

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 EUROPEAN LEGAL SCHOLARS
AS AMICI CURIAE IN SUPPORT OF
NEITHER PARTY**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are European legal scholars with knowledge of the jurisprudence of the European Court of Human Rights (“the European Court”) established pursuant to the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, C.E.T.S. No. 005 (hereinafter “the Convention”).

Amici wish to provide the Court with information on the case law of the European Court with respect to the application of the Convention to the regulation of abortion by the 47 Member States,² with a combined population of approximately 800 million people. BERNADETTE RAINEY, ELIZABETH WICKS & CLARE OVEY, JACOBS WHITE & OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 17 (7th ed. 2017).

¹ Under Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus* briefs in support of either or no party.

² Forty-seven States are contracting parties to the Convention. The United States is one of six “Observer Members” of the Council of Europe. *Our Member States*, COUNCIL OF EUR., <https://www.coe.int/en/web/about-us/our-member-states> (last visited July 27, 2021).

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SUMMARY OF ARGUMENT

The Court previously has considered European law when interpreting the Constitution. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575 (2005) (considering certain foreign law “instructive” when interpreting the Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (discussing the European Court’s reasoning when interpreting the Due Process Clause of the Fourteenth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (resorting to other countries’ views on capital punishment for the mentally ill). To be sure, the propriety of doing so is disputed. *See, e.g., Roper*, 543 U.S. at 627–28 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 322–28 (Rehnquist, C.J., dissenting). But the fact that the very same source of European law this Court previously invoked also allows prohibitions on abortion admits of no serious dispute. *Roper*, 543 U.S. at 563; *Atkins*, 536 U.S. at 313–14.

Amici, accordingly, wish to highlight relevant abortion jurisprudence from the European Court that may prove helpful to this Court. Specifically, the European Court has a body of case law weighing abortion laws against human rights standards. This case law addresses issues comparable to those faced by the Court, including the scope of the right to privacy and the interests and rights that may legitimately be balanced against such a right by the state when regulating or restricting abortion.

The case law of the European Court with respect to the compatibility with the human rights protected by

the Convention of national laws regulating and restricting abortion can be summarized as follows:

1. Member States may protect human life before birth through national law. The European Court has identified several rights and interests justifying such laws. These include protecting the right to life of the unborn, the legitimate interest of society in limiting the number of abortions, and the interests of society to protect morals.

2. The European Court has held that the Convention does not confer a right to abortion.

3. The compatibility with the Convention of Member States' laws on abortion is primarily assessed by reference to Article 2 ("Right to life") and Article 8 ("Right to respect for private and family life") of the Convention.

4. The European Court has not determined whether the unborn child is a person for the purposes of Article 2 of the Convention. The European Court has not interpreted Article 2 as prohibiting States from making abortion legal; it instead interprets Article 2 as allowing States a margin of appreciation to determine the starting point of the right to life in their domestic law.

5. Legislation regulating the termination of pregnancy touches upon the sphere of a woman's private life and thus may come within the scope of Article 8. But the European Court has also consistently recognized that Member States have a wide margin of appreciation under the Convention with respect to the regulation of abortion.

6. Consistent with the foregoing, the European Court has recognized as compatible with a Member State's obligations under the Convention even very restrictive abortion laws, including a national law prohibiting abortion at all stages of pregnancy and for any reason other than where there was a risk to the life (including by way of suicide) of the expectant mother.

7. While acknowledging that it is the task of an individual Member State to frame its own abortion law, the European Court has found that it follows from its responsibility under Article 19 of the Convention to supervise whether any such law constitutes a proportionate balancing of the competing interests involved.

8. The European Court has not relied upon any concept of the viability of the "foetus"³ as a basis for assessing the compatibility of Member States' abortion laws with the Convention.

9. In several cases, the European Court has found that Member States have violated the Article 8 rights of claimants seeking to access abortion services permitted under national law as a result of deficiencies in the way the national law has been given effect. These have included deficiencies in the arrangements for conscientious objection by healthcare providers or deficiencies in the processes for establishing whether the conditions under national

³ The European Court uses the terms "foetus" and "unborn child" interchangeably. See *Vo v. France*, 2004-VIII Eur. Ct. H.R. 67, 109; *A, B & C v. Ireland*, 2010-VI Eur. Ct. H.R. 185, 261. ("ABC").

law for a lawful abortion have been satisfied by a claimant in a particular case.

