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 *AMICUS CURIAE* THE AMERICAN CORNERSTONE INSTITUTE AND ITS FOUNDER/CHAIRMAN, DR. BENJAMIN S. CARSON, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The American Cornerstone Institute is a non-partisan, not-for-profit organization founded by world-renowned pediatric neurosurgeon and 17th Secretary of the Department of Housing and Urban Development Dr. Benjamin S. Carson. The Institute's mission is to educate the public on the importance of Faith, Liberty, Community, and Life to the continued success of the United States of America. The preservation of life, from conception onwards, is a central tenet of the American Cornerstone Institute.

In furtherance of this mission, the American Cornerstone Institute submits this brief in support of the Petitioners.

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[1] Pursuant to Supreme Court Rule 37, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amicus curiae and its counsel made any monetary contribution toward the preparation and submission of this brief. On June 1, 2021, the Respondent filed a blanket consent to the filing of all amicus briefs, and on June 9, 2021, the Petitioner did the same.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Nearly fifty years ago, this Court announced a never-before-recognized constitutional right to terminate a pregnancy. *Roe v. Wade*, 410 U.S. 113, 116 (1973). In doing so, it relied, in part, on "the vigorous opposing views, even among physicians," as to when human life begins. *Id.* The Court declined to resolve this debate, noting instead that "[o]ne's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe," all inform the answer. *Id.*

Nearly thirty years ago, when this Court reaffirmed *Roe*, it again eschewed answering the question of when human life begins, commenting instead that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). By evading this question, the Court deemed itself at liberty to hold, a second time, that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *See Roe*, 410 U.S. at 158; *accord Casey*, 505 U.S. at 851.

But the question left unanswered by the Court in *Roe* and *Casey* has a definitive answer. Embryology, the branch of biology and medicine that examines the study of human conception and development in the womb, tells us that, at the moment of conception, a new cell that has received half its chromosomes

from one parent and half from the other is, propelled by its own genetic programming, growing and developing. Once that happens, a new, unique, human life has come into existence.

This is a matter of objective scientific fact. The Court need not (and should not) ignore it. "Because our bodies began at conception, then so did we." Gerald V. Bradley, *Moral Truth and Constitutional Conservatism*, 81 LA. L. REV. 1317, 1339 (2021). In other words, because life indisputably begins at conception, personhood must as well.

While science delivers this basic, objective fact, sound reason compels what the Court must do with it. Throughout recorded history, people have recognized that human persons possess certain natural rights that exist by virtue of our humanity alone. Indeed, these natural rights echo throughout our Declaration of Independence, our Constitution, and the political writings of our Country's founding generation.

The existence of these rights does not depend on theology (although most, if not all, of the world's major religions recognize them). Nor are these rights given by a government. They derive from our mere existence.

One principle reigns as universal and as universally true: Human life is a profound good. The termination of innocent human life, therefore, is a profound wrong. It necessarily follows that the government, to the extent it wishes to be considered legitimate, must protect that good while doing what

it can to safeguard against that wrong. These assertions are hardly up for serious debate.

The question currently before the Court is whether our national charter protects one person's decision to end the life of someone not yet born. Because (1) science dictates that life in the womb is indeed that of a unique human person who will, absent disease, trauma, or violence, continue to mature into a fully formed adult, and (2) our government was instituted to secure the natural right of all people to life (which is a right that predates all written law and depends on no written law for its existence), the answer can only be no. For these reasons and those that follow, the Court should reverse the decision of the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

I. LIFE, AND THEREFORE PERSONHOOD, BEGINS AT CONCEPTION.

In *Roe*, Justice Blackmun's majority opinion declined to "resolve the . . . question of when life begins." 410 U.S. at 159. In the view of the *Roe* majority, "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus." *Id.* So, the Court concluded, it was "not in a position to speculate as to the answer." *Id*. For that reason (and a few others), the Court decided that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158.

Science, however, has answered the question that, at one time, the Court thought could be resolved only through speculation. *Id.* at 159. Modern embryology conclusively shows that, at the moment of fertilization,[2] a life that is genetically distinct from the mother has come into existence and is developing by virtue of its own biological processes. Reason, in turn, compels the conclusion that this new, distinct human life is indeed a person.

A. Science provides a clear picture as to what occurs at the moment of conception.

To determine what occurs at conception, there is no need to seek the opinion of either a philosopher or a theologian. Philosophy, theology, and ethics inform what we *ought* to do with the objective facts we know. But embryology, "the scientific study of what the early embryo is, what it does, and how it develops," provides the baseline, observable, objective data. *See* ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 27–28 (Doubleday 2008); *see also* BRUCE M. CARLSON, HUMAN EMBRYOLOGY & DEVELOPMENTAL BIOLOGY (6th ed. 2019).

