Case No. 19-1392

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IN THE
**Supreme Court of the United States**

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
*Petitioners*,

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,
*Respondents*.

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On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

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# Brief *Amicus Curiae* of the Prolife Center at the University of St. Thomas in Support of Petitioners

Teresa S. Collett
*Counsel of Record*
Prolife Center at the
University of St. Thomas
MSL 400
1000 La Salle Avenue
Minneapolis, Minn. 55403
(651) 271-2958
tscollett@stthomas.edu

Paul Benjamin Linton
921 Keystone Avenue
Northbrook, Ill. 60062
(847) 291-3848
pblconlaw@aol.com

Counsel for *Amicus Curiae*

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## INTEREST OF *AMICUS CURIAE*[*]

*Amicus Curiae*, the Prolife Center at the University of St. Thomas, is an academic center focused on effective legal protection for human life. A significant part of the Center's work consists of assisting government officials in drafting, passing, and defending laws to protect human life. Current uncertainty regarding the constitutional necessity and composition of a health exception to abortion statutes and regulations makes the work of assisting officials draft constitutional laws far more difficult.

## SUMMARY OF THE ARGUMENT

This case presents the Court with a unique opportunity to correct a judicial error of historic dimension. *Roe v. Wade*, 410 U.S. 113 (1973), should be overruled, and the regulation of abortion, including its prohibition, should be evaluated under the rational basis standard of judicial review. In correcting the error of *Roe*, however, the Court should make clear that the States are *not* required to permit abortions for reasons relating to the mental or psychological health of the pregnant woman, or for undefined reasons of health, either of which would lead the Court, and the country, back to a regime of abortion–on–demand.

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[*] Letters of consent have been filed with the Court. None of the counsel for the parties authored this brief in whole or in part, and no one other than the amicus or its counsel has contributed money or services to the preparation or submission of this brief.

# ARGUMENT

## IN RESTORING THE STATES' AUTHORITY TO PROHIBIT ABORTION, SUBJECT TO THE RATIONAL BASIS STANDARD OF JUDICIAL REVIEW, THE STATES CANNOT BE REQUIRED TO ALLOW ABORTIONS TO BE PERFORMED FOR REASONS OF THE PREGNANT WOMAN'S MENTAL OR PSYCHOLOGICAL HEALTH, OR FOR UNDEFINED REASONS OF "HEALTH," BECAUSE TO IMPOSE SUCH A REQUIREMENT WOULD EFFECTIVELY MANDATE ABORTION ON DEMAND.

Petitioners have asked this Court to overrule its decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and their progeny, and to subject all regulation of the practice of abortion, including prohibitions of abortion, to the rational basis standard of review. *Amicus curiae* joins in that request. In this brief, *amicus curiae* argues that, in restoring the States' authority to prohibit abortion, the Court should not require or in any way suggest that, under the rational basis standard, the States must permit abortions sought because of the mental or psychological health of the pregnant woman, or because of undefined "health" reasons. Requiring either would continue the present regime of abortion-on-demand, at least with respect to abortions sought before viability.

The most striking evidence of the inherent manipulability of a mental health exception may be found in examining California's experience (pre-*Roe*) with its Therapeutic Abortion Act of 1967. According to data cited by the California Supreme Court, more than 60,000 abortions were authorized and performed in 1970 for

alleged "mental health" reasons, even though the standard for invoking the exception was the same as the standard for civil commitment, to wit, the pregnant woman had to pose a danger to herself or to others or to the property of others. *People v. Barksdale*, 503 P.2d 257, 265 (Cal. 1972). It is absurd to believe that more than 60,000 women met the standard for civil commitment merely because they were pregnant. Other evidence indirectly confirms that a mental health exception, or even an undefined "health" exception, is subject to widespread abuse.

Prior to *Roe v Wade*, thirteen States enacted one version or another of Section 230.3 of the Model Penal Code (set forth in Appendix B to *Doe v. Bolton*, 410 U.S. 179, 205–06 (1973). Section 230.3 permitted abortion when, among other reasons, the physician believed that there was a "substantial risk" that continuation of the pregnancy would "gravely impair the physical or mental health of the mother . . . ." Abortion data, broken down according to reason for the abortion, is available for eight of those thirteen States for 1972. That data reveals that more than *93%* of all abortions performed in those eight States (38,586 out of 41,395) were performed for reasons purportedly relating to the woman's mental health. *See* Appendix A. And comparing data for 1973, when abortion was permitted upon request at least up until viability (if not thereafter) from the date of this Court's decision in *Roe v. Wade* (January 22, 1973), to 1972, when an abortion had to be "justified" for one of the reasons set forth in the statutes based on the Model Penal Code, is also instructive. For three of those States–Kansas, Maryland and Oregon–the increase in the total number of abortions was modest, 2.97%, 8.55% and 1.88%, respectively. *See* Appendix B.

