NOS. 23-235, 23-236

In the Supreme Court of the United States

U.S. FOOD AND DRUG ADMINISTRATION, ET AL.,

APPELLANTS,

V.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,

APPELLEES

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39 of the Rules of this Court, the Petitioners, Americans *en ventre sa mere*, ask leave to file the attached Petition for Joinder of Putative Appellees, without prepayment of costs, and to proceed *in forma pauperis*.

Leave to proceed in forma pauperis has not been sought in any other court as this Petition is made directly to this Court. The Petitioners are indigent as their parents and natural guardians, who are their sole means of support, do not seek their nurturing and care, but rather their demise. This Petition is being submitted by their Next Friend, Gregory J. Roden, who seeks to represent them pursuant to Federal Rule of Civil Procedure 17(c)(2) and the common law. 1 CHITTY'S CRIMINAL LAW, 301 (I. Riley 1819). Gregory J. Roden is a member of the Bar of this Court,

has written the attached Petition, and is prepared to represent the Petitioners, pro bono, before this Court.

Respectfully submitted this 15th day of January, 2024.

s/Gregory J. Roden

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SUPREME COURT OF THE UNITED STATES

U.S. Food and Drug Administration, et al.,	)	
Appellants,	)	Nos. 23-235, 23-236
v.	)	
Alliance for Hippocratic Medicine, et al.,	)	
Appellees.		

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO PROCEED *IN FORMA PAUPERIS*

We, Americans *en ventre sa mere*, are the petitioners in the above-entitled case. In support of our motion for leave to proceed *in forma pauperis*, we state that because of our poverty we are unable to pay the costs of this case or to give security therefor; and we believe we are entitled to redress.

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 0	$ N/A	$ 0	$ N/A
Income from real property (such as rental income)	$ 0	$ N/A	$ 0	$ N/A

Interest and dividends	$ 0	$ N/A	$ 0	$ N/A
Gifts	$ 0	$ N/A	$ 0	$ N/A
Alimony	$ 0	$ N/A	$ 0	$ N/A
Child support	$ 0	$ N/A	$ 0	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ N/A	$ 0	$ N/A
Disability (such as social security, insurance payments)	$ 0	$ N/A	$ 0	$ N/A
Unemployment payments	$ 0	$ N/A	$ 0	$ N/A
Public-assistance (such as welfare)	$ 0	$ N/A	$ 0	$ N/A
Other (specify):	$ 0	$ N/A	$ 0	$ N/A
Total monthly income:	**$ 0**	**$ N/A**	**$ 0**	**$ N/A**

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
none	N/A	N/A	$ 0
none	N/A	N/A	$ 0
none	N/A	N/A	$ 0

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A

4. *How much cash do you and your spouse have? $__0_____*

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	**Type of Account**	**Amount you have**	**Amount your spouse has**
None	N/A	$ 0	$ N/A
None	N/A	$ 0	$ N/A
None	N/A	$ 0	$ N/A

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home	**Other real estate**	**Motor vehicle #1**
(Value) $ 0	(Value) $ 0	(Value) $ 0
		Make and year: N/A
		Model: N/A
		Registration #: N/A

Motor vehicle #2	**Other assets**	**Other assets**
(Value) $ 0	(Value) $ 0	(Value) $ 0
Make and year: N/A		
Model: N/A		
Registration #: N/A		

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**
none	$ 0	$ 0
none	$ 0	$ 0
none	$ 0	$ 0
none	$ 0	$ 0

7. *State the persons who rely on you or your spouse for support.*

Name [or, if under 18, initials only]	**Relationship**	**Age**
N/A	N/A	N/A
N/A	N/A	N/A
N/A	N/A	N/A

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	**Your Spouse**
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? [ ] Yes [ ] No Is property insurance included? [ ] Yes [ ] No	$ 0	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ N/A
Home maintenance (repairs and upkeep)	$ 0	$ N/A
Food	$ 0	$ N/A
Clothing	$ 0	$ N/A
Laundry and dry-cleaning	$ 0	$ N/A
Medical and dental expenses	$ 0	$ N/A

Transportation (not including motor vehicle payments)	$ 0	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's:	$ 0	$ N/A
Life:	$ 0	$ N/A
Health:	$ 0	$ N/A
Motor vehicle:	$ 0	$ N/A
Other:	$ 0	$ N/A
Taxes (not deducted from wages or included in mortgage payments) (specify):	$ 0	$ N/A
Installment payments		
Motor Vehicle:	$ 0	$ N/A
Credit card (name):	$ 0	$ N/A
Department store (name):	$ 0	$ N/A
Other:	$ 0	$ N/A
Alimony, maintenance, and support paid to others	$ 0	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ N/A
Other (specify):	$ 0	$ N/A
Total monthly expenses:	**$ 0**	**$ N/A**

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

[ ] Yes [X] No If yes, describe on an attached sheet.

10. *Have you spent — or will you be spending — any money for expenses or attorney fees in connection with this lawsuit?* [ ] Yes [X] No

If yes, how much? $ _____

11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

We the Petitioners are indigent as our parents and natural guardians, who are our sole means of support, do not seek our nurturing and care, but rather our demise.

