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 FOUNDATION TO ABOLISH ABORTION, ABOLISH ABORTION TEXAS, ACTION FOR LIFE, FREE THE STATES, RESCUE THOSE, OPERATION SAVE AMERICA, END ABORTION NOW, COLORADO RIGHT TO LIFE, AMERICAN RIGHT TO LIFE, ABOLISH ABORTION ARKANSAS, ABOLISH ABORTION IDAHO, ALASKA RIGHT TO LIFE, ABOLISH ABORTION PA, SOUTHERN BAPTISTS FOR ABOLISHING ABORTION, WEST TEXAS FOR LIFE, LIBERTY RISING INSTITUTE, SC RIGHT TO LIFE, ABOLISH ABORTION NORTH CAROLINA, LOVE LIFE, VOICE FOR THE VOICELESS, SCOTT HORD MINISTRIES, NUMEROUS OTHER AMERICANS FOR ABOLISHING ABORTION, AND 20 STATE LEGISLATORS, IN SUPPORT OF NEITHER PARTY

BRADLEY W. PIERCE
Counsel of Record
FOUNDATION TO ABOLISH ABORTION
P.O. Box 402
Liberty Hill, Texas 78642
Tel. (512) 598-1092
bradley@faa.life

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICI CURIAE[1]

The **Foundation to Abolish Abortion** is a national nonprofit abolitionist organization with the mission to exalt and vindicate the image of God by promoting sound public policy that provides equal protection under the law to all preborn human beings.

Abolish Abortion Texas is a nonprofit abolitionist organization with the mission to abolish abortion in Texas by mobilizing Christians to influence civil government in obedience to the Great Commission.

Action for Life is a national organization dedicated to ending abortion in all 50 state legislatures and in Congress.

Free the States is an abolitionist organization educating legislators and the people of the Biblical and Constitutional necessity of ignoring Roe and abolishing abortion immediately.

Rescue Those exists to educate, equip, and mobilize the saints in the name of Christ to rescue the preborn being led to slaughter.

Operation Save America has been on the frontlines of the culture; mobilizing Christians, proclaiming

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than amici, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consent to the filing of amicus briefs.

the gospel of Christ, and seeking to establish biblical justice for the preborn.

End Abortion Now is a ministry dedicated to raising up and equipping local churches to save lives at abortion clinics and to demand an immediate end of abortion with their own local legislators.

Colorado Right to Life is considered the black sheep of the Right to Life community because we object to regulating murder. We advocate only for the abolition of abortion.

American Right to Life advocates enforcing God's enduring command, *Do not murder*. Regulating abortion dishonors God.

Abolish Abortion Arkansas is a Christ-centered organization, which seeks Constitutional, equal protection for unborn Arkansans by calling for churches and magistrates to interpose on their behalf.

Abolish Abortion Idaho is an organization of Christians dedicated to the abolition of abortion in Idaho through public education and state legislation.

Alaska Right to Life. Ending Abortion in Alaska. One day at a time, one life at a time, for all time.

Abolish Abortion PA works to establish equal justice for preborn children in Pennsylvania, without exception or compromise, through the gospel of Jesus Christ.

Southern Baptists for Abolishing Abortion exists to educate, equip, and mobilize Southern Baptists to abolish abortion immediately, without exception or compromise to the glory of God.

West Texas for Life's mission is to see the State of Texas abolish all abortion.

Liberty Rising Institute educates and equips church congregations on the constitutional and biblical principles of the abolition movement, then helps them engage their individual legislators.

SC Right to Life is dedicated to abolishing abortion in South Carolina.

Abolish Abortion North Carolina is an organization of Christians who seek to stand on the Word of God, trust in His providence, and bring the gospel into immediate and uncompromising conflict with child sacrifice.

Love Life exists to unite and mobilize the Church to create a culture of Love and Life that will result in an end to abortion and the orphan crisis.

Voice For The Voiceless is a nonprofit Christian ministry working to end abortion in Utah.

Scott Hord Ministries exists to abolish abortion and to rescue preborn babies from abortion.

Numerous other Americans for abolishing abortion.[2]

20 members of multiple state legislatures (listed in *Appendix A*). These amici have a longstanding interest in fulfilling their duties to provide preborn children the equal protection of the laws.

SUMMARY OF ARGUMENT

Amici call upon the Court to fulfill its God-given and oath-bound constitutional duty to administer justice. Amici also call upon the Court to restrain its unconstitutional abuse of power in *Roe v. Wade*[3] in order to restore public respect for the Constitution, for the Court as an institution, for the Court's rulings in general, and for the value of human life itself. Additionally, amici respectfully advise the Court that, for so long as the Court does not overrule *Roe* itself, more and more Americans who are faithful to the Constitution can, should, and will be seeking to pursue the abolition of abortion via other peaceful constitutional means. Finally, amici urge the Court to recognize that a preborn person is entitled to the equal protection of the laws under the Fourteenth Amendment—state

[2] The names of numerous other Americans for abolishing abortion may be viewed at https://faa.life/americans.

[3] References to *Roe v. Wade* (410 U.S. 113 (1973)) herein generally include its judicial progeny such as *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

laws protecting born persons should equally protect those not yet born.

ARGUMENT

I. *Roe v. Wade*, and refusal to overrule it, undermines the legitimacy of the authority of the Court.

The Supreme Court of the United States is an integral component of our country's federal system and of our republican form of government. As such, public respect for the Court as an institution and public respect for its rulings are vital to our country's stability.