Employing an "undefined" health exception fares no better. Prior to *Roe*, the District of Columbia allowed abortion only if it was necessary "for the preservation of the mother's life or health . . . ." D.C. Code, § 22-201 (1967). The District of Columbia Code itself did not define the term "health" and there was no legislative history to indicate what Congress intended by use of that term when it first enacted the statute in 1901. A physician indicted under § 22-201 challenged the statute, arguing that the standard for permitting abortion was unconstitutionally vague. The district court granted the physician's motion to dismiss the indictments. On appeal, this Court reversed and upheld the statute. *United States v. Vuitch*, 402 U.S. 62 (1971).

In *Vuitch*, the Court, exercising its authority to provide a definitive construction of a statute adopted by Congress for the District of Columbia, broadly interpreted the word "health" to include "psychological as well as physical well-being." *Vuitch*, 402 U.S. at 72. The Court explained, "the term 'health' presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." *Id*. In 1972, when an abortion could be performed in the District of Columbia only to preserve the life or health of the mother, 38,868 abortions were performed. In 1973, when abortions could be performed upon request before viability at any time after the Court decided Roe v. Wade ( January 22, 1973), there were 40,812 abortions performed in the District of Columbia, an increase of barely 5% (1,944 abortions). It is apparent from this data that the pre-*Roe* District of Columbia abortion statute, as construed by this

Court, effectively allowed abortion for any reason.[1]

Experience with federal funding of abortions for indigent women is also revealing. Prior to the enforcement of the Hyde Amendment, restricting federal funding of abortions for women enrolled in the Medicaid program, the Government was paying for between 250,000 and 300,000 abortions per year. *McRae v. Califano*, 491 F. Supp. 630, 639 (E.D.N.Y. 1980)*, rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980). Once the Hyde Amendment went into effect, those numbers dropped by more than 98%, even when federal funding was allowed for reasons relating to the woman's life or physical health, and in cases where the pregnancy resulted from rape or incest. *Id*. at 654. That suggests that the overwhelming majority of abortions obtained by indigent women prior to the implementation of the Hyde Amendment were authorized for mental health reasons. And, given that the numbers of

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[1] In Doe v. Bolton, 410 U.S. 179 (1973), the Court adopted the Vuitch definition of health to resolve a vagueness issue in what was left of the Georgia abortion statute after the district court had struck down the permitted exceptions as too narrow, leaving the statute to read that the physician could perform an abortion whenever he determined that it was "necessary." Doe, 410 U.S. at 191-92. The Court held that "the medical judgment," as to the necessity of an abortion, "may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Id. at 192. Doe v. Bolton did not decide, and did not purport to decide, whether, as a matter of federal constitutional law, States must allow abortions for reasons relating to the pregnant woman's mental or psychological health. See Voinovich v. Women's Medical Professional Corp., 523 U.S. 1036, 1038 (1998) (Thomas, J., dissenting from the denial of certiorari).

abortion paid for by the federal government (before the Hyde Amendment went into effect) accounted for a *minimum* of 23%–40% of *all* abortions performed in the United States,[2] it is apparent that the "medical necessity" standard for federal reimbursement meant nothing more than that the abortion was desired by the pregnant woman.[3]

This Court should overrule *Roe v. Wade* and *Planned Parenthood v. Casey*, and restore to the States their rightful constitutional authority to prohibit the practice of abortion, subject to the rational basis standard of judicial review. Restoration of that authority cannot be subject to a requirement that the States must allow abortions for mental or psychological health reasons, or for undefined reasons of "health." To impose such a requirement on the States would lead the country back into a regime of abortion–on–demand, a regime the Constitution quite plainly does not mandate.

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[2] The Center for Disease Control reported 615,831 legal abortions in 1973, 763,476 in 1974, 854,853 in 1975, 988,267 in 1976, and 1,079,430 in 1977. Abortion Surveillance, 1982–1983 Morbidity and Mortality Weekly Report (CDC), Vol. 36/No. 1SS (Feb. 1987), 11SS, 12SS (Table 1).

[3] This conclusion–that, under Medicaid (before the Hyde Amendment went into effect), any desired abortion was deemed "medically necessary" and would be paid for with government funds–is consistent with Justice Brennan's view that, regardless of a pregnant woman's choice–to carry her pregnancy to term or to undergo an abortion–"the procedures in each case constitute necessary medical treatment for the condition of pregnancy." Beal v. Doe, 432 U.S. 438, 448 (1977) (Brennan, J., dissenting).

