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

BRIEF OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE
in Support of Petitioners

Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833
rick@claybrooklaw.com

David A. Bruce
205 Vierling Dr.
Silver Spring, Md. 20904

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions and Statutes

Other Authorities

STATEMENT OF INTEREST[1]

The **Pacific Justice Institute** ("PJI") is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such includes those who, as a matter of conscience, hold the view that each individual is of great value. To this end, PJI has engaged in extensive litigation involving the sanctity of life, including high profile cases involving end of life issues.

SUMMARY OF ARGUMENT

The "right" to abortion rests on this false premise more often assumed than stated: because men do not have to carry their babies, women have the same "right." This underlying, but false, predicate then generates a subsidiary tenet that women should not have to retard their careers due to childbearing: if men's career progress is not burdened by pregnancy, then women should also be able to shed that burden so that they do not "fall behind" their male peers. Sometimes the argument is also heard that, but for the right to abort, a woman will be "forced" to carry her child to term, making her a "slave" to the child.

---

[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

These falsities should be fully exposed. For neither males nor females is there a "right" to have sexual relations without accruing its natural consequences, any more than there is a "right" not to be affected by what one hears or reads when exercising the freedoms of speech, press, and assembly. The equality demanded is this: A male has no right under our Constitution to rid himself of his obligations should his engaging in sexual relations result in a child, and neither does his female partner. The Constitution does not alter the biological differences between male and female, and it does not require those differences to be "equalized" when they naturally result in different consequences.

Nor can a woman carrying a child that is the consequence of a consensual act in any sense be considered to be in "slavery" or "*in*voluntary servitude."[2] In fact, it is the mother who treats her aborted fetus as property, and thus as a slave, in violation of the Thirteenth Amendment. Abortion carries with it all the indicia of slavery prohibited by that amendment.

Neither proffered rationale for abortion addressed here, even if given some credence, supports the viability rule set out in *Roe v. Wade*.[3] But neither rationale has any force.

---

[2] *Amicus* is not unaware that, in a small minority of overall cases, sexual intercourse is not consensual. Such incidences are reprehensible and are appropriately criminalized.

[3] 410 U.S. 113 (1973).

ARGUMENT

I. Women Are Not Treated "Unequally" Simply Because Men Do Not Bear Children

This Court is appropriately considering whether the viability line written in the sand by *Roe* and *Casey* should be eliminated. Those defending it fear that, without some such line that gives a mother an absolute "right" to dispose of her child, the right will be washed away entirely.

But what lies at the heart of a woman's perceived right to abort? Justice Ginsburg in her dissent in *Gonzales v. Carhar*t,[4] in which the 5-4 majority upheld a legislative prohibition of the "partial birth abortion" technique in the late stages of pregnancy, comes closest to articulating what, we submit, is the underlying, core belief:

> As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." 505 U.S., at 869 (plurality opinion). See also *id.,* at 852 (majority opinion). . . . Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." *Id.,* at 856. Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." *Ibid.* Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of

[4] 550 U.S. 124 (2007).

> privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.[5]

Justice Ginsburg basically posited this syllogism:

A. Women have equal status with men.

B. Men do not have to carry children or have their lives affected by pregnancy, i.e., they have "autonomy" not to do so.

C. Thus, women have a right not to carry children or have their lives affected by pregnancy, either.

For Justice Ginsberg, this right to the "equal autonomy" of women overrides any protection for the taking of the lives of those not yet outside the womb, even though they would normally become adult women and men if they were not aborted.

Justice Ginsburg's syllogism doesn't work, for the simple reason that, when it comes to carrying children, males and females are not equally situated by their biology.[6] Moreover, in all but rare cases,

---

[5] *Id.* at 171-72 (Ginsburg, J., dissenting) (citing *Casey v. Planned P'hood of Se. Pa.,* 505 U.S. 833 (1992) (footnote omitted); *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1311 (1991).

[6] *See Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974) (holding that a State excluding pregnancy from disability coverage did not violate the Equal Protection Clause by

women have engaged in sexual intercourse voluntarily and with full understanding that the result may be pregnancy, even if conception precautions have been used. Man and woman stand equal under the law in making the decision whether to engage in consensual sexual intercourse. But the law does not have the power to change the fact that the natural consequences of that consensual act are different for the man and the woman. It simply does not follow, to use Justice Ginsburg's terminology, that, if men are "autonomous" with regards to carrying children because of their biology, then women are autonomous in the same way, despite their different biology.