Regarding the Court as an institution, the public respect it possesses first originated with the establishment of the document that birthed it. Without the Constitution of the United States (the "Constitution"), there would be no Supreme Court of the United States. Accordingly, public respect for the Court as an institution is directly connected with the respect that the public has for that document upon which the Court's existence depends. As esteem for the federal constitution may wax and wane, so does esteem for its institutions.

Regarding the Court's rulings, the public respect they attain is closely tied to the extent to which those rulings are perceived to adhere to the Constitution. Of course, like the previous point, this respect depends on

the extent to which the public first esteems the Constitution itself. Accordingly, if the public respects the Constitution, the public will respect rulings that adhere to it, and vice versa.

Respect for these two objects does not reside in isolated silos. The measure of public respect for the Court as an institution and the measure of public respect for its rulings are inextricably intertwined. If respect for the Court as an institution increases, so generally will respect for its rulings. If respect for the Court's rulings declines, so will respect for it as an institution.

The Court is not merely a passive observer in these matters. It is an active party in helping influence public opinion. Most importantly, through its example, the Court influences public respect for the Constitution. If the Court shows consistent respect for the Constitution in its rulings, public respect for the Constitution will grow overall and concomitantly so will respect for the Court and its rulings. If the Court shows consistent disrespect for the Constitution in its rulings, the Court might continue to enjoy public respect for a time if the public likewise disrespects the Constitution, but the eventual erosion of its constitutional foundation will ultimately lead to the collapse of the Court itself.

In light of these considerations, amici come as true friends of the Court as a constitutional institution. Amici believe that it is in the best interest of the Court to enjoy strong public respect, both for the Court as an institution and for its rulings. Additionally, the Court

as an entity is dependent upon public respect for the document upon which its existence depends. As such, amici believe that it is also in the best interest of the Court for the public to have a strong respect for the Constitution, and it is important for the Court to lead by example in that respect. Ultimately, what is good for the Constitution is good for the Court, and what is good for both the Constitution and the Court is good for the country. Consequently, amici are concerned not just for the outcome of this case but are also concerned for the public respect for the institution of the Court itself and for public respect for the Constitution upon which the Court's existence is based.

Of course, both the Constitution and the Court are human inventions. This is not to say that either is unimportant, but merely to point out that neither is transcendent, inerrant, or eternal. Similarly, while public opinion is important, it is not the highest or final authority. While the stability of our country relies upon these things, it does so in a secondary way. Ultimately, our true peace and stability depends first and foremost upon the blessing of God. Conversely, while any decline in public respect for the Constitution would be a threat to the Court, the greatest threat to all is the righteous judgment of God if we as a country and our institutions fail to acknowledge Him in all our ways as the ultimate authority.

Therefore, before discussing the important topic of rectifying and preserving the legitimacy of the Court's authority, it is appropriate to first consider the source of all legitimate authority.

At the outset, we must first recognize that all human authority is derivative of God's authority.

In the preamble of the Constitution, the states claim to derive their authority from the people: "We the people of the United States. . . ." In the Declaration of Independence (the "Declaration"), this authority derived from the people is referred to as "the consent of the governed." According to the Declaration, it is from this earthly source that governments derive their just powers.[4]

Naturally, this begs a question: from what source do the people get their own authority? How can the people have authority to delegate unless it has first been delegated to them by some higher authority? If the people delegate some authority to a state, which then delegates some authority to federal institutions, the extent of the legitimacy of authority of those federal institutions depends upon the origin of that authority.

In its opening, the Declaration addresses this when it invokes the authority of both general and special divine revelation—the Laws of Nature and of Nature's God—as the ultimate source of the legitimate authority of the thirteen united States of America.[5] Sir William Blackstone said, "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be

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[4] Para 2 (U.S. 1776).

[5] Para 1 (U.S. 1776).

suffered to contradict these."[6] The Declaration goes on to acknowledge the divine Creator as the endowing source of unalienable human rights such as life.[7] The Declaration then closes by "appealing to the Supreme Judge of the world for the rectitude of our intentions" and putting "a firm reliance on the protection of divine Providence."[8]

The ultimate source of all legitimate earthly authority is divine. It is derived from "our Lord,"[9] Jesus Christ, who has been delegated it by God the Father. As Christ said, "All authority in heaven and on earth has been given to me."[10]

As a result, "we the people of the United States" only have so much authority as Christ has delegated to us. Regarding the power of the Court, it only has so much authority, and over such matters, as delegated to it by the people through the states in the Constitution. Even to that extent, it only has so much authority, and over such matters, as the people have been delegated by God. As already discussed, the people can delegate only so much authority as they possess.

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[6] 1 William Blackstone, *Commentaries on the Laws of England* 42 (1765).

[7] Para 2 (U.S. 1776).

[8] Para 32 (U.S. 1776).

[9] The Constitution is dated "the seventeenth day of September *in the year of our Lord* one thousand seven hundred and eighty seven" (emphasis added).

[10] Matthew 28:18 (ESV). *See also* Psalm 2.

The Court is not only bound by the text of the Constitution, but it is also bound by the limits on human civil authority revealed by God. This is true because the power of the Court comes not only through the people, but also directly from God. Jesus said to Pilate, "You would have no authority over me at all unless it had been given you from above."[11] The Apostle Paul wrote, "For there is no authority except from God, and those that exist have been instituted by God."[12] As one of the Court's first justices said, "Human law must rest its authority ultimately upon the authority of that law which is divine."[13] Moreover, as a more recent justice asserted in his opening statement as lead prosecutor at the Nuremberg trials, "[E]ven rulers are, as Lord Chief Justice Coke said to King James, 'under God and the law.' "[14] Finally, as we are reminded in the Apostle Paul's epistle to the Romans when he spoke of civil rulers: "[F]or he is God's minister, an avenger to execute wrath on him who practices evil."[15]

Therefore, whether this Court chooses to acknowledge this truth or not, it and other civil officials and institutions have been given authority and associated

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[11] John 19:11 (ESV).