## CONCLUSION

The judgment of court of appeals should be reversed.

July 28, 2021 Respectfully submitted,

Teresa S. Collett
*Counsel of Record*
Prolife Center at the
University of St. Thomas
MSL400
1000 La Salle Avenue
Minneapolis, Minn. 55403
(651) 271-2958
tscollett@stthomas.edu

Paul Benjamin Linton
921 Keystone Avenue
Northbrook, Ill. 60062
(847) 291-3848
pblconlaw@aol.com

# APPENDIXES

## Appendix A

### Indication of Reason for Abortion by State of Occurrence (1972) Selected States (statutes based on the Model Penal Code)*

| | Mental Health | | Physical Health | | Risk of Fetal Deformity | |
|---|---|---|---|---|---|---|
| State | No. | % | No. | % | No. | % |
| Ark. | 603 | 76.0 | 158 | 19.9 | 29 | 3.7 |
| Colo. | 4,774 | 90.8 | 129 | 2.5 | 10 | 0.2 |
| Del. | 1,321 | 98.4 | 12 | 0.9 | 8 | 0.6 |
| Kan. | 11.075 | 90.4 | 171 | 1.4 | 119 | 1.0 |
| Md. | 8,794 | 96.7 | 211 | 2.3 | 20 | 0.2 |

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* Prior to Roe v. Wade (1973), thirteen States adopted one version or another of the Model Penal Code provision on abortion (§ 230.3). No data is provided for California for 1972 because, after 1970, the State ceased to collect data on the reasons for which abortions were performed. See People v. Barksdale, 503 P.2d 257, 265 n. 7 (Cal. 1972) (striking down the Therapeutic Abortion Act of 1967); for Florida, which did not enact its version of the Model Penal Code until April 1972; for New Mexico, which did not collect abortion data; for Georgia, whose law was substantially modified (to eliminate the need to state any reason for obtaining an abortion) pursuant to a district court order decision in 1970, see Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), aff'd as modified, 410 U.S. 179 (1973); or for North Carolina, which combined into one category both mental health reasons and socio-economic reasons. All data is derived from Table 19 of the Center for Disease Control Abortion Surveillance Annual Summary 1972 (April 1974).

| | | | | | | |
|---|---|---|---|---|---|---|
| Or. | 6,997 | 95.7 | 216 | 3.0 | 61 | 0.8 |
| S.C. | 725 | 84.9 | 86 | 10.1 | 17 | 2.0 |
| Va. | 4,297 | 95.6 | 104 | 2.3 | 28 | 0.6 |
| Total | 38,586 | 93.2 | 1,087 | 2.62 | 292 | 0.7 |

| | Rape or Incest | | Other | | Unknown | | |
|---|---|---|---|---|---|---|---|
| State | No. | % | No. | % | No. | % | 100 |
| Ark. | 3 | 0.4 | 0 | 0.0 | 0 | 0.0 | 100 |
| Colo. | 49 | 0.9 | 0 | 0.0 | 298 | 5.7 | 100 |
| Del. | 0 | 0.0 | 1 | 0.1 | 0 | 0.0 | 100 |
| Kan. | 882 | 7.2 | 1 | 0.0 | 0 | 0.0 | 100 |
| Md. | 22 | 0.2 | 46 | 0.5 | 0 | 0.0 | 100 |
| Or. | 29 | 0.4 | 6 | 0.1 | 0 | 0.0 | 100 |
| S.C. | 8 | 0.9 | 12 | 1.4 | 6 | 0.7 | 100 |
| Va. | 5 | 0.1 | 62 | 1.4[**] | __ | ___ | 100 |
| Total | 998 | 2.4 | 128 | 0.30 | 304 | 0.73 | 100 |

[**] Other and unknown reported as one category.

## Appendix B

Total Number of Reported Abortions for Selected States that had Enacted the Model Penal Code Provision on Abortion[***]

| State | Reported Abortions (1972) | Reported Abortions (1973) | Change from 1972 to 1973 |
|---|---|---|---|
| Kan. | 12,248 | 12,612 | 2.97% (+364) |
| Md. | 9,093 | 9,871 | 8.55% (+778) |
| Or. | 7,309 | 7,447 | 1.88% (+138) |
| Total | 28,650 | 29,930 | 4.46% (+1,280) |

[***] All data is derived from Table 19 of the Center for Disease Contro Abortion Surveillance Annual Summary 1972 (April 1944) and Table 2 of the CDC Abortion Surveillance Annual Summary 1973 (May 1975).