Too often, men have sought sexual intimacy with no corresponding commitment to assisting women if that intimacy should produce children. Too often, men have refused to share responsibility for proper childrearing. Too often, men have placed their careers ahead of the needs of their families. Ironically, the abortion "right" for women as set out by this Court has given men all the more incentive to act promiscuously and to spurn caring for children they do father. The all too frequent male attitude is, "You can abort if you get pregnant, so let's have sex," and, "If you don't abort our child, that's your decision alone, so don't ask me for any support later."[7]

---

discrimination against women, as "pregnancy is an objectively identifiable physical condition with unique characteristics").

[7] *See* Erika Bachiochi, The Rights of Women (2021); Vincent Rue, "*The Hollow Men": Male Grief & Trauma Following Abortion*, http://www.usccb.org/about/ pro-life-activities/respect-life-program/rlp-2008-the-hollow-men-

The Constitution does not condone such conduct by fathers in any way. But just because males have too often ignored their obligations in childbearing and childrearing does not give females a right to do the same. The accurate syllogism is this:

A. Those involved in consensual conduct are responsible for the natural consequences of that conduct and do not have a legal right to avoid them.

B. The natural consequence of sexual intercourse is pregnancy.

C. Both the man and the woman are responsible for a pregnancy resulting from their sexual intercourse, and neither has a legal right to avoid that consequence of their voluntary action.

And, of course, as this Court has consistently recognized from *Roe* forward, the fact that a natural consequence of sexual intercourse is conception and that conception creates an independent, living entity requires the interests relating to that new entity to be considered as well.[8]

---

male-grief-and-trauma-following-abortion.cfm ("According to Morabito (1991), abortion can actually encourage sexual exploitation of women. In this scenario, the male may view his partner's pregnancy as a 'biological quirk corrected by abortion.'").

[8] *See, e.g.*, *Gonzales*, 550 U.S. at 158; *Casey*, 505 U.S. at 846 (maj. op.), 871, 878 (plurality op.); *Roe v. Wade*, 410 U.S. 113, 159 (1973) (noting that the abortion situation,

Neither the Constitution nor this Court can alter the different anatomy of men and women. Neither the Constitution nor this Court can alter the fact that women get pregnant physically and men do not. And neither the Constitution nor this Court can grant equal "autonomy" to women by allowing them to kill their unborn children.

That Justice Ginsburg at least implicitly realized that her syllogism is faulty because it violates physical nature is demonstrated by her assertion in her solo dissent in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*,[9] in which she wrote that a woman who aborts "is not a 'mother.'"[10] To the contrary, a woman who aborts is a natural mother who has killed her child. She may not be acting like a *nurturing* mother, but she is still a mother biologically. Word games with deadly consequences are the result of applying the faulty syllogism that undergirds this Court's abortion jurisprudence. Female equality does not require pitting the pregnant mother against her defenseless child.

---

due to whom ("an embryo and, later, a fetus") the pregnant woman carries, "is inherently different than marital intimacy").

[9] 139 S. Ct. 1780 (2019). One is reminded of Paul's vision of Jesus during which Jesus observes, "It is hard for you to kick against the goads." (Acts 26:14 (NIV).)

[10] *Id.* at 1793 n.2. (Ginsburg, J., dissenting).

II. Fetuses When Aborted Are Treated as Slave Property, in Violation of the Thirteenth Amendment

Some scholars have suggested that a right to abort may be grounded in the Thirteenth Amendment, arguing that forcing a woman to bear her child is a form of slavery or involuntary servitude.[11] Of course, this argument stumbles out of the gate over the fact that becoming pregnant is the natural result of a voluntary act; consequently, even a strong proponent of abortion has labeled the argument "bizarre."[12] This does not mean that the Thirteenth Amendment is irrelevant to the analysis of abortion. When aborting her fetus, a mother treats her child as slave property, in violation of the amendment.

As with abortion now, views on slavery, both before and after the Revolution, were deeply divided. And, as with abortion, slavery induced cognitive dissonance in the law, with it sometimes treating slaves as people and sometimes as property. This inconsistency in the law of slavery reflected a consistent pattern of protection for the interests of the powerful, to the detriment of the weaker, and the same is true now in the law of abortion. The Thirteenth Amendment remedied this inconsistency with respect to slavery. A review of the amendment's

---

[11] *See* David Cruz, *"The Sexual Freedom Cases"? Contraception, Abortion, Abstinence, and the Constitution*, 35 Harv. C.R.-C.L. L. Rev. 299 (2000).