[12] Romans 13:1 (ESV).

[13] James Wilson, "Of the General Principles of Law and Obligation," in 1 *The Works of the Honourable James Wilson, L.L.D.*, 104–05 (Bird Wilson ed., 1804).

[14] Robert Jackson, "Opening Statement," Nov. 21, 1945, 2 *Trial of the Major War Criminals before the International Military Tribunal* 143 (International Military Tribunal, Nuremberg 1947).

[15] Romans 13:4 (NKJV).

responsibility by God to act as His ministers of justice. Amici therefore call upon the Court to submit itself to God and His law to administer justice in this matter.

In addition to the Court's most important role as a minister of God, the Court is also, and most proximately, a creature of the Constitution. Article III of the Constitution provides, "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[16]

As a creature of the Constitution, the Court does not rule over that document but rather is subject to it. Accordingly, the Court is not to control the words of the Constitution but to be controlled by them. One body alone is intended to have mastery over the text of the Constitution, and it is not the Court. According to Article V of the Constitution, amendments to the text of the Constitution may be proposed by Congress or by a constitutional convention called for by the states. Such proposed amendments must then be ratified by three-fourths of the state legislatures or state conventions, as applicable.[17] Therefore, the body of states is ultimately master of the text of the Constitution, and this is the exclusive method available for altering what the

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[16] U.S. Const. art. III, § 1.

[17] U.S. Const. art. V.

Constitution says. The Court was not intended to be "a constitutional convention in continuous session."[18]

Nowhere in the Constitution was the Court granted authority to amend the Constitution. Though the Court may interpret the Constitution's text and apply it to cases, the Court was not given authority to alter the text. To do so would have been for the people through the states to grant the Court power *carte blanche*, rendering the Constitution illusory, and turning the very concept of having a written constitution on its head. However, though no such blank check was ever written to the Court, the Court has for long been more and more overdrawing its balance of granted authority and we the people and our states have largely acquiesced to it doing so. This concept of the Supreme Court, *ex cathedra*, infallibly overruling the very origin of its own existence, is dangerous and destructive, as the present case demonstrates. Yet citizens have accepted this practice more and more.

Over time, Americans in general have increasingly come to treat the Court as having absolute authority, or near to it. *Its opinions are our commandments. Its judgments are our last resort. Its decrees are infallible. Its word is final. Its rule is law. We may disagree with the Court. We may question it. We may even seek to change it. Yet we do not dispute its authority. We acknowledge it alone as having the ultimate*

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[18] Woodrow Wilson, *quoted in* John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 Am. J. Legal Hist. 44, 57–58 (1991).

prerogative to determine right and wrong, good and evil, life and death. When the Court is just, we follow it. When it errs, we follow it. When we are attacked, it is the refuge to which we run, the name which we invoke. It offers salvation to those who put their trust in it. We lay our problems at its feet to resolve. Though it may be slow to save, yet our faith in it only deepens. Its members are as our messiahs. The one who appoints them is as our high priest. Its only standard is itself. We study its words as sacred script. We conform our actions and statutes to its proclamations. It is supreme over all laws. It is sovereign over all authorities. All must bow before it.

Regarding *Roe*, instead of refusing to comply with an evil judicial ruling, we have willingly submitted ourselves to it for the last 48 years. We have chosen not to deny the Court's authority to authorize the slaughter of the innocents, but to validate it. We write our laws being ever so careful to ultimately comply with the Court's opinions. We parse its decisions looking for loopholes and gaps that we can exploit. We work so hard to find vulnerabilities with its rulings while being ever so careful not to challenge its authority, no matter how far outside its legitimate scope it goes.

When the often-compromised laws we write are challenged, we return to the Court asking for permission to continue regulating abortion as healthcare instead of abolishing it as murder. We say, "May it please the Court," and we are grateful when it gives us crumbs.

Yet of those who hate the Court's decision in *Roe* almost none call it illegitimate. To the contrary, our response is merely that we must change the membership of the Court. To this end, we give our votes to anyone who tickles our ears with promises of court appointees who will follow the Constitution and reverse the court's bad jurisprudence. Our litmus test for presidential candidates is that they tell us what we want to hear: "we will nominate pro-life justices, then things will change." We believe them. We repeatedly put our faith in them, no matter how consistently they miscarry it.

The Court in *Roe* has said that evil must be allowed to run rampant in our land contrary to God's commands to magistrates to restrain it. But if God commands one thing, and the Court commands another, whom do we obey? If Americans are unwilling to say no to the Court, what have we made it?[19] If Americans are unwilling to say no to evil, what does that make us?