12. *State the city and state of your legal residence.*
N/A

Your daytime phone number: (____) _____N/A_____

Your age: _ en ventre sa mere ____ *Your years of schooling*: _N/A_____

Last four digits of your social-security number: _N/A_____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: January 15, 2024

By Next Friend, Gregory J. Roden

NOS. 23-235, 23-236

In the Supreme Court of the United States

U.S. FOOD AND DRUG ADMINISTRATION, ET AL.,

Appellants,

V.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,

Appellees

MOTION FOR JOINDER OF PUTATIVE APPELLEES

AMERICANS *EN VENTRE SA MERE*

Petitioners,

BRIEF FOR PETITIONERS

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Counsel for Petitioners

QUESTIONS PRESENTED

This case concerns mifepristone, a drug that the U.S. Food and Drug Administration (FDA) approved in 2000 for terminating early pregnancies. The Fifth Circuit held that respondents—doctors and associations of doctors who oppose abortion—have Article III standing to challenge FDA's 2016 and 2021 actions with respect to mifepristone's approved conditions of use and that those actions were likely arbitrary and capricious. The court therefore affirmed the district court's stay of the relevant agency actions. The questions presented are:

1. Whether respondents have Article III standing to challenge FDA's 2016 and 2021 actions.

2. Whether FDA's 2016 and 2021 actions were arbitrary and capricious.

3. Whether the district court properly granted preliminary relief.

PARTIES TO THE PROCEEDING

Plaintiffs-appellees below: Alliance for Hippocratic Medicine; American Association of Pro-Life Obstetricians & Gynecologists; American College of Pediatricians; Christian Medical & Dental Associations; Shaun Jester, D.O.; Regina FrostClark, M.D.; Tyler Johnson, D.O.; and George Delgado, M.D.

Defendants-appellants in the court of appeals: U.S. Food and Drug Administration (FDA); Robert M. Califf, M.D., in his official capacity as FDA's Commissioner of Food and Drugs; Janet Woodcock, M.D., in her official capacity as Principal Deputy Commissioner of FDA; Patrizia Cavazzoni, M.D., in her official capacity as Director of FDA's Center for Drug Evaluation and Research; the U.S. Department of Health and Human Services (HHS); and Xavier Becerra, in his official capacity as Secretary of HHS. Danco Laboratories, L.L.C. was an intervenor- appellant below.

RELATED DECISIONS

United States District Court (N.D Tex.):
Alliance for Hippocratic Medicine, et al. v. U.S. Food & Drug Administration, et al., No. 22-cv-223 (Apr. 7, 2023)

United States Court of Appeals (5th Cir.):
Alliance for Hippocratic Medicine, et al. v. U.S. Food & Drug Administration, et al., No. 23-10362 (Aug. 16, 2023)
Alliance for Hippocratic Medicine, et al. v. U.S. Food & Drug Administration, et al., No. 23-10362 (Apr. 12, 2023) (partially granting and partially denying stay pending appeal)

Supreme Court of the United States:
U.*S. Food & Drug Administration, et al. v. Alliance for Hippocratic Medicine, et al.*, No. 22A902 (Apr. 21, 2023)
Danco Laboratories, LLC v. Alliance for Hippocratic Medicine, et al., No. 22A901 (Apr. 21, 2023)

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BRIEF FOR PETITIONERS

MOTION FOR JOINDER OF PUTATIVE APPELLEES

AMERICANS *EN VENTRE SA MERE*

Pursuant to Fed. R. Civ. P. 21, Americans *en ventre sa mere* ("Petitioners"), by their Next Friend,[1] respectfully move for leave to join as Plaintiffs-Appellees in this cause before the Court.

ARGUMENT

I. JUSTICE REQUIRES THE PETITIONERS BE JOINED IN THIS CASE

In *Mullaney v. Anderson*, this Court allowed joinder while the case was pending before as matter of justice, "Rule 21 of the Federal Rules of Civil Procedure authorizes the addition of parties 'by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.'" *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952). This Court allowed joinder of parties as Plaintiffs-Appellees to eliminate any potential dispute over the plaintiffs' standing, "Here, for the first time, petitioner questioned the standing of respondent union and its Secretary-Treasurer to maintain this suit." *Id.* at 416. This Court allowed two members of the union to join observing, "To grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent…. Nor would their earlier joinder have in any way affected the course of the

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[1] Fed. R. Civ. P. 17(c)(2):

> (c) Minor or Incompetent Person….
> (2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

litigation." *Id.* Then concluding, "We grant the motion in view of the special circumstances before us." *Id.*

Federal Rule of Civil Procedure 19 provides, in relevant part, that "A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if… that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a).

Whereas, the right to life of children *en ventre sa mere* was an acknowledged civil right at the time the Fourteenth Amendment was adopted, as confirmed by this Court in *Dobbs v. Jackson Women's Health Organization*, 597 U.S ___, ___ (2022):

> [A]bortion had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.
>
> ….
>
> There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point.