[12] *See, e.g.*, Mark Tushnet, *The Left Critique of Normativity: A Comment*, 90 Mich. L. Rev. 2331 n.27 (1992).

history and the ills it addressed demonstrates that *homo sapien* fetuses in the abortion process are treated now as slaves were then.[13]

A. Revising the Common Law to Treat Children as Property of the Mother

Slave owners had a problem. While newborn livestock generally followed the rule that it was owned by the owner of the mother, newborn persons took their name and rights from their father.[14] But white men were having sexual intercourse with negro women, with predictable consequences. If the common law were applied, their children would take the name and rights of the father and be free persons. Nevertheless, they would be bastards that the state was responsible to maintain if the father refused to do so, for which the state could sue for

---

[13] This review of the history of slaves treated as property relies largely on the scholarship of Paul Finkelman in *Slavery in the United States: Persons or Property?* in The American Experience: Blurred Boundaries of Slavery 105ff. (2012) (hereinafter, "Finkelman"). For an examination of parallels between abortion and slavery, see Michael Perry, *Liberal Democracy and Religious Morality,* 48 DePaul L. Rev. 1 (1998); Debora Threedy, *Slavery Rhetoric and the Abortion Debate*, 2 Mich. J. Gender & L. 3 (1994).

[14] "Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that '*partus sequitur ventrem*' in the brute creation, though for the most part in the human species it disallows that maxim." William Blackstone, Commentaries on the Laws of England 2:390 (1766).

compensation against the father in bastardy proceedings.[15]

This problem would be solved, of course, if the slave mother were treated as if she were livestock and her progeny took that legal status, too. Then, the white male owner would have done nothing illegal when he did whatever he willed with his property, with or without the mother's consent, and any resulting child would simply give him more property that he could use as he desired. And that was the solution the all-white-male Virginia House of Burgesses enacted in 1662: "WHEREAS *some doubts have arisen whether children got by Englishmen upon negro women should be slave or ffree [sic], Be it therefore enacted* . . . that all children borne in this country shall be held bond or free only according to the condition of the mother . . . ."[16]

In establishing the abortion license in *Roe*, the majority treated the unborn child as property of the mother. And like with slave children in the 1600's, this also reversed the common law that children take the name and rights of the father. The Court in *Roe* repeatedly cited the work of Professor Cyril Means, Jr.,[17] in part to argue that there was "scholarly support" for the proposition that the only purpose of anti-abortion laws was to protect the life of the mother, not that of the fetus.[18] The literature on

---

[15] Finkelman at 111.

[16] "Negro womens [sic] children to serve according to the condition of the mother," Act XII, Dec. 1662, 2 Hening 170 (italics in the original).

[17] *See, e.g.*, 410 U.S. at 133-135.

[18] *Id.* at 151 & n.47.

which the Court relied was tendentious, and later scholarship, most notably that of Professor Joseph Dellapenna, has shredded Mean's work.[19] The common law consistently treated as a person worthy of protection any fetus that could be proven to be living.[20] And so did the states and territories prior to enactment of the Civil War Amendments, as they consistently recognized that a fetus was an unborn child.[21]

The Court's abortion jurisprudence parallels the pre-Revolution reversal of the common law to make children adopt the status of their slave mothers, regardless of the status of their fathers. It is now the mother of the fetus who has the ultimate say as to whether the fetus will be aborted, irrespective of the father's wishes. The father does not have a veto power.[22]

---

[19] Jos. W. Dellapenna, Dispelling the Myths of Abortion History (2006).

[20] *Id.* chs. 3-9.

[21] *See, e.g.*, Conn. Pub. Acts, ch. LXXI, §§ 1, 2, at 65 (1860) (outlawing abortion "of *unborn child*")(emphasis added); Me. Rev. Stat., ch. 160 § 13 (1840) (outlawing abortion by "any woman *pregnant with child*, whether *such child* be quick or not") (emphasis added); Ore. Gen. Laws, Crim. Code, ch. 43, § 509, at 528 (1845-64) (referring to woman "*pregnant with a child*") (emphasis added); *see* Brief of *Amicus Curiae* Samaritan's Purse *et al.*, filed in this docket, and its appendix collecting statutes of over 30 states and territories that became states.

[22] *See Planned P'hood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69-71 (1976).

Professor Finkelman commented on the change in the common law to saddle children of slave mothers and white fathers with slave status as follows:

> The law also led to a particularly disgraceful aspect of American slavery which would continue until final abolition: masters would be the owners of their own children fathered with slave women and would treat them as property, to be bought, sold, used as collateral, and gifted. This law reduced the children of all slave women to property and, perversely, led generations of white southern men to treat their own children as property.[23]

This Court's abortion jurisprudence allows mothers to treat their own children as property—not to be bought or sold as reusable property, but to be killed because they are a present or future burden to their mothers. It allows mothers to treat their own children as slaves.

B. Providing for No Violation of Law for an Owner's Killing of a Slave

British common law provided for the protection of all human life.[24] Despite their value, masters sometimes killed their slaves. Would there be punishment for such killing (treating slaves as persons) or not (treating them as property)?

---

[23] Finkelman at 112.
[24] *Id.* at 113.