Allowing such disregard for both God and the Constitution to continue does not bode well for our country's future. *Roe* undermines the Constitution by, at best, ignoring it and, at worst, intentionally turning it completely on its head. Amici will not belabor the

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[19] "And God spoke all these words, saying: 'I am the Lord your God, who brought you out of the land of Egypt, out of the house of bondage. You shall have no other gods before Me. . . . For I, the Lord your God, am a jealous God, visiting the iniquity of the fathers upon the children to the third and fourth generations of those who hate Me, but showing mercy to thousands, to those who love Me and keep My commandments.' " (Exodus 20:1-6 (NKJV)).

arguments against *Roe* that others will no doubt thoroughly address except to quote Justice White, the only Democrat-appointed justice who dissented in *Roe* (and also dissented in *Casey*):

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.[20]

Ultimately, the Court's egregious decision in *Roe* is an affront to God and a malignancy that must be excised. It finds no basis in the text of the Constitution. Indeed, its holdings run completely contrary to the text of the Constitution flouting both its text and spirit. As a result, the *Roe* decision and the Court's repeated refusal to overrule it has undermined public respect for the Constitution, for the Court as an institution, for the Court's rulings in general, and for the value of human life itself, which God commands magistrates to protect by administering justice. Furthermore, the disregard for the rule of law demonstrated in *Roe* has metastasized into other areas. Ultimately, if the Court does not amputate *Roe* from its body of jurisprudence, it will further fester and rot the foundations of our republic and its institutions, and it will further invite the righteous judgment of God.

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[20] *Doe v. Bolton*, 410 U.S. 179, 221–22 (1973).

II. Where the Court does not restrain its authority within its legitimate bounds, the Court impels those faithful to the Constitution to seek redress via other constitutional avenues.

In the United Kingdom, Members of Parliament have long been required to swear an oath to the monarch. Even today, the oath reads, "I (name of Member) swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth, her heirs and successors, according to law. So help me God."[21]

Our oaths of office in the United States are different. Here, the government of the United States was founded to be a "government of laws, and not of men." This simply means that America was designed as a constitutional republic, and not a monarchy or oligarchy.[22] *Lex rex*, the law is king. Not *rex lex*, the king is law.

Reflecting that principle, public officials in the United States generally swear an oath not to a person, to a group of persons, or even to an institution. Instead, almost all public officials in this country swear an oath

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[21] UK Parliament, *Swearing In and the Parliamentary Oath* (July 21, 2021) https://www.parliament.uk/about/how/elections-and-voting/swearingin [https://perma.cc/YE4N-VGZY].

[22] John Adams, 2 Papers of John Adams 314, *Novanglus Letter No. VII* (R. Taylor ed. 1977) (referring to Aristotle, Livy, and Harrington as defining a republic to be a government of laws, and not of men); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

to a written document: the Constitution.[23] Notably, none of them swear an oath of allegiance to this Court, nor does anything in the Constitution bind them to the Court's opinions unconditionally. American public officials are oath-bound to follow the Court insofar as the Court follows the Constitution, but not farther. Of course, deference should be given to the Court in interpreting the Constitution, but not unconditional submission. If the Court demands unconditional submission, it makes itself a tyrant. If we grant it unconditional submission, we make it an idol. Instead, the Court should submit to the highest Authority from whom it derives its powers, and the people should appeal to the ultimate Lawgiver from whom all powers are delegated.

If the Court itself fails to restrain its authority within its legitimate bounds, its actions will impel public officials obliged to fulfill their own constitutional and God-given duties to pursue other avenues to do so.

Concerning this case, *Roe* and its judicial progeny have purported to authorize the prenatal homicide of more than 2,300 American people each day on average.[24] The daily flow of this Nile River of blood in our land cries out loudly for justice, which the members of the Court are themselves oath-bound to administer, "so

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[23] *See* Foundation to Abolish Abortion, *Oaths of Office* (July 21, 2021) https://faa.life/oaths-of-office [https://perma.cc/3ZDE-8ZC2].

[24] Guttmacher Institute, *Induced Abortion in the United States* 1 (2019), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf ("Approximately 862,320 abortions were performed in 2017") [https://perma.cc/S5W6-SFV6].

help me God."[25] However, the Court is not only failing to administer justice in this respect, it is actively standing in the way of it. Inevitably, as history demonstrates, when justice is consistently denied by an institution commissioned to provide it, the demand for justice will seek fulfillment from another source.

Of course, amici repudiate violent acts of aggression through vigilantism or mob action. Furthermore, amici oppose popular revolution. Instead, there are numerous constitutional avenues available at both the federal and state levels for public officials to seek to secure the right to life through current civil institutions.

Certainly, it would be best for the Court to right its own wrong, and amici request it does so here. However, the Court has so far refused. It has continued to violate the rule of law by maintaining the underlying holding of *Roe* and its judicial progeny. As a result, citizens, public officials, and civil institutions still desiring to faithfully follow God and the Constitution can, should, and more and more are seeking redress via other peaceful constitutional avenues to abolish

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[25] 28 U.S.C.S. § 453 ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.' "). *See also* 5 U.S.C.S. § 3331.

abortion in order to rescue their preborn neighbors who are being led to the slaughter.

a. Those who oppose *Roe* could seek to amend the federal constitution; but should they?

While amending the Constitution is a natural option to consider, there are several problems with it. First, it implies that the Constitution is somehow defective either in its actual text or because the Court has de facto amended it, both of which are unnecessary and even dangerous implications to accept or encourage. Second, amending the Constitution is an extremely slow process to pursue while thousands are murdered by abortion every single day. Third, success is highly unlikely given that thirty-eight states must agree to the proposed amendment. Finally, even if the Constitution were to be successfully amended, the Court could simply choose to ignore the text by a "raw exercise" of judicial supremacy, just like it did in *Roe*.[26] This last point is made more menacing by the first point, which is that the very attempt to amend the Constitution to undo a judicially created "amendment" would likely further concede the legitimacy of the

[26] *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting) ("As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.").

concept of judicial supremacy, which is a fundamental underlying problem.

b. Those who oppose *Roe* may pursue other federal-level remedies.