ARGUMENT

I. The European Convention on Human Rights does not preclude protection by national law of human life before birth⁴

A. The protection by national law of human life before birth is a legitimate aim for the purpose of justifying the lawfulness of a *prima facie* interference with another Convention right

The compatibility with the Convention of Member States' laws on abortion are primarily assessed by the European Court by reference to Article 2 ("Right to life") and Article 8 ("Right to respect for private and family life") of the Convention.

Article 2(1) of the Convention provides that "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Derogation from Article 2 is not possible. Article 2(2) exhaustively "sets out the limited circumstances when deprivation of life may be

⁴ See generally *Brüggemann and Scheuten v. Germany*, App. No. 6959/75, Rep. of Comm'n, Eur. Comm'n H.R. Dec. & Rep. at 19 (July 12, 1977); *W.P. v. United Kingdom*, App. No. 8416/78, Eur. Comm'n H.R., Admissibility (May 13, 1980); *D. v. Ireland*, Admissibility, 2006-XI Eur. Ct. H.R. at 35; *ABC*, 2010-VI Eur. Ct. H.R. at 257, 259, 263; *R.R. v. Poland*, 2011-III Eur. Ct. H.R. 209, 247.

justified and the Court has applied a strict scrutiny when those exceptions have been relied on by the respondent States.” *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 185 (holding no violation of the Convention by United Kingdom’s criminalization of assisted suicide); *see also Stewart v. United Kingdom*, App. No. 10044/82, 39 Eur. Comm’n H.R. Dec. & Rep. 162, 169(1984); *McCann v. United Kingdom*, App. No. 18984/91, (GC), 21 Eur. Ct. H.R. 97, ¶¶ 146-150 (1995).

The “principle of sanctity of life” is “protected under the Convention.” *Pretty*, 2002-III Eur. Ct. H.R. at 194-95. The Grand Chamber of the European Court has affirmed that the right to life is an “inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights.” *Streletz, Kessler & Krenz v. Germany*, 2001-II Eur. Ct. H.R. 409, 448.

In *Pretty v. United Kingdom*, the European Court held that its case law “accords pre-eminence to Article 2 as one of the most fundamental provisions of the Convention.” 2002-III Eur. Ct. H.R. at 185. Article 2 “safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory.” *Id.*

As detailed further below, the European Court and, previously, the Commission have been reluctant to determine the question of whether the scope of the protection of human life articulated in Article 2 includes human life before birth.

Nevertheless, the Commission and the European Court (including the Grand Chamber) have

consistently viewed as permissible under the Convention the decision of individual States to recognize in national law a public interest in the protection of human life before birth. *See Reeve v. United Kingdom*, App. No. 24844/94, Admissibility (Eur. Ct. H.R. Nov. 30, 1994); *Boso v. Italy*, 2002-VII Eur. Ct. H.R. 451; *Odièvre v. France*, 2003-III Eur. Ct. H.R. 51, 80; *Vo*, 2004-VIII Eur. Ct. H.R. at 109; *Draon v. France*, App. No. 1513/03, (GC), 2006-IX Eur. Ct. H.R. at 33 (2005).

In *Reeve v. United Kingdom*, the Commission observed:

United Kingdom law does not allow an action for ‘wrongful life.’ It appears that the law is based on the premise that a doctor cannot be considered as being under a duty to the foetus to terminate it and that any claim of such a kind would be contrary to public policy as violating *the sanctity of human life*. . . . Having regard to the moral and ethical considerations involved in this area, the Commission finds that the restriction, which pursues *the aim of upholding the right to life*, must be considered as falling within the State’s margin of appreciation.

App. No. 24844/94, Admissibility (Eur. Ct. H.R. Nov. 30, 1994) (emphases added).

In *Odièvre v. France*, the Grand Chamber held:

There is also *a general interest at stake*, as the French legislature has consistently sought to protect the mother’s and child’s health during pregnancy and birth *and to avoid abortions, in particular illegal abortions*, and children being

abandoned other than under the proper procedure. *The right to respect for life, a higher-ranking value guaranteed by the Convention, is thus one of the aims pursued by the French system.*

2003-III Eur. Ct. H.R. at 80 (emphases added); *see also id.* at 87-88 (Ress, J., concurring, joined by Kuris, J.).