Virginia, the State that always had the most slaves,[25] is representative of how this question was handled in the Colonies. In 1669, it enacted a law that an owner would not be held responsible criminally if his slave died from punishment. The statute created a legal presumption that the master always acted rationally in such circumstances, stating that "it cannot be presumed that prepensed malice . . . should induce any man to destroy his own estate."[26] Then, in 1680, in "An act for preventing Negro Insurrections," Virginia allowed the killing of any slaves who escaped from their masters and "lye hid and lurking in obscure places."[27] It expanded that permission a decade later by authorizing local justices of the peace to order sheriffs to "kill and destroy . . . by gunn or any otherwise whatsoever" any "negroes, mulattoes, and other slaves unlawfully absent[ing] themselves from their masters and mistresses service" who "lie hid and lurk in obscure places."[28] Finally, in 1723 the Virginia legislature provided that, if captured, such slaves could be "punished, by dismembering, or in other way, not touching life," but that death from such punishment would not be prosecuted.[29]

While there was some moderation of these measures in the early 1800's when most of the slave

---

[25] *Id.* at 107.
[26] "An act about the casuall killing of slaves," Act I, Oct. 1669, 1 Hening 270.
[27] Act X, June 1680, 2 Hening 481.
[28] "An Act for suppressing outlying Slaves," Act XVI, April 1691, 3 Hening 86.
[29] "An Act directing the trial of Slaves," chap. IV, May 1723, 4 Hening 126.

States criminalized the torture and intentional murder of slaves, [30] the message was clear: slaves had the status of wild beasts. They could be harshly punished to the point of death by their owner/masters and "destroy[ed]" by public authorities if "lurk[ing] in obscure places," without a prior hearing or trial.[31]

The parallel to abortion is plain. Under this Court's abortion jurisprudence, fetuses may be poisoned, dismembered, and killed by their owners/mothers without fear of criminal prosecution. The law assumes that any mother who kills her fetus has good reasons to do so, as she will be sublimating her normal, maternal instincts. The

---

[30] Finkelman at 113 n.40; *e.g.*, Act to Amend Sec. 37 of the Act of 1740 (S.C. 1858) (providing "if any person, being the owner of any slave, . . . shall inflict on such slave any cruel or unusual punishment, such person . . . shall be fined and imprisoned") (noted in Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and Cruel and Unusual Punishment*, 94 N.C.L. Rev. 817, 838-39 n.101); *State v. Hoover*, 4 Dev. and Bat. 365 (N.C. 1839) (master executed after torturing his slave to death over a number of months); *Souther v. Cmwlth.*, 7 Gratt. 672 (Va. 1851) (master convicted of second degree murder after torturing his slave to death).

[31] Jonathan D. Martin, Divided Mastery: Slave Hiring in the American South (2004), recounts numerous instances of legal protections provided to slave owners that drew on property law. Martin quotes a Florida judge in an 1835 hiring dispute: "[I]n all relations, and in all matters, except as to crimes, the slave is regarded by our law as *property*; and being so considered, the case before us is governed by the law of bailments." *Id.* 94 (quoting *Forsyth v. Perry*, 5 Fla. 337 (1853)).

idea that she might do so out of anger or caprice or mental illness will not be entertained by the law. That the fetus, if allowed to continue to develop, might prove inconvenient to the mother and others is wholly sufficient justification for killing her fetus.[32] The fetus is property of the mother and may be disposed of summarily. The fetus is her slave. Even so, the disposition cannot be overly cruel. The mother may be prohibited from killing her fetus when the fetus can obviously feel pain and is crushed and dismembered in a way that amounts to torture.[33]

C. Treating Slaves as Partial Persons for Purposes of Representation

By the time of the Revolution, while there were many free blacks in the Northern States, in the South the status of blacks as slaves and property was well entrenched.[34] In forming a nation, the Northern States accepted by silence in the Articles of Confederation that slaves would not be treated as persons, but property, by the Southern States.[35] And during negotiations of the Treaty of Paris, the States demanded compensation for those 15,000 or so former slaves who had been granted freedom during the Revolution by the British and had moved to

---

[32] For example, in *Danforth*, the Court recognized that the abortion decision is "stressful" for mothers, 428 U.S. at 66-67, and may have "profound," "possibly deleterious" effects on a marriage, *id.* at 70, but that the mother, who is the one more affected by carrying the child, must be able to abort even if the father of the child objects. *Id.* at 71.

[33] *See Gonzales*, 550 U.S. at 132, 138-40.

[34] *See* Finkelman, *supra* note 10.

[35] *Id.* at 115-16; *see* Arts. of Confed.

