in some cases for the right of woman to procure an abortion. As the fourth amendment proscribes unreasonable seizures with regard a woman's ability to secure her person it provides the necessary textual support to retain the holdings of *Roe* and *Casey* which allowed some but not all prohibitions on abortions.

An examination of the fourth amendment and its history reveals a right to secure their person from unreasonable searches and seizures. Prior cases reveal a history of this amendment in protecting persons from unreasonable governmental intrusion. The fourth amendment has been utilized in a civil law context to protect against both unreasonable searches and seizures. *Soldal v. Cook County* 506 U. S. 56 (1992) and *Chandler v. Miller* 520 U.S. 305 (1997) serve as examples of how the fourth amendment applies in that context.

As in all fourth amendment cases, reasonableness will serve as a guidepost in determining how much protection should provide to the woman. Certainly a statute that interferes with a woman right to protect her health or to prevent the continuation of an unconsented pregnancy are within the protection of the fourth amendment.

ARGUMENT

I.

THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE IS NOT A VALID SOURCE FOR THE EXERCISE OF JUDICIAL REVIEW IN THE CONTEXT OF ABORTION

The issue for review by the Court is whether prohibitions on all elective (an abortion where the mother's life is not in danger) pre-viability abortions are unconstitutional. The Court in *Planned Parenthood v. Casey* 505 U.S. 833 (1992) held that prior to viability that a woman had a fourteenth amendment liberty interest in seeking an abortion without undue interference by the State. However, the Court in *Casey* sustained several restrictions placed by the state on the procedure. That decision is once again being examined by the Court. The Petitioners have argued that *Casey* (and Roe) are wrongly decided in that there is no textual basis to support that decision. The Respondents have argued that *Casey* and *Roe* should be upheld under the doctrine of stare decisis. It is the position of this amici that although the Petitioner's argument regarding the reasoning of *Casey* may be correct, that the holding of *Casey* is still supported by the Constitution. As such, some but not all prohibitions on elective abortions prior to viability would be allowed under the Constitution.

In our federal system, the Federal Government possesses only limited powers. The powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people." U.S. Const.,

Amend. X. As such, the States possess the "police power" and the ability to make policy judgments. See *United States v. Morrison,* 529 U.S. 598 (2000). However, in *Marbury v. Madison* 5 U.S. 137 (1803), this Court held the Supreme Court had the power to review statutes to determine whether they were repugnant to the United States Constitution. While Article III does rest the judicial power with the Courts, the ability to invalidate acts of the Congress or state legislatures is not specifically found in the Constitution. While no one doubts that the Court does have that power, some (including members of this Court) feel that some restraints are needed in its exercise. The Court noted that "[O]ur deference in matters of policy cannot, however, become abdication in matters of law. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176, 2 L.Ed. 60 (1803). In this duty, the Court is often asked to review statutes or regulations for compatibility with the fourteenth amendment Due Process clause. The pertinent language is set forth:

> … No State shall… deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend XIV

By its very nature, the fourteenth amendment issues a general statement regarding the requirements of state in depriving a person of life, liberty, and property. Normally the fourteenth amendment is used to protect procedural due process concerns. See, e.g. *Girot v. Keith* 212 Ill.2d 372 (Ill. 2004) However, the Court has from time to time

expanded the reach of the due process clause to include a substantive component, which in taken to the extreme could almost touch any subject regarding one's liberty that could be challenged. The Court has used that clause to strike down pursuant to Judicial review, many state and federal statutes. The Court in the case of *Lochner v. New York*, 198 U.S. 45 (1905), held that limits to working hours violated the Fourteenth Amendment due process clause, stating that the law constituted an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract". Subsequently, the Supreme Court issued several decisions invalidating statutes that sought to regulate working conditions during the Great Depression. However, in *West Coast Hotel Co. v. Parrish* (1937) in which the Supreme Court upheld the constitutionality of minimum wage legislation effectively overruled Lochner and ended the substantive due process era. Several years later, the Court in *Williamson v. Lee Optical of Oklahoma* 348 U.S. 483 (1955) unanimously declared, "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." However, when reviewing personal liberties, the Court has continued with substantive due process and used a higher standard of review in those types of claims. See *United States v. Carolene Products Co.*, 304 US 144 (1938) note 4.