Recently, there has been talk by some prominent Democrat public officials of pursuing "court packing," limiting jurisdiction of the Court, and other options if the Court even "chipped away" at *Roe*.[27] Of course, such talk is inappropriate.[28] The reason it is inappropriate, though, is not because the means discussed are per se unconstitutional. Rather, it is essentially inappropriate because the end being sought is unconstitutional and because the means used in support of that end would be significantly disruptive to the stability of the country.

Of course, refusing to seek an unconstitutional end is a decision based on principle, while choosing whether to seek a potentially disruptive end is a decision based on prudence. The first is virtually

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[27] Alexander Bolton, *Democrats:* Roe v. Wade *blow would fuel expanding Supreme Court*, The Hill (May 24, 2021), https://thehill.com/homenews/senate/554843-democrats-roe-v-wade-blow-would-fuel-expanding-supreme-court [https://perma.cc/3Q6E-VQ9C].

[28] Even more inappropriate were threats made by the highest-ranking Democrat senator, eliciting a rebuke by the Court's Chief Justice. Pete Williams, *In rare rebuke, Chief Justice Roberts slams Schumer for 'threatening' comments*, NBC News (March 4, 2020), https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036 [https://perma.cc/N44Y-24Q9].

absolute,[29] while the second depends on weighing the risks and benefits. In other words, while the options described in this section and the next are constitutional and valid if used to seek a constitutional objective, they are admittedly disruptive to some degree. However, as discussed even further below, to determine the net benefit or cost of the option under consideration, its potential disruption must be weighed against the existing disruption caused by the continued effect of *Roe*.

Among others, there are several federal-level remedies available as possible options to consider by those who sincerely desire to end the prenatal genocide in America:

- Congress limiting the jurisdiction of the federal courts.[30]
- Congress increasing the size of the Court (i.e., "court packing").
- Congress removing judges for lack of "good [b]ehaviour" or by "impeachment and conviction."[31]
- The president refusing to enforce unconstitutional judicial decisions.

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[29] If it does not violate God's law.

[30] *See* H.R. 2597, 110th Cong. (2007) ("Sanctity of Life Act of 2007").

[31] U.S. Const. art. III, § 1. *See also* Saikrishna Prakash and Steven D. Smith, *How to Remove a Federal Judge*, 116 Yale L.J. 72 (2006).

c. Those who oppose *Roe* may pursue state-level remedies.

At the level of individual states, or a group of states, the remedies available to abolish abortion are by exercising interposition and also choosing not to cooperate with the enforcement of *Roe*.[32] [33]

The "Supremacy Clause" of the Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[34] Consequently, only decisions by the Court that are consistent with the Constitution are the supreme law of the land and therefore binding on the states. Of course, prudence dictates that states should not declare actions of the federal judiciary void for light or indefinite causes. However, states should not concede that the federal judiciary is infallible nor that its powers are unlimited.

As discussed by Petitioners and undoubtedly by other amici, nothing in the Constitution of the United States provides for a right to abortion of preborn human beings. Moreover, the concept of the federal judiciary compelling states to allow the practice of prenatal homicide runs completely contrary to the text and principles of the Constitution. We must adamantly

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[32] Although the application and considerations will differ, these remedies may also be pursued at an even more local level by political subdivisions such as cities and counties.

[33] *See Appendix B* for examples of such legislation from ten states. *See also* https://faa.life/states.

[34] U.S. Const. art. VI, ¶ 2.

deny that the power to authorize the genocide of more than 62 million preborn human beings over the last 48 years and counting[35] is within the legitimate authority of the federal judiciary. Accordingly, actions of the federal judiciary purporting to provide a right to abortion are not made in pursuance of the Constitution and consequently are not the supreme law of the land.

Pursuant to the Supremacy Clause, states can declare and treat *Roe* as void to the extent *Roe* claims to prohibit states from providing the equal protection of the laws to persons who have not yet been born. Therefore, states can enforce prohibitions of abortion without regard to *Roe*. Furthermore, states can prohibit the use of any personnel or financial resources from enforcing, administering, or cooperating with *Roe*.

d. Admittedly, these constitutionally available remedies are more disruptive than the Court overruling *Roe* itself, but they are not as disruptive as allowing continuous mass prenatal genocide or the continual undermining of the rule of law.

Critics of the constitutional remedies discussed above may point out that such remedies could be disruptive to the current state of our country. Amici do not contest that possibility.

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[35] *See U.S. Abortion Clock* (July 21, 2021), http://www.numberofabortions.com/ [https://perma.cc/HCB9-PTPE].

There should be little dispute that the least disruptive means of addressing *Roe* is for the Court to overrule the decision itself, although even that would obviously be disruptive to the current state of affairs. Amici do request this Court overrule *Roe*, and we pray to God it does in this case. However, as discussed above, that avenue has been thoroughly pursued without success. For over 48 years, those opposing oppression and violence toward preborn human beings have, without ceasing, petitioned this Court for redress in the most humble terms, but those repeated petitions have been answered only by repeated injury. Hundreds of thousands are still slain in this country every year under the color of *Roe*, and the Court's disregard for the rule of law on this issue generally continues so far unabated.

