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 *AMICI CURIAE* HANNAH S. – A FORMER IVF FROZEN EMBRYO AND JOHN AND MARLENE S. – ADOPTIVE PARENTS OF THE FIRST "ADOPTED" FROZEN EMBRYO IN AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Hannah S.

Amicus Hannah S., hereafter *Amicus* Hannah, began her life through in vitro fertilization. She was formed outside her genetic mother's womb and was sustained there, in a frozen state, for over two years. *Amicus* Hannah was a human being from the time of fertilization. She is now an adult and a graduate student pursuing a Master's degree in Social Work. *Amicus* Hannah plans to help others, orphans, and adoptive children and families seeking options regarding adoption. To the best of our knowledge – *Amicus* Hannah may well be the first former frozen embryo person to file an *Amicus Curiae* Brief as an adult at the United States Supreme Court. Today frozen embryos are usually treated by the law as property, as slaves were once treated. They are donated to others but not legally adopted.

John and Marlene S.

Amicus Hannah's parents are John and Marlene S. They were the first couple to "adopt" a human frozen embryo as their child, that is, *Amicus* Marlene was the

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[1] Consent to this Brief was given by all parties, after timely notice of intent to file the Brief. No party contributed to the writing or financing of the brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than *amici*, or their counsel, made a monetary contribution to the preparation or submission of the brief.

first woman to have an "adopted" embryo, frozen shortly after fertilization, placed in her womb. As the "adoptive" mother, allowing Hannah to be placed in her womb, *Amicus* Marlene supplied oxygen, nutrients, a warm place to grow, and love. Isn't that what every human needs? Up to that point in time, the vetting and selection criteria, such as a home study, background check, etc. usually required to adopt a child, had not been applied to obtaining a frozen embryo. But it was voluntarily chosen by Marlene and John S. before "adopting" Hannah in the frozen embryo form of life.

SUMMARY OF ARGUMENT

The story of this "adoption" and this *Amici Curiae* Brief will reveal that *Roe*'s[2] measuring line for viability has now been moved all the way back to fertilization by the modern scientific advancement called in vitro fertilization. *Roe*, at 160, has this viability definition: *"'viable,' . . . potentially able to live outside the mother's womb, albeit with artificial aid."*

Advances in science have eliminated the distinction between previability and viability. Previability prohibitions on elective abortions should be constitutional because viability occurs at fertilization, as proven through in vitro fertilization techniques.

[2] *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

ARGUMENT

Since *Roe*, viability has been identified as the pivotal point for balancing of interests between the mother's rights to privacy and the state's interest in "potential" life. In 1973, the *Roe* court stated:

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of **meaningful life outside the mother's womb**. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.*, at 163-164 (emphasis added).

The *Roe* Court declined to "speculate" as to when life begins, stating:

> "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, **at this point in the development of man's knowledge,** is not in a position to speculate as to the answer." *Id.*, at 159 (emphasis added).

In vitro fertilization, non-existent at the time of the *Roe* decision, is defined by Webster as: "fertilization of an egg in a laboratory dish or test tube; specifically:

fertilization by mixing sperm with eggs surgically removed from an ovary followed by uterine implantation of one or more of the resulting fertilized eggs – abbreviation IVF."[3] The baby is created in a laboratory and transferred to a uterus. The baby contains all the components of a separate life to become fully developed, **at the time of fertilization**. The frozen embryo lives outside his or her mother's womb, "albeit with artificial aid," *Roe* at 160, which is part of the scientific advancement of "man's knowledge." *Roe* at 159. *Amicus* Hannah's life is proof-positive of this fact.

How It All Began

In December of 1997, *Amici* John and Marlene invited Ron Stoddart, the executive director of Nightlight Christian Adoptions, and his wife, to join them for a dinner play. The play was "An American Christmas" and was set around 1900, with actors in full Victorian regalia. *Amici* John and Marlene were longtime family friends with Ron. *Amici* had broached the idea of "adopting" frozen embryos with him. He was in favor of the idea. "During the dinner program, an actress playing the role of a relative from Germany was lamenting that San Diego, unlike her native country, had no snow at Christmas. Touching the cheek of a little girl, she began a soliloquy about a snowflake:

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[3] https://www.merriam-webster.com/dictionary/in vitro fertilizations.

> ***In the intricate design of each flake of snow, we find the Creator reflecting the individual human heart.***"[4]

The name of the embryo adoption program was settled: The Snowflakes Embryo Adoption Program.