No doubt. When Justice Blackmun recounted in *Roe v. Wade* the findings of the 1857 AMA Committee on Criminal Abortion deploring "abortion," it was the failure of some states to proscribe abortion *before* quickening which was the object of its ire:

> "The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection."[2]

Justice Blackmun further recounted that this position was reiterated some 14 years later:

> In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names."[3]

Accordingly, this Court struck down *Roe* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) along with their dismissal of children *en ventre sa mere* as merely "potential life":

> What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." See *Roe*, 410 U. S., at 159 (abortion is "inherently different"); *Casey*, 505 U. S., at 852 (abortion is "a unique act"). None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion.

This case concerns mifepristone, a drug that the U.S. Food and Drug Administration (FDA) approved in 2000, alleged to be safe for the mother and effective for terminating early pregnancies. That action by the FDA was under the

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[2] *Roe v. Wade*, 410 U.S. 113, 141-142 (1973).

[3] *Id.* at 142.

umbrella of the *Roe* regime, and hence the interests of those unborn human beings whose lives were to be terminated was never considered. Yet under Texas law, both common law and statutory, abortion at any stage of gestation was held to be criminal.[4] Whereas, in the *Slaughter-House Cases*, this Court held the scope of the Privileges and Immunities Clause included the guarantees, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection." The *Slaughter-House Cases*, 83 U.S. 36, 79 (1873). Per the text of Section 1 of the Fourteenth Amendment it is clear that the scope of these federal guarantees was to be broadly implemented among all classes of members of this country—"Put another way, the legal problem was not centrally about what was protected but about who was protected."[5] The Petitioners, whose very lives are at stake in the outcome of this case are the epitome of a party who has "standing to sue"—having a "personal stake in the outcome of the controversy" such that without their joinder this dispute cannot be adjudicated in a truly "adversar[ial] context and in a form historically viewed as capable of

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[4] *Gray v. State*, 178 S.W. 337, 338, 77 Tex.Cr.R. 221, 224 (Tex. Crim. App. 1915) (Prendergast, P. J.) ("The courts of our various States differ as to this, most of them holding that an abortion can be produced at any time after conception and before the woman was 'quick' with child"). Although under an 1840 statute Texas was to adopt the "common law of England," in deciding what exactly that common law was, Texas looked to the common law experience of the of the several states, as in the case of *Grigsby v. Reib*, a case concerning common-law marriages—such marriages had been abrogated in England by an act of Parliament in 1823. *Grigsby v. Reib*, 153 S.W. 1124, 1125 (Tex. 1913) (Brown, C. J.).

[5] Hamburger, PRIVILEGES OR IMMUNITIES, 105 Nw. U.L. Rev. 61, 70 (2011).

judicial resolution."[6] Accordingly, the Petitioners ought to be joined as a party in order that their interests may be properly represented.[7]

II. Americans *en ventre sa mere* are the Real Parties in Interest

Federal Rule of Civil Procedure 17(a) provides, in relevant part, "An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:… a guardian." And, in Fed. R. Civ. P. 17(c):

> A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

Justice Blackmun acknowledged in *Roe v. Wade* that "unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem." 410 U.S. 113, 162. As did Justice Stevens in *Planned Parenthood v. Casey*, citing *Roe* at that very point, and writing that with regard to "the contingent property interests of the unborn" that they "are generally represented by guardians ad litem."[8] But there was nothing "contingent" in the concerns of the Supreme Court of New Jersey for

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[6] *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

[7] Fed. R. Civ. P. 19(d): "Exception for Class Actions. This rule is subject to Rule 23." Fed. R. Civ. P. 23(g)(2):

> Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

[8] *Planned Parenthood v. Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part).

the right to life of the child *en ventre sa mere* in *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, wherein they appointed a special guardian for the infant and ordered "the guardian to consent to such blood transfusions as may be required and seek such other relief as may be necessary to preserve the lives of the mother and the child."[9]

Accordingly, the child *en ventre sa mere* possesses an immediate civil right to have representation by a "guardian for the suit," i.e. a guardian ad litem, as acknowledged by both Justices Blackmun and Stevens. Pursuant to Federal Rule of Civil Procedure 17(c)(2), a federal court must appoint a guardian ad litem to protect a minor who is unrepresented in an action. Indeed, "Courts of justice as an incident of their jurisdiction have inherent power to appoint guardians ad litem."[10] But, "where the suit is defended in any form short of an appearance and defense by guardian," then "the infant is deemed not to have had his day in court."[11]

Also, "Rule 17(c) 'gives a federal court power to authorize someone other than a lawful representative to sue on behalf of an infant or incompetent person where that representative is unable, unwilling or refuses to act or has interests which conflict with those of the infant or incompetent'"[12]—as in this cause wherein the

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[9] *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 *N.J.* 421, 424 (1964), *cert.* denied, 377 *U.S.* 985, 84 *S. Ct.* 1894, 12 *L. Ed.* 2d 1032 (1964).

[10] *Hatch v. Riggs National Bank*, 361 F.2d 559, 565 (D.C. Cir., 1966). *See* Linton, THE LEGAL STATUS OF THE UNBORN CHILD UNDER STATE LAW, 6 U. St. Thomas J.L. & Pub. Pol'y 141, 154 (2011) ("[A]ll States… permit a guardian ad litem to be appointed to represent the interests of an unborn child.").