Therefore, while both the federal-level and state-level alternative remedies mentioned above would admittedly be disruptive to the current situation, we must not pretend that our current situation is one of peace. "Gentlemen may cry, 'Peace! Peace!'—but there is no peace."[36] The war upon preborn people in our land has continued relentlessly for nearly five decades. It will naturally be disruptive to change that status quo. However, if we are not willing to sacrifice our "personal

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[36] Henry, P. (1817). Patrick Henry's Speech to the Virginia House of Burgesses, Richmond, Virginia March 23, 1775. Historic American Documents (Lit2Go Edition). *See also* Jeremiah 6:14 and 8:11 ("They have healed the wound of my people lightly, saying, 'Peace, peace,' when there is no peace.").

peace and affluence"[37] in order to save the lives of more than 2,300 innocent children every day, are we not asking them to lay down their lives for our sake? If we do so, are we any longer worthy as a society to be called "the home of the brave?"[38]

III. In addition to overruling *Roe*, the Court should recognize that the Equal Protection Clause of the Fourteenth Amendment requires that state laws protecting born persons against homicide may not deny equal protection to persons not yet born.

a. A preborn human being, no matter how small, is a person under the Fourteenth Amendment.

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws" (the "Equal Protection Clause").[39]

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[37] Francis A. Schaeffer, How Should We Then Live 205 (1976) ("Personal peace means just to be let alone, not to be troubled by the troubles of other people, whether across the world or across the city—to live one's life with minimal possibilities of being personally disturbed. Personal peace means wanting to have my personal life patterns undisturbed in my lifetime, regardless of what the result will be in the lifetimes of my children and grandchildren. Affluence means an overwhelming and ever-increasing prosperity—a life made up of things, things, and more things—a success judged by an ever-higher level of material abundance.")

[38] Key, Francis Scott, *The Star-Spangled Banner*, The Yale Book of American Verse. Ed. by Thomas Raynesford Lounsberry.

[39] U.S. Const. amend. XIV, § 1.

As several legal scholars have demonstrated, the term "person" in the Equal Protection Clause of the Fourteenth Amendment should be interpreted to include preborn human beings from the moment of fertilization.[40] Because these scholars and others have thoroughly addressed this concept, and because other amici will likely discuss it further, this brief asserts this premise without further discussion.

b. The Equal Protection Clause requires homicide laws of the states to protect persons not yet born equally as persons who are.

As discussed above, *Roe* is not just unconstitutional, it is anti-constitutional. More than that, it is evil. Nonetheless, there is one point raised in the case that merits serious consideration yet has been largely disregarded or downplayed by those arguing from a Pro-Life position. There is a discussion running through the case, from at least oral arguments through the opinion, regarding an inconsistency between the position being asserted in *Roe* and the anti-abortion statutes in Texas at that time (which were similar to many other states' abortion laws).

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[40] *See* Joshua J. Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harv. J.L. & Pub. Pol'y 539 (2017); Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 Ohio State L.J. 14 (2012). *See also* Steven Andrew Jacobs, *The Future of* Roe v. Wade: *Do Abortion Rights End When a Human's Life Begins?*, 87 Tenn. L. Rev. 769 (2020).

As recited below, during both sets of oral arguments, counsel for Texas asserted that a fetus—a preborn human being at any stage of gestation—is a person for purposes of the Fourteenth Amendment. Therefore, Texas argued, the fetus as a person is constitutionally entitled to the equal protection of the laws. However, the tragic irony of this argument was that the very statutes the argument sought to defend did not provide such equal protection of the laws to fetuses.

First, the purpose of the statutes had been interpreted by Texas courts to be for the protection of the mother, not her preborn child. As a result, Texas courts had determined that the statutes against abortion did not apply to conduct committed by the mother, whether that conduct involved soliciting and hiring an abortionist to perform the abortion or whether she did it herself.[41] Of course, Texas law had no such exclusion

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[41] *Moore v. State*, 37 Tex. Crim. 552, 558, 40 S.W. 287, 288 (1897) ("The statute regards her as the victim, not as the criminal; as the object of protection rather than of punishment."). *See* 2 Vernon's Texas Statutes 1191–96 (1948), https://www.sll.texas.gov/assets/pdf/historical-statutes/1948-2/1948-2-vernons-texas-statutes.pdf (currently Tex. Rev. Civ. Stat. Art. 4512.1–4512.6) (though not of course dispositive of the argument, the chapter numbering of the statutes interestingly places the Abortion chapter just below the Rape chapter rather than among the homicide-related chapters). *See also Watson v. State*, 9 Tex. App. 237, 244–45 (1880) and *Fondren v. State*, 74 Tex. Crim. 552, 557, 169 S.W. 411, 414 (1914).

or immunity for similar conduct committed by mothers where the victim was an innocent born child.[42]

Secondly, depending on whether the crime was homicide of a born person or abortion of a fetus, the available penalties were different. The available penalties at the time for "voluntarily kill[ing] any person" (i.e., murdering) a born person ranged from two years to capital punishment.[43] Whereas the available penalties for intentionally destroying a fetus (i.e., abortion) ranged from two to five years[44]—far less than the available range for murder of a born person.

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[42] Some may argue that the reason mothers were excluded from prosecution was to make prosecution of the abortionist easier. It did so by avoiding the evidence corroboration rule that would apply if the mother were considered an accomplice. Tex. Code Crim. Proc. Art. 38.14 ("A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense," unchanged from the original Art. 653 (1857)). There is certainly truth to this, and it perhaps was a part of the rationale. However, Texas courts strongly implied additional reasons: "The statute regards her as the victim, not as the criminal; as the object of protection rather than of punishment." *Moore v. State*, 40 S.W. 287, 288 (1897). Moreover, it is still a denial of equal protection of the laws for which there must be some compelling justification. Additionally, any such evidentiary rationale has grown weaker over time due to technological advances making corroboration considerably easier.