England, considering them stolen property. The English refused.[36]

During the debates on the Constitution, interests changed, and the Southern States demonstrated a convenient schizophrenia. Unlike under the Articles of Confederation, it was clear that representation in the House of Representatives was to be apportioned by population. Thus, counting slaves as persons for purposes of enumeration for representation was to the advantage of the Southern States, and their representatives argued for it. The result was a compromise that allowed "all other Persons," i.e., slaves, to get three-fifths credit.[37]

While wanting full advantage of the personhood of slaves when it suited them, Southerners also insisted that the Constitution guard their ability to define who were slaves and, thus, property of their owners. The Commerce Clause allowed the national government to regulate interstate and foreign commerce in property, but not to prohibit the foreign slave trade for twenty years, while again, in a nod to the Northern opposition to slavery, referring to slaves as "persons."[38] Similarly, the Southern States

---

[36] Finkelman at 116, citing Graham R. Hodges, Root & Branch: African Americans in New York & East Jersey, 1613–1863 (1999), and Graham R. Hodges, Black Loyalists Directory: African Americans in Exile in the Age of the Revolution (1997).

[37] U.S. Const. art. I, § 2, cl. 3; *see generally* Sean Wilentz, No Property in Man ch. 2 (2018).

[38] *Id.* art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight,

successfully pushed for a provision for the return of fugitive slaves, and, while it treated slaves in substance as property, the text spoke of them as "Person[s] held to Service or Labor."[39]

The cognitive dissonance in the Court's abortion jurisprudence and terminology has frequently been noted. The fetus is sometimes referred to as a "potential life," such that, after viability, the state may restrict abortion.[40] What makes it any less a "potential life" after viability than before? And, of course, there is nothing "potential" about a fetus except that it has the potential to continue to develop into adulthood barring interference, neglect, injury, or deadly disease. A fetus is already alive and is already a *homo sapien*. It might give less qualms to abort when the child is early in development, but there is no logical or scientific distinction between killing the unborn child before it forms its limbs and its heart starts beating and dismembering it and sucking out its brain while it is in the birth canal.[41] The only distinction is between when you are allowed, as a legal matter, to treat the fetus purely as property and when you are not.

---

but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

[39] *Id.* art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

[40] *Roe,* 410 U.S. at 163; *Casey,* 505 U.S. at 876.

[41] *See Gonzales*, 550 U.S. at 159-67.

The illogic and confusion in our law is also shown by the fact that, when a mother desires to bring a fetus to term but the negligence of another causes a miscarriage, many states allow an action for the wrongful death of the fetus.[42] In today's urban economies, a child is a financial drain. Thus, if the fetus is viewed solely as property, if someone negligently causes a miscarriage, it results in a net financial gain for the urban mother, and no damages should be due. However, the wrongful death statutes assume that the fetus is a person and of intrinsic value, both individually and to the parents, and, thus, worthy of compensation similar to a person already born.

D. Adjudicating Slaves to Be Property Under the Constitution

With the Constitution giving mixed messages about the status of slaves, treating them in essence as property but referring to them sometimes as "persons," such tension was fated to be resolved by the Supreme Court. This Court did so in a series of pre-Civil War decisions that firmly established that,

---

[42] According to the National Council of State Legislatures, "at least **38** states have fetal homicide laws . . . . At least **29** states have fetal homicide laws that apply to the earliest stages of pregnancy ("any state of gestation/development," "conception," "fertilization" or "post-fertilization") . . . ." (emphasis in original), http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx (last visited July 20, 2021). *See, e.g.*, Minn. Stat. § 609.266, which defines "unborn child" to mean "the unborn offspring of a human being conceived, but not yet born."

under the Constitution, slaves were not persons, as the Constitution sometimes indicated, but the property of their owners.

In a trio of cases between 1825 and 1827 involving Africans who had been pirated from a Spanish slaver but then captured by the U.S. Coast Guard, this Court upheld the claim of Spain that 39 of the captured Africans were the property of Spanish owners and should be returned to them.[43] As there were no records to particularize which Africans had been purchased by the Spaniards, this Court affirmed the allocation of 39 Africans by lot to Spain, with the rest returned to Africa.[44]

In 1841, this Court recognized that slaves constituted property in interstate commerce and upheld contracts for their sale.[45] Then, in *United States v. The Amistad*,[46] this Court released some Africans who could prove that they had not been legally imported into Cuba, but, at the same time, held that the cabin boy on the ship, who had been born a slave in Cuba, had to be returned to bondage.[47] In other words, this Court recognized that free people could fight illegal enslavement, but

---

[43] *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). *See generally* John Noonan, *The Antelope*: The Ordeal of the Recaptured Africans and the Administrations of James Monroe and John Quincy Adams (Univ. of Cal. Press 1977).

[44] *The Antelope (III)*, 25 U.S. (12 Wheat.) 546 (1827).