In *Roe v. Wade*, 410 U.S. 113 (1973) the Court invalidated a state statute which allowed an abortion only when the mother's life was at stake. However, *Casey*'s joint opinion as in *Roe*, rested its decision to invalidate the spousal notification requirement enacted by the

Pennsylvania legislature using the liberty clause of the fourteenth amendment. In that analysis, both cases became unmoored from *Griswold v. Connecticut* and it's textual grounding and more akin to the discredited *Lochner* substantive due process theory. The complaint over that past several decades by legal scholars and citizens alike is that the "liberty clause" could be interpreted to invalidate any number of different enactments by legislatures given it had the support of five Justices of the Court.[2] As Justice Scalia noted in his *Casey* dissent, that invalidation was supported by merely five unelected judges interpreting a single general word to invalidate a statute enacted by the people's representatives.

But although the Court has found that the Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint, *Washington v. Glucksberg* 521 U.S. 702 (1997) (Due Process Clause "protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them""), it has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unknown area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, the Court to a large extent, places the matter outside the arena of public debate and legislative action. The Court exercises care whenever asked to break new ground in this area, as the liberty protected by the Due Process Clause could be transformed into the policy preferences of the members of this Court. *Washington*

2. See David Garrow, *Liberty and Sexuality,* Open Road Media (2015) which catalogs some of the anti-*Roe* scholarship.

v. Glucksberg 521 U.S. 702 (1997) In that case, the Court noted that in the few occasions that the Court ventured down this road, it was for protection for rights that were without serious opposition. *Roe* was not in that category.

It is for that reason, it is argued that when the Court does exercise the power of Judicial review, that to strike a law or regulation put forward by the other elected branches, it should point to a specific clause or prohibition in the text of the constitution to abrogate that legislative or executive act. The same reasoning would also hold true for any analysis under the ninth amendment as it suffers from the same open-ended language defect. The essence of this argument is contained in the dissent in *Casey* by Justice Scalia when he points out that abortion is not found in the Constitution and that any decision invalidating the practice or restraint on abortion must be linked to a specific clause in the Constitution. Otherwise, it allows almost unfettered discretion to judges who are both unelected and unaccountable. *Casey's* joint opinion dismisses this argument by simply observing that:

> "[I]t is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution. See *Adamson v. California,* 332 U.S. 46, 68-92, (1947) (Black, J., dissenting). But of course, this Court has never accepted that view". *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)

That is where the *Casey* decision loses its footing. This amicus believes that the members of the Court now agree with Justice's Scalia's dissent in *Casey* and that the reasoning of *Casey* which rests on the basis on the Liberty clause is flawed and not a basis to strike a prohibition of abortion contained in a legislative enactment.

The above argument is the basis of much of the petitioner's position made in support of overruling *Casey* (and *Roe*) and as such, argue that any restrictions or prohibitions on abortion are constitutional employing the analysis of the dissent of Justice Scalia in *Casey*. However, it is the position of this amicus that simply overruling *Roe* and *Casey* is not the end point in this matter.

The Petitioner's brief acknowledges that the case of *Griswold v. Connecticut* 381 U.S. 479 (1965) has textual support in the Constitution, namely the fourth amendment. U.S. Const. Amend. IV Although, the Griswold decision referenced a penumbral theory in its decision, the opinion quotes and relies on the fourth amendment. The petitioner correctly points out that *Griswold* grounded the case in the "privacy of the home".[3] *Griswold* was one of the supports used in *Roe v. Wade*, which had its "central holding" upheld in *Casey*. However, Roe primarily relied upon the due process clause of the fourteenth amendment in striking an abortion ban enacted in Texas. The joint opinion's defense in *Casey* of this reasoning was weak and its phrase regarding "the mysteries of life" is widely

3. *Griswold* has also been instrumental in protecting other types of relationships as well that implicate privacy protections. See Jason Pierceson, (2014). *Same-sex marriage in the United States: The road to the Supreme Court*. Rowman & Littlefield Publishers.

criticized. As such the petitioner's arguments regarding those decisions are not without merit.