[43] 2 Vernon's Texas Statutes 1257 (1948), https://www.sll.texas.gov/assets/pdf/historical-statutes/1948-2/1948-2-vernons-texas-statutes.pdf.

[44] 2 Vernon's Texas Statutes 1191 (1948), https://www.sll.texas.gov/assets/pdf/historical-statutes/1948-2/1948-2-vernons-texas-statutes.pdf (currently Tex. Rev. Civ. Stat. Art. 4512.1).

Under two circumstances, though, the available penalty range for an abortion would increase. First, the available penalty range doubled if the mother did not consent to the procedure.[45] Second, the available penalty range could increase to be equal to murder, but only under circumstances where the mother died from the procedure.[46] Of course, these penalty enhancement provisions just further demonstrate that the primary purpose of the law was to protect the mother, not her fetus.

These inconsistencies were not lost on the appellants in *Roe*. In the original oral arguments before the Court in 1971, Sarah Weddington, counsel for Roe, brought them to the Court's attention:

> Weddington: The women certainly are not subject to prosecution in the State of Texas.
>
> . . . .
>
> Justice Stewart: Could they, under Texas law, be charged as accomplices or as co-conspirators, or anything like that?
>
> Weddington: No, we have expressed Texas cases. In one situation, *Woodrow v. State* [sic][47], an 1880 case, the woman had taken a potion to induce abortion, and the Texas court

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[45] *Id*.

[46] 2 Vernon's Texas Statutes 1194 (1948), https://www.sll.texas.gov/assets/pdf/historical-statutes/1948-2/1948-2-vernons-texas-statutes.pdf (currently Tex. Rev. Civ. Stat. Art. 4512.4).

[47] Presumably, she is referring to *Watson v. State*, 9 Tex. App. 237, 244–45 (1880).

> specifically said that the woman is guilty of no crime, even in that situation. And, that in fact she is the victim of our law.[48]
>
> . . . .
>
> Weddington: [T]hese statutes were adopted for the health of the mother. Certainly, the Texas courts have referred to the woman as being the victim, and they have never referred to anyone else as being the victim. Concepts have certainly changed. I think it's important to realize that in Texas self-abortion is no crime. The woman is guilty of no crime, even though she seeks out the doctor; even though she consents; even though she participates; even though she pays for the procedure. She, again, is guilty of no crime whatsoever. It's also interesting that in our statutes—the penalty for the offense of abortion depends on whether or not the consent of the woman was obtained prior to the procedure. It's double if you don't get her consent. There is no indication in *Fondren v. State*, for example, the court ruled that a woman who commits an abortion on herself is guilty of no crime. Again, "she" being regarded as the victim, rather than the perpetrator of the crime. Obviously, in our State, the offense is not murder. It is an abortion, which carries a significantly lesser offense.[49]

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[48] Oral Argument at 7:21 (Dec. 13,1971), *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), https://www.oyez.org/cases/1971/70-18.

[49] Oral Argument at 21:01 (Dec. 13,1971), *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), https://www.oyez.org/cases/1971/70-18.

Justices White and Stewart also noticed the glaring double standard and pointed it out to counsel for the State of Texas during his own oral arguments:

> Justice White: If you're correct that the fetus is a person, then I don't suppose you'd have a—the state would have great trouble permitting an abortion, wouldn't it?
>
> Robert C. Flowers: Yes, sir.
>
> Justice White: In *any* circumstance.[50]
>
> . . . .
>
> Flowers: And we feel that the concept of fetus being in the—within the concept of a person within the framework of the United States Constitution and the Texas Constitution is an extremely fundamental thing.
>
> Justice Stewart: Of course, if you're right about that, you can sit down. You've won your case. *An acceptance of ours may be the Texas abortion law presently goes too far in allowing abortion*.[51]

Moreover, discussion of this issue was not confined to oral arguments. In the majority opinion in *Roe*, the

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See also Oral Argument at 10:24 and 12:27 (Oct. 11,1972), *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), https://www.oyez.org/cases/1971/70-18 (Counsel for Roe reiterated these points during oral re-arguments before the Court in 1972 (omitted for brevity)).

[50] Oral Argument at 31:39 (Oct. 11,1972), *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), https://www.oyez.org/cases/1971/70-18.

[51] Oral Argument at 35:53 (Oct. 11,1972), *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), https://www.oyez.org/cases/1971/70-18.

Court describes these "inconsistencies" as a "dilemma" of Texas:

> When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. . . .
>
> There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out . . . that, in Texas, the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?[52]

Essentially, the Court was simply making the point that actions speak louder than words. It smacks of insincerity to argue that a fetus is a person under the Fourteenth Amendment while simultaneously failing to treat fetuses as such by providing them the equal protection of the laws.

When the Fourteenth Amendment prohibits states from denying the equal protection of the laws to any person, what does it say when a state still denies equal protection of the laws to fetuses? The answer seems

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[52] *Roe v. Wade*, 410 U.S. 113, 157–58 n. 54 (1973).

plain. Either the state disrespects and is flagrantly violating the Equal Protection Clause, or the state does not truly believe that a fetus is a person under the Fourteenth Amendment.