[45] *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841).

[46] 40 U.S. (15 Pet.) 518 (1841).

[47] *Id.* at 590.

that slaves were property and were not entitled to liberty.

The following year, this Court interpreted for the first time the Fugitive Slave Act of 1793.[48] The law allowed a black to be remanded to a claimant "upon proof to the satisfaction" of any federal, state, or local judge or magistrate, "either by oral testimony or affidavit taken before and certified by a magistrate of any such State or Territory, that the person so seized or arrested" was a fugitive slave. This lax evidentiary standard led many Northern states to enact "personal liberty laws"[49] to guard against free blacks being improperly claimed by affording them greater procedural protections. In *Prigg v. Pennsylvania*,[50] this Court reversed a conviction under Pennsylvania's personal liberty law, finding the State statute in conflict with the federal law. However, moving beyond considerations of the Supremacy Clause, this Court stated that the Fugitive Slave Clause of the Constitution[51] was self-executing. Justice Story wrote for the majority:

> We have said that the [fugitive slave] clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or legislation whatsoever, because there is no

---

[48] "An Act respecting fugitives from justice, and persons escaping from the service of their masters," Act of Feb. 12, 1793, 1 Stat. 302.

[49] *See generally* Thomas D. Morris, Free Man All: The Personal Liberty Laws of the North, 1780–1861 (1974).

[50] 41 U.S. (16 Pet.) 539 (1842).

[51] U.S. Const. art. V, § 2, cl. 3.

> qualification or restriction of it to be found therein, and we have no right to insert any which is not expressed and cannot be fairly implied. Especially are we estopped from so doing when the clause puts the right to the service or labor upon the same ground, and to the same extent, in every other State as in the State from which the slave escaped and in which he was held to the service or labor. If this be so, then all the incidents to that right attach also. The owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own State confer upon him, as property, and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding States. Indeed, this is no more than a mere affirmance of the principles of the common law applicable to this very subject.[52]

Thus, this Court, relying on the Constitution, held that slaves were property with no procedural rights of personhood. It reinforced this by commenting that an owner could enforce his constitutional right to recover his slave in an *in rem* proceeding for property.[53]

---

[52] 41 U.S. at 613.

[53] *Id.* at 624. *See generally* Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 Sup. Ct. Rev. 247–94 (1995); Paul Finkelman, Prigg v. Pennsylvania: *Understanding Justice Story's Pro-Slavery Nationalism*, 2 J. of Sup. Ct. Hist. 51–64 (1995).

In 1847, this Court upheld a judgment under the Fugitive Slave Law of 1793 against a white Ohioan who had given a ride to several fugitive blacks.[54] The white man had no formal notice of their fugitive status, but was near the Kentucky border, and he admitted that he had assumed that they were slaves.[55] This Court noted that his "offence consists in continuing to secrete from the owner what the acts of Congress and the constitution, as well as the laws of several of the States, treat, for certain purposes, as property, after knowing that claims of property exist in respect to the fugitive."[56] While defining slaves as property, the Court also recognized that slaves were human beings. It held, however, that, under the law, they must be considered property until there was a change in the law:

> Before concluding, it may be expected by the defendant that some notice should be taken of the argument, urging on us a disregard of the constitution and the act of Congress in respect to this subject, on account of the supposed inexpediency and invalidity of all laws recognizing slavery or any right of property in man. But that is a political question, settled by each State for itself; and the federal power over it is limited and regulated by the people of the States in the constitution itself, as one of its sacred compromises, and which we

---

[54] *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847).
[55] *Id.* at 226.
[56] *Id.* at 225.

> possess no authority as a judicial body to modify or overrule.[57]

The capstone was provided in 1857 by *Dred Scott v. Sandford*.[58] After ruling that Scott did not gain his freedom by living with his master in one free state and one free territory, Chief Justice Taney in his "Opinion for the Court" continued by holding, first, that slaves were a form of property specially protected under the Constitution and, second, that even free blacks were not citizens of the United States, basing this in part on the largely accepted science of the day that whites as a race were superior to negros. Blacks, he wrote,

> were at that time [1787] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[59]

This Court's abortion decisions are rooted in a similar blindness to true science. The accurate science of conception is now known by every junior high student paying attention in biology class: a new, living organism is created immediately. There is no logical, intrinsic difference in the essence of that new, living organism depending on whether it is in its first month of gestation or its ninth, whether it

---

[57] *Id.* at 231.
[58] 60 U.S. (19 How.) 393 (1857).
[59] *Id.* at 402-05.

is viable outside the womb or not. The only difference is an emotional one: the organism early in gestation does not have as many recognizable attributes of the fully developed child, and so it is not as intuitively obvious that the organism is a *homo sapien*. But established science tells us it is so.[60] The only difference between then and now is that we have even more certainty of conception facts than Chief Justice Taney had that his social science was askew. But the results of ignoring facts are the same: fetuses, like blacks before the Civil War Amendments, are considered the property of another, the most elemental definition of slavery.[61] This

---

[60] In the early 1800's, after science could verify the conclusion that a new, living organism was begun at conception, States and Territories revised their abortion laws to outlaw abortion from conception, rather than from quickening. *See generally* Dellapenna, *supra* note 19, chs. 6-9.