While that ends the case in the eyes of the petitioner, is there any basis for sustaining the holding of *Roe* and *Casey*? In one sense, it seems problematic to return to the same position that women were in in 1973. Would states be able to prosecute mothers who suffer miscarriages for manslaughter after being forced to carry a pregnancy? In what respects would the State be allowed to circumvent the privacy of a woman to get details of her medical condition under the Health Insurance Portability and Accountability Act of 1996? HIPAA, Pub L 104-191, 110 US Stat 1936 [1996] codified at 42 U.S.C. § 1320d Given Federal government's interest in protecting patient privacy, one wonder's how the states will be able to enforce this prohibition given this interest.

Stepping back and returning to *Griswold*, can it lead to an answer to the abortion issue, considering that the petitioner has conceded that *Griswold* is grounded in the fourth amendment? In many respects, the fourth amendment is one provision that deals with bodily integrity that is contained in the Bill of Rights. Taking a cue from Justice Gorsuch in his dissent in *Carpenter v. United States* 138 S.Ct. 2206 (2018), if one wants the Court to vindicate the fourth amendment rights, then an analysis should be set forth. This amicus submits that the protections of the fourth amendment should be considered in evaluating abortion restrictions.

II.

THE FOURTH AMENDMENT PROTECTS WOMEN AGAINST UNREASONABLE PHYSICAL RESTRAINTS THAT PREVENT THEM FROM SECURING THEIR PERSON

It is black letter constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. See *Williamson* v. *Lee Optical of Okla., Inc.,* 348 U. S. 483 (1955). That theory, however, assumes a situation in which the choice does not intrude upon a protected liberty especially one found in the Bill of Rights. Thus, while some people might disagree about whether the flag should be saluted or disagree about the proposition that it may not be defiled, the Supreme Court has ruled that a State may not compel or enforce one view or the other under the first amendment. See *Texas* v. *Johnson,* 491 U. S. 397 (1989). Here, despite petitioner's arguments to the contrary, an unreasonable physical restraint which hinders the securing of their person is protected within the text of the Constitution and some aspects of abortion regulation must remain outside the realm of legislatures and executives.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "basic purpose of this Amendment," cases have recognized, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court of City and County of San Francisco*, 387 U. S. 523, 528 (1967). The interpretation is guided by the historical understandings

"of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted." *Carroll v. United States*, 267 U. S. 132, 149 (1925). On this, cases have recognized some basic reference points. It has been recognized that the Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States,* 116 U. S. 616, 630 (1886).

In the seminal Fourth Amendment case of *Boyd v. United States* 116 U.S. 616 (1886) the Court wrote, in frequently quoted language, that the Fourth Amendment's prohibitions apply:

> "to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property." *Id.,* at 630.

Perhaps the most eloquent statement of the principle of liberty underlying these aspects of the fourth amendment was given by Justice Brandeis, dissenting in *Olmstead v. United States,* 277 U. S. 438:

> "The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of

> the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone— the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . .." *Id*. at 478

In *Terry v. Ohio* 392 U.S. 1, (1968), the Court noted in determining whether a seizure had occurred determined that "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." citing *Union Pac. R. Co.* v. *Botsford,* 141 U. S. 250, 251 (1891). In *Katz v. United States*, 389 U.S. 347 (1967) the Court observed that the fourth amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. That observation is certainly correct in that fourth amendment also protects from unreasonable seizures or physical restraints.

The above language shows the broad purpose behind the fourth amendment. The dual protections of both privacy and security are the guideposts that provide the protection offered by the fourth amendment. However, the determination of whether the fourth amendment

applies in each fact situation depends on the language contained in the amendment itself. Employing a method of interpretation championed Justice Scalia, when interpreting any document, you look at the language used to make a judgment whether an action is allowed or prohibited. The text must be the starting point whether it be a contract, statute, or constitutional provision. If a mistake is made in a contract or even a statute, the remedy to fix is not onerous. But as it has been pointed out in cases such as *Washington v. Glucksberg*, mistakes made in constitutional interpretation are not easy to correct given the process of amendment provided for in the Constitution. So, the Court should have to rely on a specific provision of the Constitution to invalidate actions of elected officials of the other branches.