Unfortunately, the legal and public policy work of the Pro-Life movement has generally failed to adequately address this inconsistency since *Roe* was decided. Almost every Pro-Life policy that has reached this Court, including the one under consideration, has been afflicted with at least one of these two denials of equal protection of the laws that the Court pointed out in *Roe*: (1) mothers granted or allowed a blanket license to kill with impunity, and (2) lower available penalty ranges for abortion of a fetus versus comparable homicide of a born person.

Ultimately, what is required by the Constitution and logical consistency are not 15-week bans or heartbeat bans or any other partial regulation. Every state already has laws on the books protecting human beings from unjustifiable homicide. That is, it is already illegal in every state to murder human beings, but exceptions exist to allow for abortion. The states simply need to repeal those exceptions so that the existing homicide laws apply to all human beings. As the Constitution requires, we need to provide equal protection of the laws to all persons, both before and after birth. In other words, what is needed is what is proclaimed on the frieze over the portico of this Court's building: "EQUAL JUSTICE UNDER LAW."

CONCLUSION

Amici urge the Court to overrule *Roe* and to recognize that the Equal Protection Clause requires that state laws protecting born persons against homicide may not deny equal protection to persons not yet born. If the Court does not, amici urge other civil officials and institutions to additionally pursue the abolition of abortion via other peaceful constitutional avenues to fulfill their oaths and God-given duties.

> Now therefore, be wise, O kings; Be instructed, you judges of the earth. Serve the Lord with fear, And rejoice with trembling. Kiss the Son, lest He be angry, And you perish in the way, When His wrath is kindled but a little. Blessed are all those who put their trust in Him.[53]
>
> * * *
>
> If you faint in the day of adversity, your strength is small. Rescue those who are being taken away to death; hold back those who are stumbling to the slaughter. If you say, "Behold, we did not know this," does not he who weighs the heart perceive it? Does not he who keeps

[53] Psalm 2:10-12 (NKJV).

watch over your soul know it, and will he not repay man according to his work?[54]

Respectfully submitted,

BRADLEY W. PIERCE
Counsel of Record
FOUNDATION TO
ABOLISH ABORTION
P.O. Box 402
Liberty Hill, Texas 78642
Tel. (512) 598-1092
bradley@faa.life

Counsel for Amici Curiae

[54] Proverbs 24:10-12 (ESV).

APPENDIX A

APPENDIX A

List of Public Officials Amici Curiae

(listed alphabetically by state)

Rep. Priscilla Giddings (ID)
Rep. Ron Nate (ID)
Rep. Heather Scott (ID)
Rep. Tony Wisniewski (ID)
Rep. John Jacob (IN)
Rep. Brett Fairchild (KS)
Sen. Mike Moon (MO)
Rep. Larry G. Pittman (NC)
Rep. David Zimmerman (PA)
Sen. Warren Hamilton (OK)
Sen. Jake A. Merrick (OK)
Rep. Sherrie Conley (OK)
Rep. Wendi Stearman (OK)
Rep. Jonathon Hill (SC)
Rep. Drew Dennert (SD)
Rep. Taffy Howard (SD)
Rep. Kyle Biedermann (TX)
Rep. Briscoe Cain (TX)
Rep. Bryan Slaton (TX)
Rep. James White (TX)

APPENDIX B

APPENDIX B

Current State Legislation
Compiled at https://faa.life/states

Alaska

House Bill 206, the Life at Conception Act/the Preborn Child Equality Act of 2021.[1]

Arizona

House Bill 2650, the Abolition of Abortion in Arizona Act.[2]

House Bill 2877, the *Roe v. Wade* Is Unconstitutional Act.[3]

Idaho

House Bill 56, the Idaho Abortion Human Rights Act.[4]

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[1] http://www.akleg.gov/basis/Bill/Detail/32?Root=HB0206#tab1_4

[2] https://apps.azleg.gov/BillStatus/BillOverview/75305

[3] https://apps.azleg.gov/BillStatus/BillOverview/76078

[4] https://legislature.idaho.gov/sessioninfo/2021/legislation/H0056/

Indiana

House Bill 1539, the Protection at Conception Act.[5]

Maryland

House Bill 997, the Equal Protection for Unborn Human Life Act.[6]

Missouri

Senate Bill 391, the Abolition of Abortion in Missouri Act.[7]

North Carolina

House Bill 158, proposing an amendment to the North Carolina Constitution.[8]

Oklahoma

Senate Bill 495, the Equal Protection and Equal Justice Act.[9]

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[5] http://iga.in.gov/legislative/2021/bills/house/1539

[6] http://mgaleg.maryland.gov/2021RS/bills/hb/hb0997F.pdf

[7] https://www.senate.mo.gov/21info/BTS_Web/Bill.aspx?BillID=55985890&SessionType=R

[8] https://www.ncleg.gov/BillLookUp/2021/hb158

[9] http://www.oklegislature.gov/BillInfo.aspx?Bill=SB495&Session=2100

South Carolina

House Bill 4046, the South Carolina Unborn Victims of Violence Act of 2021.[10]

Texas Legislation

House Bill 3326, the Abolition of Abortion through Equal Protection for All Unborn Children Act.[11]

Senate Bill 1671[12] and House Bill 3641,[13] the *Roe v. Wade* Is Unconstitutional Act.

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[10] https://www.scstatehouse.gov/sess124_2021-2022/bills/4046.htm

[11] https://capitol.texas.gov/BillLookup/History.aspx?Bill=HB3326&LegSess=87R

[12] https://capitol.texas.gov/BillLookup/History.aspx?Bill=SB1671&LegSess=87R

[13] https://capitol.texas.gov/BillLookup/History.aspx?Bill=HB3641&LegSess=87R