Backing up. *Amici* John and Marlene were married in 1985. When it was time to start a family, they were unable to become pregnant, like so many others. After several years, *Amici* sought answers from a fertility doctor and went through treatments. Still no pregnancy. Finally, in January of 1997, *Amicus* Marlene was diagnosed with premature ovarian failure. She posed a question that would change their family's history, and maybe history itself: "Are there any embryos we could adopt?"

This is when *Amici* John and Marlene began working with Ron Stoddart, and the Snowflakes Embryo Adoption Program was born. Babies born through the Program are now known as Snowflake babies, a term that has become ubiquitous in embryo adoption. Wikipedia even has a "Snowflake Children" page. *Amicus* Hannah was the first snowflake "adopted" and born alive. And the rest, as they say, is history.[5]

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[4] Author of poem Unknown. *See* generally*, A Snowflake Named Hannah: Ethics, Faith and the First Adoption of a Frozen Embryo*, by John Strege, Kregel Publications (2020), p. 48 for the full *Amici* story.

[5] It should be noted that Louise Joy Brown was the first IVF baby created outside her mother's womb. She was born on July 25, 1978; **five years after *Roe***. www.history.com. This Day In History, July 25, 1978.

While going through the in vitro fertilization process, *Amici's* doctor suggested **donor embryos**, where couples anonymously donate embryos to a doctor, who decides what is done with them. *Amici* learned they might be able to choose the baby's genetic parents' hair and eye color. That seemed more like buying a car, than growing a family.

Amici also learned the "donation" process was nothing like adoption – there were no screenings of the couples who received the donated embryos, no home studies and no background checks. *Amici* thought, "Things are donated – money, food, clothing, time. You don't donate **life**." A frozen embryo is a life, created at fertilization, but is currently treated as property. *See*, e.g., *McQueen v. Gadberry*, 507 S.W. 3d 127, at 149 (Mo. App. 2016) (motion for rehearing and transfer denied) where the Court treated frozen embryos as property "with special characteristics."

WHERE WE ARE TODAY

On June 24, 2017, a picnic at Fairgrounds Park in Loveland, Colorado, was like so many other picnics, yet unlike any other. There were families and friends, food and fun. But what set this picnic apart was that all the children there had been "adopted" as frozen embryos. The occasion was the celebration of the 20th anniversary of the Snowflakes Embryo Adoption Program[6] at Nightlight Christian Adoptions. As indicated,

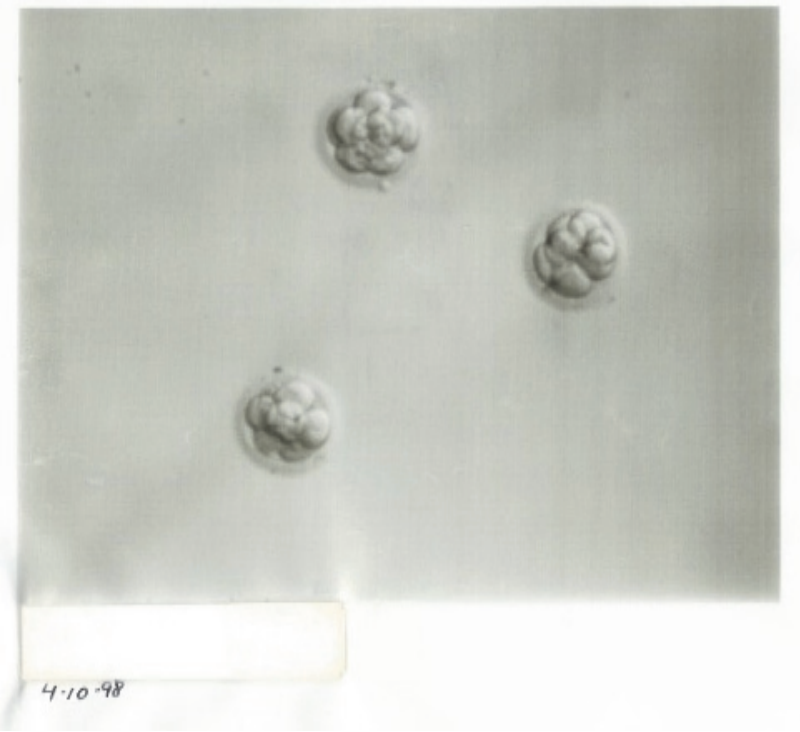
[6] https://www.reporterherald.com/2017/06/24/embryo-adoption-program-celebrates-its-snowflakes-in-loveland/.

infra, *Amici* John and Marlene had a role in the founding of the program as their daughter, Hannah, was the first "adopted" frozen embryo.