In addition, both the Commission and the European Court have consistently viewed as permissible under the Convention the decision of individual States to recognize in national law individual legal rights, including the right to life, on the part of an unborn child. *Brüggemann and Scheuten v. Germany*, App. No. 6959/75, Comm'n, at 19 (12 July 1977); *W.P.*, App. No. 8416/78 at 7; *D.*, 2006-XI Eur. Ct. H.R. at 35; *ABC*, 2010-VI Eur. Ct. H.R. at 257, 259, 263; *R.R.*, 2011-III Eur. Ct. H.R. at 247. In *ABC*, the Grand Chamber referred to “the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect.” 2010-VI Eur. Ct. H.R. at 257, 259, 263; *see also Open Door and Dublin Well Woman v. Ireland*, App. Nos. 14234/88, 14235/88, Plenary, at 21 (Eur. Ct. H.R. Oct. 29, 1991).

Accordingly, the European Court has also affirmed the right of Member States to take such public interests and individual rights into account when framing laws (including criminal laws⁵) with respect

⁵ For example: *Amy v. Belgium*, App. No. 11684/85, Admissibility (Eur. Ct. H.R. Oct. 5, 1988) (complaint against penal conviction of a Belgian physician for having practiced an illegal abortion declared inadmissible by the Commission); *Tokarczyk v. Poland*, App. No. 51792/99, Admissibility (Eur. Ct.

to the restriction of abortion. This is because, as the European Court has put it, “the margin of appreciation accorded to a State’s protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother.” *R.R.*, 2011-III Eur. Ct. H.R. at 247.

B. The issue of when the right to life under Article 2 begins comes within the margin of appreciation that the Court generally considers States should enjoy

The European Court and, previously, the Commission have been reluctant to determine the question of whether the scope of the protection of human life articulated in Article 2 includes human life before birth. *Brüggemann*, App. No. 6959/75 at 19; *W.P.*, App. No. 8416/78 at 10; *H. v. Norway*, App. No. 17004/90, Comm’n (May 19, 1992); *Open Door*, App. Nos. 14234/88, 14235/88, at 22, 25; *Boso*, 2002-VII Eur. Ct. H.R. 451; *Vo*, 2004-VIII Eur. Ct. H.R. at 109; *Evans v. United Kingdom*, 2007-I Eur. Ct. H.R. 353, 376.

In the landmark case of *Vo v. France* in 2004, the Grand Chamber declined to answer whether the “unborn child is a person for the purposes of Article 2 of the Convention,” 2004-VIII Eur. Ct. H.R. at 109, having considered in some detail the previous

H.R. Jan. 31, 2002) (complaint of a gynecologist against his conviction of aiding and abetting abortion held to be manifestly ill-founded).

decisions of the Commission and the European Court on this issue, *id.* at 105-07.

The case concerned a woman who intended to carry her pregnancy to term and whose unborn child was expected to be viable. Her pregnancy was terminated as a result of an error by a doctor and thus, as the Grand Chamber put it, she “had to have a therapeutic abortion on account of negligence by a third party.” *Id.* at 107. The issue, in the Court’s eye, was “whether, apart from cases where the mother has requested an abortion, harming a foetus should be treated as a criminal offence in the light of Article 2 of the Convention, with a view to protecting the foetus under that Article.” *Id.* This question required the Court to conduct “a preliminary examination of whether it is advisable for the Court to intervene in the debate as to who is a person and when life begins, in so far as Article 2 provides that the law must protect ‘everyone’s right to life.’” *Id.*

The Grand Chamber concluded that “the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere[.]” *Id.* at 107-08. It gave two reasons for this view: first, “the issue of such protection has not been resolved within the majority of the Contracting States themselves,” and, second, “there is no European consensus on the scientific and legal definition of the beginning of life.” *Id.*

The Grand Chamber went on to rule that the action for damages in the French administrative courts could be regarded as an effective remedy that was available to the applicant so that, even assuming that Article 2

was applicable, there had been no violation of Article 2.

Since its judgment in *Vo*, the European Court, both in its ordinary Chamber and Grand Chamber judgments, has consistently concluded that the question of whether to protect in national law human life before birth is a matter for individual Member States to decide in the first instance and is not determined by the Court by reference to Article 2. *See R.R.*, 2011-III Eur. Ct. H.R. at 247.

In 2007, the Grand Chamber reiterated the position in *Vo* by refusing to find a violation of Article 2 in the destruction of embryos stored *in vitro*, which was lawful under English law. *Evans*, 2007-I Eur. Ct. H.R. at 376.