In his book, *A Matter of Interpretation* (1987), Justice Scalia sketches a method of textual interpretation that looks at the meaning of words when it was adopted but also relies on a trajectory of the provision to account for advances or changes those actions. He points out that constitutional provisions should be given an expansive interpretation, but not one which the language would not bear. As Justice Scalia points out, not strict construction, but reasonable construction is required in interpreting constitutional texts. [4]

When interpreting a constitutional provision, the text is paramount. The language used in the fourth amendment prohibits unreasonable searches and seizures of persons,

4. Antonin Scalia. 1997. *A Matter of Interpretation: Federal Courts and the Law: An Essay.* Princeton, NJ: Princeton University Press.

houses papers and effects. In assessing the coverage of the fourth amendment, the meaning of the words when the fourth amendment was enacted gives us a startingpoint. Searches and seizures are the key activities discussed in the fourth amendment. The word search has in its ordinary meaning was the same as it is today: "`[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.'" *Kyllo v. United States,* 533 U.S. 27, 32 (2001) (quoting N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989) However, if someone exposes something to the public, there can be no search as it is not hidden. A seizure is also protected in the amendment. A seizure is defined as the act of seizing; the act of laying hold on suddenly; as the *seizure* of a thief. The Court has found that a "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property. Secure is defined as to guard effectively from danger; to make safe. N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989) Looking at the language used, the amendment protects people from unreasonable inspections, examination, or control of hidden (private) aspects of their persons, homes (and offices or commercial buildings) papers (digital information on phones protected in *Riley v. California* 134 S.Ct. 2473 (2014)), and effects (personal property such a vehicles). When one considers the itemized aspects worthy of protection in the fourth amendment, it does have broad coverage for places and things a person may expect to be protected as private. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974).

Another key word in the fourth amendment in this case is the definition of "person". A person is defined as "An individual human being consisting of body and soul". N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989) That definition is very similar to its modern definition. Reading person together with secure helps answer our question. A reasonable construction of those words indicate that the fourth amendment is to allow a human being with body and soul to be able to resist attack or be safe from danger. This recalls notions referenced by some scholars of the concept of personhood. See Jed Rubenfeld, (1989). *The right of privacy*. Harv. L. Rev., *102*(4), 737 In fact, the meaning of "person" goes beyond what is typically associated with physical arrests.

Even though the meaning of the words may apply, contemporaneous understanding of the fourth amendment raises some questions. Does not the fourth amendment apply only in a criminal case? How does the fourth amendment apply to a medical situation? In terms of abortion regulations, the operative term is seizure. Unreasonable seizures are defined as a 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (omissions in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)) I would submit that as the Court did *Soldal v. Cook County*, that it need not apply the technical rules regarding seizures that involve probable cause and arrests as done in criminal cases. *California v. Hodari D.*, 499 U.S. 621 (1991) In the civil context, the Court simply determined whether there was some

meaningful interference with an individual's possessory interests. Unlike Soldal, the fourth amendment protection is requested for a person. Applying the logic of Soldal, possession means control or ownership. *Soldal v. Cook County*, 506 U. S. 56 (1992) So, the fourth amendment interest here involves the control over a woman's body. [5]

The fourth amendment has also been applied in a medical setting. A compelled surgical intrusion into an individual's body implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable" even if likely to produce evidence of a crime. *Schmerber* v. *California,* 384 U. S. 757 (1966) Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts. See *Winston* v. *Lee,* 470 U. S. 753 (1985) (invalidating surgical removal of bullet from murder suspect); *Rochin* v. *California,* 342 U. S. 165 (1952) (invalidating stomach pumping). *Ferguson v. City of Charleston* et. al 532 U.S. 67 (2001) (invalidating a search

5. It goes without saying that under this approach that an argument could be made that any statute which places a physical restraint on the movement or liberty of a person such as statutes preventing homicides, thefts, battery, or sexual assault could be considered seizures. However, those activities have been proscribed nearly since the beginning of time. See *Holy Bible, King James Version*, Exodus 20 and as such would be easily classified as reasonable seizures or physical restraints upon the person. The amicus points out that in the Bible, the first right bestowed upon Adam and Eve was to allow them to be clothed. In other words, privacy was one of the first rights granted by God to them. See *Holy Bible, King James Version*, Genesis 2.

of a pregnant woman's urine) An abortion is typically a medical procedure, done in the safety and supervision of a doctor's office or clinic. Getting the procedure done with a physician's legal assistance was one of the motivating factors that started the case in *Roe*. Under petitioner's analysis, that would change and go back to woman utilizing the self-help remedies that existed prior to *Roe*.