The moment of conception triggers a cascade of complex biological and chemical processes, the precise details of which are fully canvased elsewhere. *See* GEORGE & TOLLEFSEN, *supra* at 27–28; *see also* CARLSON, *supra* at 27–32 (describing process of

[2] This brief will use the terms "conception" and "fertilization" interchangeably.

fertilization); GARY C. SCHOENWOLF ET AL., LARSEN'S HUMAN EMBRYOLOGY 32 (5th ed. 2015) (same). For present purposes, it is enough to recognize that fertilization occurs when two sex cells, called gametes, interact. *See* SCHOENWOLF ET AL., *supra* at 32–33. Specifically, "the male gamete (a sperm cell) penetrates the female gamete (an egg, or oocyte), and "the two parts, sperm and egg, [transform] into a single entity, the human embryo." GEORGE & TOLLEFSEN, *supra* at 28, 37; *see also* RONALD M. GREEN, THE HUMAN EMBRYO RESEARCH DEBATES: BIOETHICS IN THE VORTEX OF CONTROVERSY (2001).

At this point, the intersection between embryology and genetics takes on special prominence. *See* Richard M. Burian and Denis Thieffry, *From Embryology to Developmental Biology*, 22 HIST. & PHIL. LIFE SCIS. 313, 317–18 (2000). Most healthy humans have forty-six chromosomes (twenty-three pairs), which comprise the genes that house all the genetic information necessary for human development. *See* GEORGE & TOLLEFSEN, *supra* at 30. These forty-six chromosomes can be found in every cell of the human body, no matter the type—except for two. *Id.* at 31. Gametes are the exception; sperm contain twenty-three chromosomes, and eggs contain twenty-three. *See* CARLSON, *supra* at 1–2, 7.

When the sperm and egg meet and fertilization occurs, the part of each gamete that houses the twenty-three chromosomes (the nucleus) begins to expand and forms, respectively, the male pronucleus

and the female pronucleus. *Id.* at 30–31.[3] Then, the male and female pronuclei join. *Id.* at 31. When they do, the twenty-three chromosomes contributed by the man and the twenty-three contributed by the woman unite to form twenty-three pairs. *See id.* ("Through the mingling of maternal and paternal chromosomes, the zygote is a genetically unique product of chromosomal reassortment . . . ."). At this moment, the gametes cease to exist and what has come into existence is a cell, called a zygote, that has the forty-six chromosomes necessary for that cell to continue its development into a fully formed human being. GEORGE & TOLLEFSEN, *supra* at 37–38. Stated differently, during fertilization, "the paternal and maternal chromosomes come together, resulting in the formation of a zygote containing maternal and paternal chromosomes aligned on the metaphase plate." SCHOENWOLF ET AL., *supra* at 14.

B. Conception creates a new person.

As noted by Professors George and Tollefsen, three points emerge from the science described above. The first is that "the embryo is from the start distinct from any cell of the mother or of the father." GEORGE & TOLLEFSEN, *supra* at 50; *see also* RONAN O'RAHILLY & FABIOLA MÜLLER, HUMAN EMBRYOLOGY AND TERATOLOGY 8 (3d ed. 2001) ("[A] new, genetically distinct human organism is formed when the chromosomes of the male and female pronuclei blend in the oocyte."). The second is that, because the embryo "has the genetic makeup characteristic of

[3] *See also* SCHOENWOLF ET AL., *supra* at 35.

human beings," (*i.e.*, forty-six chromosomes), "the embryo is human." GEORGE & TOLLEFSEN, *supra* at 50. And, critically, the third is that the embryo, though immature, "*is a complete or whole organism*." *Id*. (emphasis added); *see also* LARRY R. COCHARD, NETTER'S ATLAS OF HUMAN EMBRYOLOGY 1 (2012) ("The zygote is the beginning of human development.").

This last point warrants emphasizing. From the moment of fertilization onward, (1) the embryo "is fully programed"; (2) it "has the active disposition to use" that programing "to develop himself or herself to the mature stage of a human being"; and (3) "unless prevented by disease or violence," it "will actually do so." GEORGE & TOLLEFSEN, *supra* at 50. In other words, because the embryo is genetically unique and is developing by virtue of its own genetic processes (*i.e.*, its growth is not driven by the woman in whose womb it is located), "[a] human embryo is a whole living member of the species Homo sapiens in the earliest stage of his or her natural development." *Id*. Stated more directly, the embryo, which exists at the moment of conception, is a new human *individual* that is actively in the process of developing itself towards full maturity. *See* Nicanor Pier Giorgio Austriaco, *On Static Eggs and Dynamic Embryos: A Systems Perspective*, 2 NAT'L CATH. BIOETHICS Q. 659, 666–67 (2002); *see also* SABINE GLOBIG, CURRENT RESEARCH IN EMBRYOLOGY 9 (2011) ("Embryology . . . deals with the formation and early development of *an individual organism*, from

fertilization of the egg (ovum) to birth.") (emphasis added).[4]

Science and reason bear out these objective facts. The embryotic stage, like the "fetal, child, and adolescent stages," "*are just that*—stages in the development of a determinate and enduring entity—a human being—who comes into existence as a single-celled organism (a zygote) and develops, if all goes well, into adulthood many years later." GEORGE & TOLLEFSEN, *supra* at 51 (emphasis in original). The same is true of an apple seed that is itself alive and can be planted in the earth, where it will germinate and begin to grow. Even though it might take several years to reach maturity (*i.e.*, the point at which it begins to bear fruit), is it not still an apple tree before that evolution progresses to fruition?