[61] Slavery was, thus, "super-protected" property under the Constitution. Similarly, but this time without benefit of any specific text in the Constitution, this Court has made abortion a "super protected" right. *See Planned P'hood v. Ind.,* 888 F.3d 300, 312 (7th Cir. 2018) (Manion, J., concurring in part, dissenting in part), *rev'd sub nom. on other grounds*, *Box v. Planned P'hood of Ind. And Ky.*, 139 S. Ct. 1780 (2019) ("[W]hile *Roe* isn't super-precedent, it did spawn a body of jurisprudence that has made abortion the only true 'super-right' protected by the federal courts today. The purported right to an abortion before viability is the only one that may not be infringed even for the very best reason. For an unenumerated right judicially created just 45 years ago, that is astounding."); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting).

allows fetuses to be treated as property—as slaves—until viability and, in some cases, until birth.[62]

E. Stripping Slaves of Legal Privileges, Including the Right to Testify

The *Prigg* decision striking down the "personal privilege laws" of Northern States fomented a strong reaction in the North and a counterreaction in the South. Northern States simply refused to continue to enforce the 1793 Fugitive Slave Law.[63] In return, the Southern States clamored for a federal law that had the teeth of more enforcement powers—and they got it. In 1850, Congress amended the Fugitive Slave Law and set up a federal judicial and bureaucratic apparatus to assist masters in recovering their slaves who fled to free states.[64]

The revised law also took direct aim at the substance of the "personal privilege laws" by stripping blacks of normal due process rights and privileges and immunities. Federal judges and newly created commissioners would hear these cases, without right of appeal to any court. The certificate issued by a judge or commissioner would "be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate,

---

[62] *See Casey*, 505 U.S. at 872.

[63] *See* Paul Finkelman, Prigg v. Pennsylvania *and Northern State Courts: Antislavery Use of a Pro-slavery Decision*, 25 Civil War History 5-35 (1979).

[64] Act of Sept. 18, 1850, 9 Stat. 462.

or other person whomsoever."[65] Moreover, picking up from laws in the Southern States that prohibited blacks from testifying against whites,[66] the amended law provided, "In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence."[67] As slavery scholar Paul Finkelman remarked, "This provision, more than any other, reduced the slave to a 'thing.'"[68]

There is a direct analogue to abortion, because the fetus cannot speak for herself as to whether her life should be terminated. And the fetus does not get independent, guardian *ad litem* representation, either. It is even worse for the fetus than it was for the free black who was unjustly accused of being a fugitive, because at least there was some judicial-type proceeding involved in the remand of a black man to a purported owner's custody at which other, white persons could present evidence on the black's behalf. The fetus, except in limited cases involving a minor who desires to abort in spite of parental or paternal objections,[69] has no judicial protection.

---

[65] *Id.* § 6.

[66] "[T]he rule was well established in the slave states, and in several of the free states, that no Negro or mulatto could testify in cases in which white persons were parties." Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 Mo. L. Rev. 471, 473 (1966).

[67] Amended Fugitive Slave Act, 9 Stat. 462 § 6.

[68] Finkelman, *supra* note 13, at 127.

[69] In *Lambert v. Wicklund,* 520 U.S. 292 (1997), this Court upheld a state statute that required parental notification before a minor has an abortion, but that provided a judicial bypass of the notification requirement if the minor could convince a court that notification would not be in her best interests. Of course, even in this

Once again, the fetus is treated exactly as a slave, as property, as a thing.

F. Prohibiting Slavery and Its Application to Abortion

The Thirteenth Amendment resolved the pressure building from treating slaves as property, rather than persons. Adopted in 1865, it reads, "Neither slavery nor involuntary servitude, except as punishment of crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[70] The amendment does not use the word "person." Rather, it outlaws the practice itself. Thus, slavery is prohibited, whether or not the *homo sapien* is considered a juridical person for other purposes (such as to obtain the protections of the Fourteenth Amendment).

What, then, is slavery? It is not defined by the amendment itself. Professor Finkelman in his work identifies the principal feature of slavery to be treatment of the individual as property.[71] Reflecting on the work of Congress and this Court, he also identifies several other incidents of slavery, largely summarized above, that help define it:

> slavery . . . was a system of [a] treating people like property—[b] without the power to control their own lives, [c] without the

---

situation, the best interests of the fetus are not directly taken into account.