A few misconceptions should be discussed regarding privacy and fourth amendment. Justice Rehnquist in his dissent in *Roe* states that "privacy" that the Court finds is not a distant relative of the freedom from searches and seizures protected by the fourth amendment to the Constitution, which the Court has referred to as embodying a right to privacy in *Katz* v. *United States,* 389 U. S. 347 (1967). Also, Justice Rehnquist found that a physicians work in abortions could not be considered private. Sometimes however, it is difficult to see the forest through the trees. Certainly, a statute that interferes with the ability of a woman to secure her person from a pregnancy implicates fourth amendment concerns. I would also disagree with the statement that one's medical procedures and findings are not "private". Surgical medical procedures certainly do not take place in public and are in fact private as protected by federal law. HIPAA, Pub L 104-191, 110 US Stat 1936 [1996] codified at 42 U.S.C. § 1320d

Some may argue that the fourth amendment only applies in criminal cases. "Lawyers, like all professionals, tend to suffer from professional myopia".[6]

6. Charles R. McGuire. (1986). *The legal environment of business: Commerce and public policy*. C.E. Merrill Publ. Company.

Most practitioners and judges associate the fourth amendment in a criminal sense. I would argue that even though courts tend to associate the fourth amendment with criminal suspects and arrests, there is no such limitation in the amendment itself. Certainly, the framers did not intend to use the fourth amendment solely to protect criminal suspects. As has been noted, the fourth amendment has been used in a variety of civil contexts.

Some have argued that privacy is not protected by the Constitution. In *Carpenter v US*, the dissent of Justice Thomas correctly points out that the word "privacy" is nowhere to be found in the Constitution. (However, the derivative word "private" is used in the fifth amendment in connection with property) However, to suggest that there is no privacy protection within the Constitution is making an argument that does not factor in the meaning of the words used in the fourth amendment. given the language in the fourth amendment. Searches are conducted to locate information or items that are hidden (or private). If someone is trying to keep something private, ergo they are seeking privacy. As such arguments that suggest privacy was not one of the textual intents of the fourth amendment should be easily dismissed. This approach is distinguished from the approach of Justice Thomas in his dissent in *Carpenter*. There Justice Thomas was attempted to divine the original intent of the fourth amendment and not the original meaning of the words in the fourth amendment itself in determining its application. *Carpenter v. United States*, 138 S. Ct. 2206 (2018) In *Katz v. US*, the Court stated that the fourth amendment could not be translated into a general right to privacy. *Katz v. U.S.*, 389 U.S. 347 (1967) While there is agreement with that statement, the language and places used in the fourth

amendment is quite extensive given the items offered protection.

In determining whether an event or activity is protected, the Court has looked historical understanding of those events. In a historical context, it is noted that in *Roe*, there was a discussion of whether abortion or "quickening" was a crime. *Roe* stated as follows:

> *The common law.* It is undisputed that at common law, abortion performed *before* "quickening"— the first recognizable movement of the fetus *in utero,* appearing usually from the 16th to the 18th week of pregnancy was not an indictable offense…. *The American law.* In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law … It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century… *Roe v. Wade* 410 U.S. 113 (1973)

The above analysis reveals that when the fourth amendment was adopted in 1791, that quickening was not

considered a crime. As such it is not outside the realm of the protections of the fourth amendment.

As with most documents drafted to cover a wide variety of subjects, certain language is used that is subject to interpretation. The fourth amendment uses the word reasonable in drawing the line of when a search or seizure is allowed. The courts have used as tools of interpretation, when reviewing the reasonableness clause, traditions and actions that were allowed at the time the fourth amendment was adopted as well as prior court decisions. As has been pointed out, that at the time of the adoption of the fourth amendment, abortion was not a crime. In fact, this amicus would point out that most pregnancies and birth took place in the home with family or midwife present to assist at birth. There were no hospitals, physicians, or medical records at founding unlike present day. Justice Thomas corrected pointed out in his dissent in *Indianapolis v. Edmonds* in a different context that:

> Taken together, our decisions in *Michigan Dept. of State Police* v. *Sitz,* 496 U. S. 444 (1990), and *United States* v. *Martinez-Fuerte,* 428 U. S. 543 (1976), stand for the proposition that suspicionless roadblock seizures are constitutionally permissible if conducted according to a plan that limits the discretion of the officers conducting the stops. I am not convinced that *Sitz* and *Martinez-Fuerte* were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered "reasonable" a program of indiscriminate stops of individuals not suspected of wrongdoing. *City of Indianapolis*

Justice Thomas correctly observed in that historical analysis that roadblock stops of those not suspected of a crime would not have been favored. In fact, I would suspect that a statute requiring a woman to strip naked, spread her legs and submit to a probe inserted into her vagina for the purpose of determining age of the fetus she was carrying would not be reasonable by the framers as well. See Note. 2015. "*Physically Intrusive Abortion Restrictions as Fourth Amendment Searches and Seizures: A new conceptual avenue for challenging abortion restrictions*". Harv. L. Rev., *128*(3), 951–972 Janelle T. Wilke, *Fourth Amendment, a Woman's Right: An Inquiry into Whether State-Implemented Transvaginal Ultrasounds Violate the Fourth Amendment's Reasonable Search Provision*, 18 Chap. L. Rev. 921 (2015).

The cases reviewed show a broad purpose for the fourth amendment and the analysis of the words reveal roots for protection of a person's bodily integrity. Use of the fourth amendment would not go against any societal norms that were established at the time of enactment and that common theories regarding the fourth amendment have been dispelled. However, can the framework of the fourth amendment as it exists currently be used to offer protection for the claims raised by the respondents?

III.

THE FOURTH AMENDMENT APPLIES TO BOTH CIVIL MATTERS AND TO ACTIONS BY PRIVATE ACTORS THAT ARE COMPELLED BY LAW

The fourth amendment throughout much of history has been relegated to primarily criminal cases involving searches and seizures of suspects, people involved in traffic stops or warrants issued to procure evidence. See e.g. *People v. Ariaza* 2020 IL App (3d) 170735 As noted however, the language of the amendment contains no such qualification. In fact, at founding, the fourth amendment was addressed to prohibit searches for illegal or untaxed goods which was mostly a civil infraction. As will be shown, the framework of the fourth amendment has been used in a civil context and in areas not involving searches of criminals. Indeed, it acknowledged what is evident from the Courts's precedents that the Amendment's protection applies in the civil context as well. See *O'Connor* v. *Ortega,* 480 U. S. 709 (1987); *New Jersey* v. *T. L. O.,* 469 U. S. 325, 334-335 (1985); *Michigan* v. *Tyler,* 436 U. S. 499, 504-506 (1978); *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307, 312-313 (1978); *Camara* v. *Municipal Court of San Francisco,* 387 U. S. 523, 528 (1967).

The Supreme Court has recognized that intrusions upon Fourth Amendment-protected areas that are compelled by law but conducted by private actors nonetheless constitute Fourth Amendment events. The Supreme Court has applied the Fourth Amendment outside of the investigation context more broadly. In *Soldal v. Cook County*, 506 U. S. 56 (1992) the Court applied the Fourth Amendment to a non-investigatory

seizure of a mobile home, which was incident to an eviction proceeding. The Court held that a "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States* v. *Jacobsen,* 466 U. S. 109, 113 (1984). Indeed, the Court declared itself "puzzled" by the suggestion that the Fourth Amendment did not apply to a non-investigatory seizure. Thus, the fact that the abortion-restriction context does not involve law enforcement, or a traditionally investigatory purpose, does not preclude the necessity of Fourth Amendment challenges to those restrictions. As in *Soldal*, this Court held that a seizure within the scope of the fourth amendment had occurred when county deputies were present during an illegal eviction by a private party and a seizure of a mobile home occurred. The deputies sole action was the prevention of Soldal from stopping the removal of the mobile home. As such, a seizure in the civil context does not have to relate to the interpretation of a physical arrest in the criminal context. *Soldal v. Cook County*, 506 U. S. 56 (1992)

In *Chandler v. Miller,* 520 U.S. 305 (1997), the Georgia legislature enacted a statute requiring drug test of anyone who intended to run for office. That statute was challenged on the basis that the statute violated the fourth amendment. This Court found that statute did violate the fourth amendment as an unreasonable search. This case is important as it involved an application of the fourth amendment to a non-criminal setting, to a legislative enactment as opposed to a judicial warrant or action by the police and did not involve suppressing evidence in a criminal case. There a statute was challenged simply for being an unreasonable search under the fourth amendment.