[11] *Bielawski v. Burke*, 147 A.2d 674, 676 (Vt., 1959).

[12] *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 85 (1st Cir., 2010).

Petitioners' parents and natural guardians seek their demise. Moreover, the trial court's standard of care is such that, "The minor's best interests are of paramount importance in deciding whether a Next Friend should be appointed."[13] A violation of that standard of care may be found to be "an abuse of discretion,"[14] resulting in the judgement of the trial court being deemed void, "a complete nullity and without legal effect."[15]

With like effect, this Court upheld the right to representation of unborn children in *McArthur v. Scott*, 113 U.S. 340 (1884). The Court held that the inheritance and property rights of the unborn descendants of General Duncan McArthur were violated by a state court case in which the unborn descendants did not have adequate representation, "[N]o provision was made for the preservation of the rights of after-born grandchildren." *Id.* at 396. The grandchildren's vested property rights under the General McArthur's will, while they were unborn and otherwise under the age of majority, was accordingly protected from actions that worked to the detriment of their title. Ergo, Justice Gray held, "As under the statute of Ohio, as construed by the Supreme Court of that State, a decree annulling the probate of a will is not merely irregular and erroneous, but absolutely void, as against persons interested in the will and not parties to the decree." *Id.* at 404.

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[13] *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 85 (1st Cir., 2010) (before Torruella, J., Souter, J., Stahl, J.). *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

[14] *FernÁndez-Vargas v. Pfizer*, 522 F.3d 55, 66 (1st Cir., 2008).

But allowing this case going forward without the joinder of the Petitioners would ultimately work a much greater injustice than it being theoretically void and null to them as parties. Rather, it would allow the continuance of the de facto outlawry imposed on children *en ventre sa mere* in *Roe v. Wade*. 4 Blackstone, COMMENTARIES Ch. 24. De jure outlawry is either denied to exist by our federal judiciary[16] or if it is encountered in state law is held to be unconstitutional.[17] At common law, "outlawry may be frequently reversed by writ of error;… if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed." 4 Blackstone, COMMENTARIES Ch. 24. In addition to a robust standard of review, the common law also allowed, "any one, as amicus curiae, may inform the court, and the party may have counsel assigned to him to take advantage of the error," as the Next Friend for these Petitioners is doing. 1 CHITTY'S CRIMINAL LAW, 301 (I. Riley 1819). Hence this right of representation for those outlawed may also be said to exist under the Ninth Amendment of our Constitution, which pertains to "the people."

III. STATES HAVE GUARDED AGAINST THE TAKING OF THE LIFE OF AN UNBORN CHILD

We note again that this Court wrote in *Dobbs*, "There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills

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[15] *Id.* at 67, n.5 (quoting *BaellaSilva v. Hulsey*, 454 F.3d 5, 9 (1st Cir., 2006)). *Cf. Powell v. Alabama*, 287 U.S. 45, 58 (1932) ("Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense").

[16] *Mindell v. Commissioner of Internal Revenue*, 200 F.2d 38, 39 (2nd Cir., 1952) (per curiam).

[17] *Autry v. Mitchell*, 420 F.Supp. 967 (E.D. N.C. 1976).

a human being." Indeed, prosecutions under the quickening common-law rule and many state statutes necessarily required a *jury finding of fact* that the unborn child had been alive prior to the actions of the accused.[18] As the Court of Criminal Appeals of Texas held in *Tonnahill v. State*, 208 S.W. 517 (emphasis added):

> There is another question involved, and upon it special instructions were asked and refused; that is, unless the *jury* should find from the facts that the child in the womb of prosecutrix was a live fetus, and its life destroyed by the means set out as a prerequisite to the abortion, the jury should find in favor of the defendant…. The court, therefore, was in error in not giving these instructions to the jury. They could not find appellant guilty under the indictment, unless the facts would show *beyond a reasonable doubt that the child was alive* at the time of the administration of the drugs, and that the medicine was administered for the purpose of destroying that life as a means of producing the abortion.

So too, a New York statute enacted decades before the enactment of the Fourteenth Amendment equates the killing of "an unborn quick child" as manslaughter, which would have necessitated some jury instructions along the lines the Court of Criminal Appeals of Texas held obligatory in such criminal proceedings.[19] See APPENDICES, *Dobbs v. Jackson Women's Health Organization*, 597 U.S ___ (2022) for this and other such statutes.

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[18] *State v. Lee*, 37 A. 75, 80 (Conn. 1897):

> The jury were, doubtless, properly instructed that it was incumbent upon the state to prove all and every essential element of the crime beyond a reasonable doubt, that the burden of proof in this respect was upon the state, and that the presumption was that he was innocent until his guilt was proved…. In this part of it they were, in effect, told that if it appeared from the evidence that what was done by the defendant was necessary to save the life of the woman or of the unborn child, the accused could not be guilty; that the presumption was that no such necessity existed; that the state might rest on that presumption in the first instance, in the absence of evidence to the contrary; and that under such circumstances it was for the defendant to go forward with evidence, if he desired to overcome the presumption against him. This, we think, was a correct statement of the law.