In 2015, the Grand Chamber again acknowledged that there is a “plurality of . . . views . . . among the different member States” on the “ethical and moral questions inherent in the concept of the beginning of human life.” *Parrillo v. Italy*, 2015-V Eur. Ct. H.R. 249, 299.

II. Article 8 does not confer a right to abortion

A. A woman’s right to private life under Article 8 is engaged by laws regulating the interruption of pregnancy

Article 8(1) of the Convention provides that “Everyone has the right to respect for his private and family life, his home and his correspondence.”

The European Court undertakes a three-staged analysis of any alleged violation of a right protected

under Articles 8 to 11. First, it determines whether the complaint falls within the scope of the right (*i.e.*, whether the right is applicable or is engaged). At this first stage, Article 8 is interpreted as having a very broad scope. In particular, Article 8's notion of "private life" is a broad concept encompassing, *inter alia*, the right to personal autonomy and personal development. It has been found to encompass subjects such as gender identification, sexual orientation and sexual life, a person's physical and psychological integrity, as well as decisions both to have and not to have a child or to become genetic parents. *See ABC*, 2010-VI Eur. Ct. H.R. at 255 and references therein.

Second, the European Court determines whether the matters complained of interfere with the right. The mere fact of interference does not entail any unlawfulness *per se* but triggers an assessment whether the interference is justified such that it does not constitute a violation of the right. That assessment is the third stage of analysis, and it is informed by the terms of the relevant Article considered in conjunction with the relevant margin of appreciation that a Member State enjoys when meeting its obligations under the Convention.

In the case of Article 8, and correlative with the breadth of the rights recognized under Article 8(1), there is a broad provision for justifying the lawfulness of an interference with those rights set out in Article 8(2), which states:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests

of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Thus, the European Court will consider whether national laws that engage the Article 8 right to respect for private life are proportionate to the legitimate aim being pursued by a Member State, with an eye toward the fair balance struck between relevant competing interests. *ABC*, 2010-VI Eur. Ct. H.R. at 259-60.

In several cases, the European Court has found that legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman. *Brüggemann*, App. No. 6959/75; *Boso*, 2002-VII Eur. Ct. H.R. 451; *Vo*, 2004-VIII Eur. Ct. H.R. at 104-05; *Tysic v. Poland*, 2007-I Eur. Ct. H.R. 219, 247; *ABC*, 2010-VI Eur. Ct. H.R. at 255; *R.R.*, 2011-III Eur. Ct. H.R. at 245-46. However, the Court has also emphasized that “Article 8 cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman’s private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus.” *ABC*, 2010-VI Eur. Ct. H.R. at 255.

Thus, for example, in reviewing the national law of Ireland, which involved express constitutional recognition of the right to life of the “unborn,” the Grand Chamber held that the “woman’s right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child.” *ABC*, 2010-VI

Eur. Ct. H.R. at 255, citing *Tysiqc* at 247 and *Vo*, 2004-VIII Eur. Ct. H.R. at 104-08.

B. Member States enjoy a wide margin of appreciation when striking a balance in national abortion law between the different rights and interests involved

The margin of appreciation doctrine developed by the European Court grants each State a “sliding scale of discretion to define the interests involved and balance rights in a manner that is particular to the State” when meeting its Convention obligations. Clare Ryan, *Europe’s Moral Margin: Parental Aspirations and the European Court of Human Rights*, 56 COLUM. J. TRANSNAT’L L. 467, 482 (2018). The importance of the margin of appreciation was affirmed by the 2012 Brighton Declaration of the Committee of Ministers of the Council of Europe, which led to the adoption of two further Protocols to the Convention in 2013. Council of Eur., Steering Comm. for Hum. Rts., Brighton Declaration: High Level Conference on the Future of the European Court of Human Rights (May 29, 2012), <http://rm.coe.int/0900001680460d52>.

One of these, Protocol No. 15, which will take effect on August 1, 2021, amends the preamble of the Convention to include an affirmation that Member States, “in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in” the Convention, “subject to the supervisory jurisdiction” of the European Court. Protocol No. 15 Amending the Convention on the Protection of Human Rights and

Fundamental Freedoms, Preamble, June 23, 2013, C.E.T.S. No. 213.