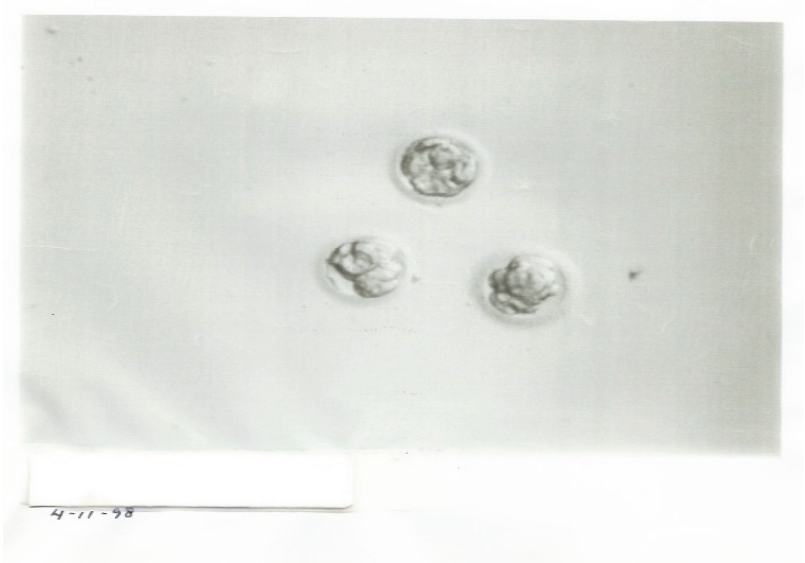
It was not a small undertaking to launch an entirely new category of adoptions. There were legal issues, as well as finding couples interested in placing their unwanted embryos for adoption, along with finding couples desiring to adopt them. But the success of the program is proof of both – the willingness to acknowledge that frozen embryos are human lives and couples desire to adopt them.

Science, and the life of *Amicus* Hannah, and the other "snowflake children" or "IVF babies", prove that viability outside the womb actually occurs at fertilization. *Amicus* Hannah was one of the frozen embryos "adopted" from a couple that already had five children. With their family complete, the couple was concerned and selfless enough that they wished to give the remaining embryos a chance to be born.

Doctors can take photographs of the embryos, substantially magnified as embryos are too small to be seen by the naked eye. See the first pictures for *Amicus* Hannah's baby book. *See* below:



Hannah and Two Siblings Viable
Outside the Womb
Day of Thaw



Hannah and Two Siblings Outside the Womb
Day of Transfer

These embryonic photos are actual photos of *Amicus* Hannah, as an embryo, not ultrasounds. It is unknown which of the three embryos in the photos is Hannah. The first photo was taken on the day of the thaw, the second photo was taken the following day, before the transfer to *Amicus* Marlene's womb. Of note in looking closely at the photos is that **overnight**, **in a petri dish, the embryos advanced to their next stage of development.** This is called "compaction", when the cells start to move to one side and a fluid-filled sac is forming. This is a complete human **life** growing on its own. Not "a clump of cells," as abortion proponents frequently call embryos.

Thus was *Amici's* journey. One that evolved from infertility to helping start a movement that allowed

infertile couples to experience pregnancies while helping alleviate a troublesome development in the in vitro fertilization industry. In couples' desperation to start a family, doctors were obliging them by helping create as many embryos as possible, often far more than they eventually might use, leaving a surplus of embryos in frozen storage.

Amicus Hannah's life proves life begins at fertilization. *Amicus* stands for the lives of all embryos in or out of the womb, especially those targeted for abortion. Mississippi should be able to value life in the womb.

Hannah After Birth

Hannah at 8 months

The Mississippi legislature, when considering whether to pass Mississippi's *Gestational Age Act*, made these specific "Findings and Purpose" part of the record, among others:

> 8. The majority of abortion procedures performed after fifteen (15) weeks' gestation are dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb. The Legislature finds that the

intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.

9. Most obstetricians and gynecologists practicing in the State of Mississippi do not offer or perform nontherapeutic or elective abortions. Even fewer offer or perform the dilation and evacuation abortion procedure even though it is within their scope of practice.

(ii) Abortion carries significant physical and psychological risks to the maternal patient, and these physical and psychological risks increase with gestational age. Specifically, in abortions performed after eight (8) weeks' gestation, the relative physical and psychological risks escalate exponentially as gestational age increases. L. Bartlett et al., *Risk factors for legal induced abortion mortality in the United States*, OBSTETRICS AND GYNECOLOGY 103(4):729 (2004).