[19] N.Y. Rev. Stat. pt. IV, ch. I, tit. II, §§ 8, 9, at 550 (1828-1835):

It is also of great significance that the common law required a stay of execution of a female should she be found to be pregnant with a living child—"quick with child."[20] As Justice Horace Gray wrote for this Court in *Union Pacific R. Co. v. Botsford*:

> The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.[21]

In the *Botsford* decision, the common law writ *de ventre inspiciendo* was recognized by this Court as a due process protection for the life of the unborn child whose mother was convicted of a capital crime. This has been the law of the land

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> Section 8: "The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree." [Unchanged in Stat. Laws 1881, § 8.]
> Section 9: "Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

Quay, JUSTIFIABLE ABORTION—MEDICAL AND LEGAL FOUNDATIONS, 49 Geo. L.J. 395, 499 (1961).

[20] 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 387-88 (1st ed.):

> REPRIEVES may also be *ex necessitate legis:* as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis*;... "*quod praegnantis mulieris damnatae poena differatur, quoad pariat:*" which doctrine has also prevailed in England, as early as the first memorials of our law will reach. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to enquire the fact: and if they bring in their verdict *quick with child* (for barely, *with child*, unless it be alive in the womb, is not sufficient) execution shall be staid generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause. For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.

[21] *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 253 (1891).

since the founding of our country. In the 1778 case of *Commonwealth v. Bathsheba Spooner*, Mrs. Spooner (daughter of the president of the Stamp Act Congress, Timothy Ruggles), having been found guilty by a jury of inciting, abetting, and procuring the murder her husband, was sentenced to death.[22] Desiring to stay her execution until she could deliver the child in her womb, she took it upon herself to write a plea of pregnancy to the Massachusetts Governor's Council, asserting that as the living child in her womb was innocent of her crime, he should not share her fate:

> May it please your honors: with unfeigned gratitude I acknowledge the favor you lately granted me of a reprieve. I must beg leave, once more, humbly to lie at your feet, and to represent to you that, though the jury of matrons that were appointed to examine into my case have not brought in my favor, yet that I am absolutely certain of being in a pregnant state, and above four months advanced in it, and the infant I bear was lawfully begotten. I am earnestly desirous of being spared till I shall be delivered of it. I must humbly desire your honors, notwithstanding my great unworthiness, to take my deplorable case into your compassionate consideration. What I bear, and clearly perceive to be animated, is innocent of the faults of her who bears it, and has, I beg leave to say, a right to the existence which God has begun to give it. Your honors' humane *christian* principles, I am very certain, must lead you to desire to preserve life, even in this miniature state, rather than destroy it. Suffer me, therefore, with all earnestness, to beseech your honors to grant me such a further length of time, at least, as that there may be the fairest and fullest opportunity to have the matter fully ascertained; and as in duty bound, shall, during my short continuance, pray.[23]

Although the jury of matrons and their evidentiary standard of quickening were both replaced since the eighteenth century with scientific method and

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[22] *Commonwealth v. Bathsheba Spooner*, 2 Am. Crim. Trials 1, 376-379 (1778) (P. Chandler ed. 1844).

[23] *Id. at* 49-50.

standards,[24] the due process protections afforded unborn children of condemned mothers remains "in order to guard against the taking of the life of an unborn child for the crime of the mother."[25]

As with any due process question, the Court looks to our nation's legal history, as stated in *Washington v. Glucksberg*, "We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."[26] So it is that well before the adoption of the Fourteenth Amendment, it has been the consistent action of the States, in their "state courts and state judicial officials,"[27] that they guarded "against the taking of the life of an unborn child"[28] as an action of the state.[29]

IV. CIVIL RIGHTS OF AMERICANS *EN VENTRE SA MERE*

As this Court wrote in *Dobbs v. Jackson Women's Health Organization*, 597 U.S ___, ___ (2022):

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[24] OLDHAM, TRAIL BY JURY 113-114 (NY Univ. Press 2006).

[25] *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 253 (1891).

[26] *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

[27] *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948):

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials.

[28] *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 253 (1891).

[29] This included presumptions under the criminal law that worked to protect children in the womb. *State v. Lee*, 37 A. 75, 79-80 (Conn. 1897):

> We think it is equally a matter of common experience that the ability to bear and bring forth children is the rule, and that the necessity of procuring an abortion or miscarriage in order to save the life of mother or child is the rare exception; that the presumption is against such necessity; and that the state, in the first instance, and in the absence of evidence to the contrary, may rest on that presumption in cases brought under the statute in question.

> "[T]o many purposes, in reference to civil rights, an infant *in ventre sa mere* is regarded as a person in being." *Commonwealth v. Parker*, 50 Mass. 263, 266 (1845). (citing 1 Blackstone 129); *see also*… *Morrow v. Scott*, 7 Ga. 535, 537 (1849);… *Thellusson v. Woodford*, 4 Ves. 227, 321–322, 31 Eng. Rep. 117, 163 (1789).