[70] U.S. Const. amend. XIII.

[71] Finkelman, *supra* note 13, at 105, 133.

> right to own land or personal property, [d] without the power to speak out about their own liberty, [e] without the power to even control their families. These were the 'badges of slavery' that began in the seventeenth century and grew until the end of slavery itself.[72]

And to these must be added [f], your "owner" being able to dispose of you with impunity.

All of these incidents and definitions of slavery apply to abortion:

[a] Fetuses are treated as the property of the mother.

[b] Fetuses do not have the power to control their own lives, but may be killed by the one who owns them, without penalty.

[c] Being aborted terminates the fetus's potential to become an adult and to own land or personal property or, for that matter, to inherit even *in utero*.[73]

[d] Fetuses have no power to speak for themselves or to fight for their own liberty. They are not even permitted guardians *ad litem* to speak for them.

---

[72] *Id.* at 133-34.

[73] Many states provide for inheritance by an unborn child who is *in utero* at the time of grantor's or intestate's death. *See, e.g.*, 755 ILCS § 5/2-3(a).

[e] Fetuses do not control their families; their families—and in particular their mothers—control them, without any necessary regard for them or their welfare whatsoever.

[f] And the whole point of abortion is that mothers may dispose of their unwanted unborn with impunity.

Abortion is also a violation of the amendment's prohibition on involuntary servitude. While a fetus is, in the large majority of instances, the result of the voluntary choice of the mother and father, a fetus has no choice about whether it comes into existence. A mother bringing her fetus to term is acting in voluntary servitude to the child. However, a mother aborting her fetus is acting in her own interests; instead of acting in the child's best interests, the aborting mother puts her fetus in unwilling, involuntary servitude to her own, perceived best interests.

Fetuses, when aborted, are treated as slaves of their mothers and put in the most severe involuntary servitude. This is prohibited by the Thirteenth Amendment.

G. The Thirteenth Amendment's Prohibition Sweeps More Broadly Than the Fourteenth's Protections

To date, this Court, when considering abortion, has considered it only under the Fourteenth

Amendment.[74] The Thirteenth Amendment, however, was in force for over two years before the Fourteenth was adopted,[75] and it sweeps more broadly.

The Fourteenth Amendment is confined to state action;[76] the Thirteenth is not. Instead, the Thirteenth regulates both public and private acts.[77] Moreover, the Thirteenth Amendment is self-executing, prohibiting the imposition of slavery and involuntary servitude by either a private citizen or government official.[78]

The Thirteenth Amendment is also broader than the Fourteenth in that, while the latter speaks of "persons," the former speaks only of the condition

---

[74] To provide precedential weight, a prior case must have considered precisely the same issue that is under consideration in the instant case. *See United States v. Shabani*, 513 U.S. 10, 16 (1994); *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Webster v. Fall*, 266 U.S. 507, 511 (1925).

[75] The Thirteenth Amendment was ratified on December 6, 1865; the Fourteenth, on July 9, 1868.

[76] U.S. Const., amend. XIV, § 1 ("No State shall . . ."); *see Timbs v. Ind.*, 139 S. Ct. 682, 687 (2019).

[77] *See United States v. Kozminski,* 487 U.S. 931, 942 (1988); *Griffin v. Breckenridge*, 403 U.S. 88, 96-102 (1971).

[78] The Thirteenth Amendment "is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force it abolished slavery, and established universal freedom." *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

imposed. Obviously, the Thirteenth Amendment protections only extend to those of the human race (rather than to animals, for instance). But there is no limiting language in the amendment, as some resort to in the Fourteenth, to limit those protections to persons already born. Thus, the Thirteenth Amendment, on its face, covers all of the human race, at whatever stage of development.

As abortion treats the fetus as a slave, the mother is prohibited from aborting by the Thirteenth Amendment. This Court should so hold.

CONCLUSION

This Court's abortion jurisprudence is built on the premise that, because fathers do not have to carry their children, mothers do not, either. This premise is not only faulty, but it results in the death of a separate life when the mother aborts her child. The equality that needs to be enforced is not a false one that denies the natural difference between male and female physiology, but a shared responsibility for the new life the parents have created by their voluntary act. It is repugnant to the principles enshrined in the Thirteenth Amendment to allow a mother to treat her child *in utero* as a slave and to end its life, either before or after her child's viability outside the womb.

Respectfully submitted this
29th day of July, 2021,

/s/ Frederick W. Claybrook, Jr.
Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833
rick@claybrooklaw.com

David A. Bruce
205 Vierling Dr.
Silver Spring, Md. 20904