IV.

ABORTION RIGHTS FIT WITHIN THE FOURTH AMENDMENT FRAMEWORK

Given that this Court has analyzed statutes in a civil context within the framework of the fourth amendment, can it apply to abortion regulations? Although the legal reasoning basis of *Roe* and *Casey* are suspect, the interests of woman that are discussed in each of the opinions are not. The fourth amendment states that one has the right to be secure in their persons from unreasonable seizures or in other words an unreasonable physical restraint. As stated in *District of Columbia v. Heller,* persons have a right protect themselves or a right to self-defense which forms the basis for second amendment right to bear arms. *District of Columbia v. Heller,* 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Similar language is found in the fourth amendment which provides that persons have the right to be secure in their persons from unreasonable control. As catalogued in *Roe* and *Casey*, a woman that is pregnant faces health consequences and disabilities relating to a pregnancy. A statute which prohibits the termination of a pregnancy when a woman faces health consequences or is forced to endure a nonconsensual pregnancy (rape or incest) would be unreasonable physical restraint (seizure) that would implicate the fourth amendment. Again, a seizure occurs when the target of the government action at issue reasonably believes that she is not free to leave, or that she is "being ordered to restrict [her] movement". *California v. Hodari D.*, 499 U.S. 621 (1991) Being unable to defend herself from an unhealthy circumstance resulting from pregnancy would restrain her from keeping herself safe as permitted under

the fourth amendment. Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the amendment protects against such intrusions if the private party acted as an instrument or agent of the Government. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 624, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)

Whether a seizure is deemed unreasonable is determined by balancing the public interest in the seizure with the "severity of the interference with individual liberty." As applied to the abortion restrictions context, the question whether the restriction constitutes a seizure is whether a reasonable person undergoing the restriction would believe she was physically restrained from performing an act. The question whether the seizure is unreasonable is whether the public interest outweighs the severity of the intrusion. Some scholars written on the application of the fourth amendment to abortion restrictions. See Note. 2015. "*Physically Intrusive Abortion Restrictions as Fourth Amendment Searches and Seizures: A new conceptual avenue for challenging abortion restrictions*". Harv. L. Rev., *128*(3), 951–972. Mary H. Wimberly, 2019. "*Rethinking the Substantive Due process Right of Privacy: Grounding Privacy in the Fourth Amendment*", 60 Vand. L. Rev. 283 It is clear from that research that abortion restrictions can implicate fourth amendment interests.

However, it is also acknowledged that the fourth amendment would provide less absolute protection than offered by *Roe* and *Casey*. Unlike the absolute protections of the first amendment, the fourth amendment allows for reasonable searches and seizures. Many restrictions

on abortion may be considered reasonable under the language of the fourth amendment. Issues of parental consent or notification, presentation of information regarding abortion alternatives, funding of abortions, or requirements for facilities are possible examples of what could be deemed reasonable under the fourth amendment analysis sketched here. The amicus submits however, that regulations used such as what was enacted in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016) which amounted to a denial of access as well as required testing such as ultrasounds should be deemed as an unreasonable seizure. Furthermore, whether the health of the woman is implicated would seem to be a matter for the woman and her physician and not for the scrutiny of the government.

Yet the prohibitions on abortions when life or health are implicated and in nonconsensual circumstances of rape and incest should be considered only a floor of the protection. One only needs to think of the consequences of forcing a minor to give birth only to possibly be required to turn the child she carried over to a man who brutally raped her for visitation. Or to the instance where a woman is forced to carry a child with a severe defect only to watch that child die a painful death soon after it was born. That must be balanced against the potential life that exists within the woman which is also a weighty interest. It is a fair assumption that *Roe* initially written provided for more a balanced approach to the subject than what occurred. But as states attempted to place restrictions in testing the Supreme Court's position on the subject, the Court deemed them as a challenge to their authority which resulted in a more unbalanced approach against the state.