The above quotation of William Blackstone's COMMENTARIES ON THE LAW OF ENGLAND bears further examination.[30] William Blackstone is widely regarded as having a profound influence on our Founding Fathers, which is something that Justice Blackmun also acknowledged, "Blackstone, whose vision of liberty unquestionably informed the Framers of the Bill of Rights, . . . wrote that '[t]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.'" *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 803 n.11 (1980) (Blackmun, J., concurring opinion). That quotation from COMMENTARIES ushers in an important section elucidating personal rights under the general description of the "right of personal security"[31]; 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 125-126 (1st ed.) (emphasis added):

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[30] "'[T]o many purposes, in reference to civil rights, an infant *in ventre sa mere* is regarded as a person in being.' *Commonwealth v. Parker*, 50 Mass. 263, 266 (1845). (citing 1 Blackstone 129)." *Dobbs v. Jackson Women's Health Organization*, 597 U.S ___ (2022).

[31] *Washington v. Glucksberg*, 521 U.S. 702, 714 (1997) (Rehnquist, C.J) ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable."); *Ingraham v. Wright*, 430 U.S. 651, 672-75 (1977) (Powell, J.) (citations omitted):

> The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by

> I. THE right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.
>
> 1. LIFE 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 mother's womb*….
>
> AN infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to it's use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.

Significantly, in the above cited passage by William Blackstone, himself a posthumous heir,[32] he provides us with a laundry list of the property rights afforded children *en ventre sa mere* in his time. Blackstone lists the main types of property rights under English law: legacy—a "gift by will of money or other personal property"[33]; copyhold estate—" a species of estate at will, or customary estate, the only visible title to which consisted of the copies of the court rolls, which were made out by the steward of the manor"[34]; "It may have a guardian assigned to it; and it is

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> free men." Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security (*See* 1 W. BLACKSTONE, COMMENTARIES *134. Under the 39th Article of the MAGNA CARTA, an individual could not be deprived of this right of personal security "except by the legal judgment of his peers or by the law of the land.").

[32] Greg Bailey, BLACKSTONE IN AMERICA,

http://www.earlyamerica.com/review/spring97/blackstone.html (last visited April 25, 2023).

[33] https://www.merriam-webster.com/dictionary/legacy (last visited August 20, 2022).

[34] BLACK'S LAW DICTIONARY 304 (5th ed. 1979):

> In England, a species of estate at will, or customary estate, the only visible title to which consisted of the copies of the court rolls, which were made out by the steward of the manor, on a tenant's being admitted to any parcel of land, or tenement belonging to the manor…. 2 Bl.COMM.95.

enabled to have an estate limited to its use, and to take afterwards by such limitation"—i.e., to obtain real estate as a posthumous heir, as if it were then actually born.

An English case, also cited above with Blackstone, *Thellusson v. Woodford*, affirmed Blackstone in the latter part of the century in which he wrote it; per Judge Buller:

> The next objection is, that, supposing, he meant a child *en ventre sa mere*, and had expressly said so, yet the limitation is void. Such a child has been considered as a non-entity. Let us see what the nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. (22 & 23 *Ch.* II. c. 10.) He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian. Some other cases put this beyond all doubt. In *Wallis v. Hodson*, Lord *Hardwicke* says (2 *Atk.* 117), "The principal reason I go upon in the question is, that the Plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person *in rerum natura*, so that both by the rules of the Common and Civil Law she was to all intents and purposes a child as much as if born in the father's life-time." (*Trower v. Butts*, 1 *Sim.* & *Stu.* 181.)[35]

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2 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 90 (1st ed.): "From the tenure of pure villenage have sprung our present *copyhold* tenures, or tenure by copy of court roll at the will of the lord."

BLACK'S LAW DICTIONARY 1407 (5th ed. 1979):

> Villein. In feudal law, a person attached to a manor, who was substantially in the condition of a slave, who performed the base and servile work upon the manor for the lord, and was, in most respects, a subject of property belonging to him.
> ....
> Pure villenage. A base tenure, where a man hold upon terms of doing whatsoever is commanded of him, nor knows in the evening what is done in the morning, and is always bound to an uncertain service.

[35] *Thellusson v. Woodford*, 4 Ves. 227, 321-322; 31 Eng. Rep. 117, 163 (1798) (Buller, J.).

And an American case, *Morrow v. Scott*, also cited above with Blackstone and *Thellusson v. Woodford*, shows the adoption of this aspect of the English common law into our own:

> Posthumous children, says Chancellor Kent, inherit, in all cases, in like manner as if they were born in the lifetime of the intestate, and had survived him. This is the universal rule in this country. *It is equally the acknowledged principle in the English Law; and for all the beneficial purposes of heirship, a child in ventre sa mere, is considered as absolutely born*. 4 *Kent's Com*. 412. In *Wallis vs. Hodson*, Lord *Hardwicke* held that, both by the rules of the *Common Law*, as well as by the Civil Law, a child in *ventre sa mere*, is in *rerum natura*, and is as much one, as if born in the father's lifetime. 2 *Atkyns*, 116. In *Doe vs. Clark*, it was held, that an infant in *ventre sa mere* is considered as born for all purposes which are for his benefit. 2 H. Blackstone, 399. In *Hall vs. Hancock*, the Court ruled, that in general, a child is to be considered as *in being*, from the time of its conception, where it will be for the benefit of such child to be so considered. 15 *Pickering's Rep*. 255.[36] This rule is in accordance with the principles of justice, and we have no disposition to innovate upon it, or create exceptions to it.[37]