(iii) Importantly, as the second trimester progresses, in the vast majority of uncomplicated pregnancies, the maternal health risks of undergoing an abortion are greater than the risks of carrying a pregnancy to term.

(iv) Medical complications from dilation and evacuation abortions include, but are not limited to: pelvic infection; incomplete abortions (retained tissue); blood clots; heavy bleeding or hemorrhage; laceration, tear, or

> other injury to the cervix; puncture, laceration, tear, or other injury to the uterus; injury to the bowel or bladder; depression; anxiety; substance abuse; and other emotional or psychological problems. Further, in abortions performed after fifteen (15) weeks' gestation, there is a higher risk of requiring a hysterectomy, other reparative surgery, or blood transfusion.
>
> (v) The State of Mississippi also has "legitimate interests from the outset of pregnancy in protecting the health of women." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992), as the "medical, emotional, and psychological consequences of abortion are serious and can be lasting . . . " *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).

Citizens in Indiana value even human remains from the womb. This Court agreed that human remains be treated with dignity by state law. In 2018, Indiana enacted a law related to the disposal of fetal remains. One provision of the law "excluded fetal remains from the definition of infectious and pathological waste." *Box v. Planned Parenthood of Indiana and Kentucky, Inc., et al.*, 129 S. Ct. 1780, 1781 (2019). The state claimed it had an interest in "the humane and dignified disposal of human remains". The Seventh Circuit invalidated the law indicating the state's interest was "not legitimate". *Id.*, at 1782. Citing *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452, n. 45, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983)

this Court reversed, having "already acknowledged that a State has a 'legitimate interest in proper disposal of fetal remains.'" *Id.*

Further evidence that life has value, from inception, is found in Justice Thomas' concurring opinion in *Box*, at 1781-1793 (emphasis added):

> The use of abortion to achieve eugenic goals is not merely hypothetical. The foundations for legalizing abortion in America were laid during the early 20th-century birth-control movement. That movement developed alongside the American eugenics movement. And significantly, Planned Parenthood founder Margaret Sanger recognized the eugenic potential of her cause. She emphasized and embraced the notion that birth control 'opens the way to the eugenist.' Sanger, Birth Control and Racial Betterment, Birth Control Rev., Feb. 1919, p. 12 (Racial Betterment). As a means of reducing the 'ever increasing, unceasingly spawning **class of human beings who never should have been born at all**,' Sanger argued that 'Birth Control . . . is really the greatest and most truly eugenic method' of 'human generation.' M. Sanger, Pivot of Civilization 187, 189 (1922) (Pivot of Civilization). In her view, birth control had been 'accepted by the most clear thinking and far seeing of the Eugenists themselves as the most constructive and necessary of the means to racial health.' *Id.*, at 189.
>
> It is true that Sanger was not referring to abortion when she made these statements, at

> least not directly. She recognized a moral difference between 'contraceptives' and other, more 'extreme' ways for 'women to limit their families,' such as '**the horrors of abortion and infanticide**.' M. Sanger, Woman and the New Race 25, 5 (1920) (Woman and the New Race). But Sanger's arguments about the eugenic value of birth control in securing 'the elimination of the unfit,' Racial Betterment 11, apply with even greater force to abortion, making it significantly more effective as a tool of eugenics. Whereas Sanger believed that birth control could prevent 'unfit' people from reproducing, abortion can prevent them from being born in the first place. Many eugenicists therefore supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher—endorsed the use of abortion for eugenic reasons. Technological advances have only heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability.

This concurring opinion is a history lesson on the origins of Planned Parenthood and Margaret Sanger's intentional design to use birth control and abortion to foster a eugenics agenda. It is unlikely the *Roe* Court could even imagine the magnitude of "the horrors of abortion" as a form of birth control that we have today. Once before, in our history, an entire class of people, African Americans, were unjustly considered

property.[7] Today, human beings, capable of life outside their mother's womb, are considered property, with "special characteristics" which can be bought and sold, dismembered and dissected, the subject of litigation, or placed in a mother's womb to bring forth a new human being.

Abortion is not contraception and any attempt to think of abortion as a contraceptive is wrong. Contraception prevents human life from starting. Abortion is the horrible killing of human life after it has begun. The Mississippi legislature made its perspective very clear. In section C of the Act: "(c) Based on the findings in paragraph (a) of this subsection, it is the intent of the Legislature, through this act and any regulations and policies promulgated hereunder, to restrict the practice of nontherapeutic or elective abortion to the period up to the fifteenth week of gestation."