As stated, the States have an interest in abortion debate as well. States may take sides in the abortion debate and come down on the side of life, even life in the unborn: "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage women to know that there are philosophic and social arguments that are important factors in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself." *Casey* 505 U. S., at 872 States also have an interest in the medical profession and the procedures used by its licensed doctors in abortions. The following procedure is summarized in *Gonzalez v. Carhart* 550 U.S. 124 (2007).

> In the usual second-trimester procedure, "dilation and evacuation" (D & E), the doctor dilates the cervix and then inserts surgical instruments into the uterus and maneuvers them to grab the fetus and pull it back through the cervix and vagina. The fetus is usually ripped apart as it is removed, and the doctor may take 10 to 15 passes to remove it in its entirety… The main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes, pulling out its entire body instead of ripping it apart. In order to allow the head to pass through the cervix, the doctor typically pierces or crushes the skull. (Taken from the summary prepared by the Reporter of decisions in Gonzalez v. Carhart. 550 U.S. 124 (2007))

Anyone who thinks that this procedure should not be regulated should have their head or better, yet their heart examined.

However, in the context of this case, the issue is a prohibition on all elective pre-viability abortions. Certainly, a meaningful interference with the ability of a woman to make herself safe would constitute an unreasonable seizure. A prohibition of all elective abortions may not allow a woman to protect herself from the health consequences of pregnancy. Several medical conditions, some caused by pregnancy and some by pre-existing conditions which then complicate pregnancy, that may necessitate an abortion to protect the mother's health. These include, but are not limited to, the following: heart disease, congestive heart failure; anemia and other diseases of the blood; urinary tract infections, acute renal failure; endocrine disorders, such as diabetes, which can either pre-exist or be caused by pregnancy, and which often produce seriously adverse effects on the woman; or diseases of the nervous system, including epilepsy, which is a condition that may be exacerbated by pregnancy, resulting in an increase in frequency of seizures. There are also sorts of mental health conditions that might necessitate an abortion. Doctors have also opined that pregnancies resulting from rape or incest pose severe threats to the mother's mental health. See *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 488–89 (E.D. Va. 1999), *aff'd*, 224 F.3d 337 (4th Cir. 2000)

This brief is not intended to anticipate all the different issues a woman or state may encounter in this matter. However, this interpretation is in line with the

methodology set forth by Justice Scalia which employs the original, reasonable meaning of the words of the fourth amendment. It would also allow for legislatures to protect potential life or regulate the practice of abortion given it does not amount to an unreasonable physical restraint on a woman to be secure in her person. Statutes that provide for parental consent or notice would certainly be reasonable subjects of regulation under the fourth amendment. It seems nonsensical to require a parents permission to even get medical treatment of any kind except in the case of an abortion. (the Court prohibited a State from imposing a provision requiring consent in *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 74 (1976)).

In this brief, this amicus has been critical of the reasoning used in *Roe* and *Casey* to come up with the constitutional basis to invalidate acts of the state legislatures. Yet even Justice Rehnquist was effusive of Justice's Blackmun's efforts in the opinion in *Roe*. Some of Roe's conclusions should not be thrown out with the substantive due process underpinning. In evaluating reasonableness under the fourth amendment, viability is an important point in the pregnancy. Before viability, the fetus is dependent in the mother as it cannot survive outside of the womb. That would seem to elevate the rights of the woman to that point. The calculus changes post viability. Restraints on the liberty of a woman become more reasonable as the pregnancy advances. Consideration should be given to the fact that the woman has allowed to the pregnancy to advance to that point and has in a sense consented to the further restraint on her liberty. In the earlier stages of pregnancy, the woman should have lesser restraint on her person as the fetus may not have developed much or that the woman may be unaware of the fact that she is pregnant.

Under this fourth amendment analysis, not all pre-viability elective abortion prohibitions would be unconstitutional. However, this analysis would preserve the basic protection of woman, anchor the protection within the text of the constitution while allowing states to have a greater voice in regulating the practice if it is so desired. If one looks at the issues involved, this analysis will not require a huge rewrite of existing law but would provide a firmer ground from which to base the analysis of individual issues. One thing that *Roe* and *Casey* did acknowledge is that the issues involved with a woman and the potential life she is carrying are complex and care must be utilized before unsettling a holding that has existed for nearly fifty years. Although the reasoning of *Roe* and *Casey* are flawed, the Court should review the interests asserted by Respondents through the requirements of the fourth amendment.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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