Accordingly, the property right for children *en ventre sa mere* continue to be protected to this day—such as the Texas Estates Codes protection of pretermitted children's share in an estate including those children "in gestation."[38]

In order to protect these property rights, Texas, provides for the appointment of an attorney ad litem, Texas Estates Codes Sec. 1002.002 (emphasis added):

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[36] *Hall v. Hancock*, 32 Mass. (15 Pick.) 225, 257 (1834) (Shaw, C.J.) (emphasis in the original):

> The single question is, whether Charles L. Hancock, for whose benefit this suit on a probate bond is brought, is entitled to share with his four brothers, in a bequest of his grandfather, James Scott. The bequest was to certain grandchildren, "that is to say, to such of them as may be living at my decease, in equal portions, be their number more or less." The claimant being born within nine months after the death of the testator, the question is, whether he was *living*, within the meaning of the law, so to be entitled to a share.

[37] *Morrow v. Scott*, 7 Ga. 535, 537 (1849) (Warner, J.) (emphasis in the original).

[38] Texas Estates Code § 255.051 et seq.

"'Attorney ad litem' means an attorney appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person, *an unborn person*."

As one American court summed up our legal history pertaining to the inheritance rights of children en ventre mere:

> It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is "born" and "alive" for all purposes for his benefit. In *Wallis v. Hodson*, 2 Atkyns 115, 118, 26 Eng. Reprint 472, decided on January 22, 1740, Lord Chancellor Hardwicke said "Nothing is more clear, than that this law considered a child in the mother's womb absolutely born, to all intents and purposes, for the child's benefit."[39]

In 1890 the Supreme Court of Texas combined these principles of from English common law and its own in an action by a posthumous child seeking to recover damages for the death of his father under a Texas wrongful death statute; "The suit was brought by the mother of the appellant, Gustave Nelson, as his next friend, to recover damages for the death of his father, resulting from injuries negligently inflicted on his father by the appellee company."[40] The defendant claimed "that at the time of the death of the plaintiff's father, on the 25th April, 1882, the plaintiff was not in being, was unborn and unknown, and an unheard-of quantity, having no legal existence, and no right of action for the injuries complained of."[41] The court countered this contention by quoting Judge Buller from *Thellusson v. Woodford*, and his above recited retort, "'Let us see what the

[39] *In re Holthausen's Will*, 175 Misc. 1022, 1024-1025, 26 N.Y.S.2d 140, 143 (1941).

[40] *Nelson v. Galveston*, H. & S. A. Ry. Co., 14 S.W. 1021 (Tex. 1890) (Hobby, J.).

[41] *Id.* at 1022.

nonentity can do…."[42] The court cited with agreement the statement of principle from another English case, "No agreement founded on law and natural justice is in favor of the child born during the father's life that does not equally extend to a posthumous child"[43]; and then asked rhetorically:

> If, then, the construction of wills, devises, and statutes was such as operated to enable a posthumous child to inherit and hold property of the character described, and considered him in all respects as entitled to the rights of a child born before the death of the father, can there be any reasonable doubt that the proper construction of our statute, giving the right of action to the 'surviving children' of the person whose death was caused, etc., includes the plaintiff in this case, as one of such children?[44]

The court then found for the plaintiff, "We think, also, that the plaintiff in this case, although unborn at the time of his father's death, was in being, and one of his surviving children."[45] *Nelson v. Galveston* was one of the early cases nationwide that helped establish the concept of duty owed the unborn under tort law and was so cited by William Prosser in THE LAW OF TORTS.[46] In 1967, the Supreme Court of Texas further extended this concept of duty and granted a right of action under the state's wrongful death statute for a viable child, six to seven months of gestation, who suffered injuries in a motor vehicle accident, was born prematurely, and died two days later. *Leal v. C. C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820 (Tex. 1967).

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[42] *Id.*

[43] *Id.* at 1023 (citing *Lancashire v. Lancashire*, 5 Term R. 49).

[44] *Id.*

[45] *Id.*

[46] W. Prosser, THE LAW OF TORTS 336 n. 20 (4th ed. 1971).

Significantly, the Civil Rights Act protections extend beyond guarantees of property rights.[47] They also guarantee "the same right… to make and enforce contracts, to sue, be parties,… and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 14 Stat. 27, §1 (1866); 42 U.S.C. § 1981(a). In this spirit of law the Supreme Court of Appeals of West Virginia held that a child, who was *en ventre sa mere* at the time of its father's accidental death, should have a separate apportionment of damages from its mother, in an action based upon the Employers' Liability Act of Congress.[48] Notably, the Employers' Liability Act (Act April 22, 1908, ch. 149, 35 Stat. 65) was promulgated pursuant to jurisdiction under the Commerce Clause.[49] Likewise, children *en ventre sa mere* have been held to be claimants under various actions

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[47] 42 U.S.C. § 1981, Equal rights under the law (Civil Rights Act of 1991), provides:

> (a) Statement of equal rights
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
> (b) "Make and enforce contracts" defined
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
> (c) Protection against impairment
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. §1982. Property rights of citizens, provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

[48] *Chafin v. Norfolk & W. Ry. Co*, 80 W.Va. 703, 93 S.E. 822 (W. Va., 1917).