The scope of the margin of appreciation will differ according to the context. Ryan, *Europe's Moral Margin*, at 487; KAREN REID, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 72 (6th ed. 2019).

With respect to the fair balance that must be struck by the domestic law of a Member State between a woman's privacy rights under Article 8 and competing rights and freedoms, including those of the fetus, the Grand Chamber in *ABC* concluded as follows:

There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. *A broad margin of appreciation* is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.

2010-VI Eur. Ct. H.R. at 260 (emphasis added).

The Grand Chamber went on in its judgment to find that there was "a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law," *id*,

but then concluded that it did “not consider that this consensus decisively narrows the broad margin of appreciation of the State.” *Id.* at 261. In this regard, the Grand Chamber stated:

Of central importance is the finding in the . . . *Vo* case that the question of when the right to life begins came within the States’ margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected . . . *the margin of appreciation accorded to a State’s protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother.*

Id. at 261 (emphasis added); *see also D.*, 2006-XI Eur. Ct. H.R. at 35.

This finding was consistent with the European Court’s 1991 judgment in another case involving Ireland where it had stated:

[I]t is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.

Open Door, App. Nos. 14234/88, 14235/88, at 23.

C. Even restrictive abortion laws can be compatible with the Convention

In 2010, a majority of the Grand Chamber held in *ABC* that Ireland’s criminal prohibition of abortion for “health and well-being reasons,” which applied at all stages of pregnancy, did not violate Article 8. 2010-VI Eur. Ct. H.R. at 262-63. The Court recorded, *inter alia*, the limited nature of the legal entitlement to a termination of pregnancy under Irish constitutional law as follows:

- a termination of pregnancy was permissible if it was established as a matter of probability that there was a real and substantial risk to the life, as distinct from the health, of the mother which could only be avoided by the termination of the pregnancy;
- an established threat of suicide constituted a qualifying real and substantial risk to the life of the woman;
- there was a right to lawfully travel abroad for an abortion and access to appropriate information and medical care in Ireland.

The Grand Chamber held that Irish law on the voluntary termination of pregnancy “struck a fair balance” between the right of women “to respect for their private lives and the rights invoked on behalf of the unborn.” *ABC*, 2010-VI Eur. Ct. H.R. at 263.

Its reasoning can be found in the following key passages of the judgment:

239. *From the lengthy, complex and sensitive debate in Ireland . . . as regards the content of its abortion laws, a choice has emerged[.]*

240. It is with this choice that the first and second applicants take issue. However, *it is equally to this choice that the broad margin of appreciation centrally applies[.]*

241. Accordingly, having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, *based as it is on the profound moral views of the Irish people as to the nature of life . . . and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn.*

Id. at 262-63 (emphases added).

D. Article 8 cannot be interpreted as conferring a right to abortion

The European Court has expressly held that Article 8 does not confer a right to abortion. This aspect of its case law is well known and well recognized in the secondary literature. WILLIAM SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN*

RIGHTS: A COMMENTARY 188 (1st ed. 2015); Daniel Fenwick, *The modern abortion jurisprudence under Article 8 of the European Convention on Human Rights*, 12 MED. L. INT'L 249, 263 (2012); Paolo Ronchi, *A, B and C v. Ireland: Europe's Roe v. Wade Still Has to Wait*, 127 L. Q. REV. 365, 368 (2011); REID, *supra*, at 373.

In *ABC*, the Grand Chamber stated that “Article 8 cannot . . . be interpreted as conferring a right to abortion” under the Convention. 2010-VI Eur. Ct. H.R. at 255-56. This was expressly re-iterated two years later, in the judgment in *P. and S. v. Poland*, App. No. 57375/08, Judgment, at 21 (Eur. Ct. H.R. Oct. 9, 2012).

This approach to Article 8 is consistent with the refusal of the Commission and subsequently the Court in other cases to declare incompatible with the Convention those aspects of the domestic law of Member States regulating the substantive grounds upon which abortion is legally available. *Brüggemann and Scheuten v. Germany*, App. No. 6959/75, Commission, at 20 (12 July 1977); *H. v. Norway*; *ABC*, 2010-VI Eur. Ct. H.R. at 265; *R.R.*, 2011-III Eur. Ct. H.R. at 247.