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[7] "They [African Americans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion at that time was fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits as well as in matters of public concern, without doubting for a moment the correctness of this opinion." *Dred Scott, Plaintiff in Error v. John Sanford*, 60 U.S. 393, at 408, 19 How. 15 L. Ed. 691 (1856).

As has been shown, Mississippi is not alone in recognizing the devastating consequences of abortion. This Court also did so in *Casey* and *Gonzalez*. Lower courts are looking to this Court to right this wrong, as reflected in *MKB*[8], *supra*.

Time has brought new information to light. And, as the Court in *Casey*[9] explained in discussing *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), overruled by *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), cases can be " . . . overruled . . . on the basis of **facts, or an understanding of facts**, **changed from those which** furnished the claimed justifications for the earlier constitutional resolutions**.**" *Brown* at 863. The overruling decisions were **comprehensible to the Nation, and defensible, as the Court's responses to changed circumstances**.

Lower courts are calling for this Court to re-evaluate the tenants of *Roe, Doe*[10] and *Casey*. In 2015, the Eighth Circuit, *MKB Management Corp. v. Stenehjem*, 795 F.3d 768, implored this Court to do so:

> "Most recently, a majority of the Court, when presented with an opportunity to reaffirm Casey, chose instead merely to 'assume' *Casey*'s principles for the purposes of its

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[8] *MKB Management Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. July 22, 2015) (*cert*. denied).

[9] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

[10] *Doe v. Bolton*, 410 U.S. 179 (1973).

opinion. See *Gonzales*, 550 U.S. 124 at 145–46, 127 S. Ct. 1610 ('assum[ing] the following principles [from *Casey*] for the purposes of this opinion,' but recognizing those principles 'did not find support from all those who join the instant opinion'); see also id. at 186–87, 127 S. Ct. 1610 (Ginsburg, J., dissenting) (observing that '[t]he Court's hostility to the right *Roe* and *Casey* secured' is evident in the fact that the Court 'merely assume[d] for the moment, rather than retained or reaffirmed,' *Casey's* principles (second alteration in original) (citation and internal quotation marks omitted)). This mere assumption may, as the State suggests, signal the Court's willingness to reevaluate its abortion jurisprudence."

"Even so, the Court has yet to overrule the *Roe* and *Casey* line of cases. Thus we, as an intermediate court, are bound by those decisions. Neither *Gonzales's* signal nor the alleged change of underlying facts empowers us to overrule the Supreme Court. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989) (emphasizing that only the Supreme Court may overturn its own precedent)."

Hannah at her college graduation

Like *The Emperor Has No Clothes*[11], it is time to admit **life does begin at fertilization**. Unlike the

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[11] The tale tells the story of two swindlers pulling a fraud on an exhibitionistic emperor, who is obsessed with clothing and fashion by telling him and his court, that they will tailor an outfit that can only be seen by the wise. This results in nobody admitting that the emperor is in fact naked, up until the very end of the tale, when he is displaying it publicly in the streets.

The story ends with a boy suddenly shouting "the emperor has no clothes" and the whole audience bursting out in laughter.

The expression has since turned into an idiomatic phrase, said when the veil falls off of an illusion. From Hans Christian Anderson's folktale of the same name, published in 1837, along with *The Little Mermaid*. https://www.slanglang.net/slang/the-emperor-has-no-clothes.

folktale, this is no laughing matter. It is logically evident that life begins at fertilization, as the example of *Amicus* Hannah clearly demonstrates. There is really no need to make something that is so simple complicated.

You see, a human is a human no matter how small.

A human is a human no matter which side
of the uterine wall.[12]

It is truly an illusion to say that we cannot determine when life begins – it begins at the beginning.

CONCLUSION

It is time for this Court to let the governed have a voice. It is time to get out of the business of forcing Americans, in every state, to pretend that the emperor has clothes – that abortion is okay because some people don't want to admit the obvious that abortion is infanticide. Many, many Americans already believe that life begins at fertilization. Science proves it is true. The life of *Amicus* Hannah proves it is true. It is time to let the citizens, through their elected representatives, pass enforceable laws that reflect that truth, that life begins at fertilization.

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[12] Adapted from oft-quoted portion of Dr. Seuss's *Horton Hears a Who*, Random House Children's Books (1954) "A Person Is A Person No Matter How Small" https://en.wikipedia.org/wiki/Horton_Hears_a_Who!

All "previability" prohibitions on elective abortions should be legal and enforceable. This Court has the ability, but does it have the courage and the will to right this wrong?

PRAYER

Amici respectfully pray this Court find that viability occurs upon fertilization and allow Mississippi's Gestational Age Act to take effect.

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