[49] *Zitnik v. Union Pac. R. Co.*, 95 Neb. 152, 145 N.W. 344 (Neb., 1914).

compensating them for the loss of a parent: state workmen's compensation,[50] wrongful death actions,[51] statutory liquor dealer liability,[52] Social Security Survivor Benefits,[53] and federal employees' survivor benefits.[54] These cases illustrate the various civil rights held by the Petitioners.

Four years before *Roe*, in *Wagner v. Finch*,[55] the Northern District court of Texas granted the Secretary of Health, Education and Welfare's motion for summary judgment contending that the claimant posthumous illegitimate child, Donna, "was not the 'child of an insured individual as that term is defined by the Social Security Act."[56] The Fifth Circuit Court of Appeals reversed, noting:

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[50] *Scott v. Indep. Ice Co.*, 135 Md. 343, 109 A. 117 (Md., 1919), *Texas Employers' Ins. Ass'n v. Soto*, 294 S.W. 639 (Tex. App., 1927), *Eason v. Alexander Shipyards*, 47 So.2d 114 (La. App., 1950), *Deemer Lumber Co. v. Hamilton*, 211 Miss. 673, 52 So.2d 634 (Miss., 1951), *Hunt v. U.S. Steel Corp.*, 148 So.2d 618, 619, 274 Ala. 328, 329 (Ala., 1963), *Wright v. American Brake Shoe Co.*, 90 A.2d 681, 47 Del. 299, 8 Terry 299 (Del. Super., 1952), *Brennfleck v. Workmen's Compensation Appeals Bd.*, 71 Cal.Rptr. 525, 265 Cal.App.2d 738 (Cal. App., 1968).

[51] *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 14 S.W. 1021 (Tex., 1890), *Herndon v. St. Louis & S.F.R. Co.*, 37 Okl. 256, 128 P. 727 (Okl., 1912), *Bonnarens v. Lead Belt R. Co.*, 309 Mo. 65, 273 S.W. 1043 (Mo., 1925), W. Prosser, THE LAW OF TORTS, 336 (4th ed. 1971).

[52] *Quinlen v. Welch*, 69 Hun 584, 23 N.Y.S. 963 (Sup.Ct.1892), *State ex rel. Niece v. Soale*, 74 N.E. 1111, 1113, (Ind., 1905), *Phair v. Dumond*, 99 Neb. 310, 156 N.W. 637, 639 (Neb., 1916), *LaBlue v. Specker*, 358 Mich. 558, 575, 576, 100 N.W. 2d 445, 454, 455 (Mich., 1960).

[53] *Wagner v. Finch*, 413 F.2d 267 (5th Cir., 1969).

[54] 5 U.S.C. § 8101(9), *Astrue v. Capato*, 566 U.S. 541 (2012).

[55] *Wagner v. Finch*, 413 F.2d 267 (5th Cir. 1969).

[56] *Id.*

> Medially speaking, Donna was *viable from the instant of conception onward*. . . . Had her father not been killed *shortly after she was conceived* and two weeks before his planned marriage to her mother, there would be no question of the child-claimant's right to benefits. . . . The fact that a worker dies before the birth of a child already "in being" is no legal or equitable reason to prohibit that child from benefits.[57]

Ironically, on the very day the *Roe v. Wade* decision was handed down, the Supreme Court of Arkansas acknowledged that children "en ventre sa mere" may be the subject of a custody award in a divorce decree. *Ryan v. Baxter*, 489 S.W.2d 241, 242, 253 Ark. 821, 822 (Ark., Jan. 22, 1973).

And contemporaneous with *Roe v. Wade* there were cases questioning whether unborn children were federally mandated beneficiaries under Aid to Families with Dependent Children (AFDC), 42 U.S.C. § 602(a)(10) (repealed). Not only did the federal courts permit the mothers to represent their children *en ventre sa mere*, but also included said children as members of the class certified to maintain said cause.[58] Necessarily, in doing so, the courts found jurisdiction of the unborn claimants' cause under federal statutes.[59]

CONCLUSION

The intentions for establishing of our Constitution are plainly stated in its Preamble and include securing "the Blessings of Liberty to ourselves and our

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[57] *Id.* 268-69 (emphasis added).

[58] *Wilson v. Weaver*, 358 F.Supp. 1147, 1151-1152 (N.D. Ill., 1973); *Wisdom v. Norton*, 372 F.Supp. 1190, 1191-1192 (D. Conn., 1974).

[59] *Wisdom v. Norton*, 372 F.Supp. 1190, 1191 (D. Conn., 1974) ("Jurisdiction of the cause is conferred by 28 U.S.C. § 1343(3) and (4), and by 28 U.S.C. § 2201.").

Posterity." U.S. CONST. preamble. Accordingly and for the foregoing reasons, Putative Plaintiffs-Appellees' petition should be granted, as a matter of justice, so that they may be joined to this action as a Plaintiffs-Appellees.

Respectfully submitted.

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