In *Brüggemann and Scheuten v. Germany*, the applicants alleged that restrictions on abortion under German law violated Article 8. In rejecting their complaint, the Commission stated that it:

[H]ad regard to the fact that, when the European Convention of Human Rights entered into force, the law on abortion in all Member States was at least as restrictive as the one now complained of

by the applicants. In many European countries, the problem of abortion is or has been the subject of heated debates on legal reform since. *There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution under discussion[.]*

Brüggemann, App. No. 6959/75 at 20, App. V (emphasis added) (summarizing national laws on abortion in all Member States); *see also W.P.*, App. No. 8416/78 at 9.

III. The European Court will supervise whether national abortion laws constitute a proportionate balancing of the competing interests involved

A. If abortion is available under national law, the legal framework devised for this purpose should be shaped in a coherent manner, allowing the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention

While acknowledging it is the task of an individual Member State to frame its own abortion law, the Grand Chamber in *ABC* observed that it followed from its responsibility under Article 19 of the Convention that it must supervise whether any such law “constitutes a proportionate balancing of the competing interests involved.” 2010-VI Eur. Ct. H.R. at 261 (citing *Open Door*, App. Nos. 14234/88,

14235/88, at 23). The same point was made later in the judgment where the Grand Chamber held:

While a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State . . . *once that decision is taken* the legal framework devised for this purpose should be “shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention.”

Id. at 265 (emphasis added) (citing *S.H. and Others v. Austria*, 2011-V Eur. Ct. H.R. 295, 316); *see also R.R.*, 2011-III Eur. Ct. H.R. at 247.

Similarly, in *Open Door and Dublin Well Woman v. Ireland* the European Court acknowledged that:

[T]he national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. . . . However *this power of appreciation is not unlimited*. It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention.

App. Nos. 14234/88, 14235/88, at 23. (emphasis added).

The European Court has not relied upon any concept of the viability of the fetus as a basis for assessing the compatibility of Member States abortion laws with the Convention.

B. If abortion is available under national law, the legal framework must enable a pregnant woman to exercise her right of access to lawful abortion effectively

In several cases, the European Court has found that Member States have violated the Article 8 rights of claimants seeking to access abortion services permitted under national law as a result of deficiencies in the way the national law has been given effect. See *Elizabeth Wicks, A, B, C v Ireland: Abortion Law under the European Convention on Human Rights*, 11 HUM. RTS. L. REV. 556, 566 (2011); SCHABAS, *supra*, at 373.

In *ABC*, the Grand Chamber held that the Irish authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life due to the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure to establish whether she qualified for a lawful abortion as a matter of Irish law. 2010-VI Eur. Ct. H.R. at 270; *see also id.* at 269, 271-73.

In three cases concerning Poland, *Tysic* (2007), *R.R.* (2011), and *P. and S.* (2012), the European Court found violations of the Article 8 rights of women who were unable in practice to access abortion services that were legal under Polish law. *Tysic v. Poland*, 2007-I Eur. Ct. H.R. 219; *R.R.*, 2011-III Eur. Ct. H.R. at 255 (finding violation of Article 3); *P. and S. v. Poland*, App. No. 57375/08, Judgment (Eur. Ct. H.R. Oct. 9, 2012). In *Tysic*, it held that when it is established that the pregnant woman fulfills the

national legal conditions allowing access to abortion, the State “must not structure its legal framework in a way which would limit real possibilities to obtain an abortion.” 2007-I Eur. Ct. H.R. at 249. In *R.R. v. Poland*, it stated that national law must enable “a pregnant woman to effectively exercise her right of access to lawful abortion” where a Member State decides to make it available. 2011-III Eur. Ct. H.R. at 251-52. In *P. and S.*, the European Court held that where a State “adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain it” and is under a “positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion.” App. No. 57375/08, at 22.⁶

CONCLUSION

The European Court allows States a wide margin of appreciation to determine the starting point of the right to life in their domestic law and to formulate their laws on abortion. Consistent with this, the European Court has held that the Convention does not confer a right to abortion and has recognized as compatible with a Member State’s obligations under the Convention even very restrictive abortion laws. However, in several cases the European Court has found violations of the Convention in respect of

⁶ The foregoing represents a condensed survey of the current state of Convention case law regarding national abortion laws. As a guide to future European Court decisions, it must be considered subject to the caveat that developments in Member States may lead the European Court to overrule its earlier decisions. See *ABC*, 2010-VI Eur. Ct. H.R. at 260.

individual applicants as a result of procedural deficiencies in the way national abortion laws have been given effect.

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