So, then, what is the answer to the ultimate question: When does human life begin?

The answer follows inextricably from the medical science—once an embryo is formed, *a human being exists*. *See* Paul R. McHugh, M.D., *Zygote and 'Clonote'—The Moral Logic of Stem Cell Research*,

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[4] Once an embryo is created, every stage of that human's evolution will occur "unless prevented by disease or violence." GEORGE & TOLLEFSEN, *supra* at 50. That is, a born child will develop into an adolescent "unless prevented by disease or violence," and an adolescent will develop into an adult "unless prevented by disease or violence." *Id.* Therefore, while sounding like a qualifier on an embryonic human life, the mere fact that an embryonic human *will* develop into a mature adult human "unless prevented by disease or violence" makes the embryo *identical* to a born individual, not different. *Id.*

351 NEW ENG. J. MED. 209, 210 (2004) ("[I]n vitro fertilization entails the begetting of a new human being right from its start as a zygote . . . ."). The fact that the embryotic stage and the fetal stage take place inside the womb matters no more than the fact that infancy largely takes place in the crib, or that adolescence takes place in the parents' home. Once a unique embryo begins the process of developing *itself* into a fully formed human being (with the biological support, but not the biological direction, of the mother), a human person exists.

II. LAW, INCLUDING OUR CONSTITUTIONAL LAW, EXISTS TO ADVANCE AND PROTECT NATURAL RIGHTS AND THE COMMON GOOD—ESPECIALLY THE RIGHT TO LIFE.

While science helps us discover objectively true facts (*i.e.*, what *is*), our reason informs, just as objectively, what we *ought* to do about it. What we know to be true (based on the science recounted in the foregoing discussion) is that human life—a unique human person—exists once the twenty-three chromosomes from a sperm cell pair with the twenty-three chromosomes from the oocyte to form what is on its way to becoming a fully developed human. What we also know to be true (based on the human capacity to reason) is that human life is a tremendously and inherently good thing, which means that those who possess it have an inherent right to keep it. No matter the particular flavor of natural-law theory or predilections of any individual natural-law theorist, one point of agreement is irrefutable: Termination of an innocent human life violates an inherent right that all humans enjoy.

Moral reasoning—the capacity of all rational persons to know what is demonstrably good and what is not by logic alone—is how we ascertain what rights we have by virtue of our humanity. Crucially, the fruits of moral reasoning—*i.e.*, the objective moral norms that flow from that reasoning—exist even in the absence of positive law memorializing those norms. Because every human of sound age and mind possesses the capacity to understand, through rationality alone, what is right and what is wrong, some universal norms resonate throughout time and place, and the same principles can be found in codes as ancient as Hammurabi's; in religions as diffuse as Judaism, Christianity, Islam, Buddhism, Hinduism, and Taoism; and in the history of our Nation's common law and that of its English forebearer. They provide no less than the foundation for the rights that most people believe should be enjoyed by all of humanity, no matter which country pens the written law.

Because these rights exist by virtue of our humanity alone, some refer to them as natural rights. Because infringement of a natural right is always objectively wrong, natural law exists. And since its inception, our Nation has incorporated into its very fabric a commitment to the advancement of the societal goods enshrined by the natural law. Therefore, just as the natural law guided the thinkers leading to the Founding of this Country, natural-law theory should guide the Court as it grapples with whether to continue lending its imprimatur to the termination of innocent life in the womb, or to scuttle the idea.

A. The natural law requires, at a minimum, government protection of innocent human life.

Distilled to its essence, natural law simply holds that what is right and what is wrong—in other words, what advances the common good[5] and what does not—can be determined objectively through the exercise of sound human reason alone. *See* Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393 (1992). These objective conclusions tell us what rights we have by virtue of being humans, that it is wrong to violate those rights, and that the government has a duty to prevent infringement of those rights where it can. The core, immutable natural-law right is the right to life that is self-evidently possessed by all persons, which means that the termination of innocent human life is a self-evident wrong.

Natural law's roots extend back at least as far as Aristotle's *Nicomachean Ethics*, and it has been an active strain of thought ever since. *See* FINNIS, *supra* at 78. In the view of Thomas Aquinas, "the first principles of natural law" hold that "the basic forms of good and evil . . . can be adequately grasped by anyone of the age of reason (and not just by metaphysicians)" and "are *per se nota* (self-evident) and indemonstrable." *Id.* at 33. In other words, our

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[5] *See* JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 125 (2d ed. 2011) (defining common good, for purposes of natural law, as "our concrete moral responsibilities, obligations, and duties," which amounts to a "requirement of favouring and fostering the common good of one's community").

human rationality, without more, leads us to the conclusion that "there are basic aspects of human well-being which are good for everyone." Bradley, *supra* at 1321.

No rational person, for instance, would deny that "[a]s animate, bodily creatures, our lives and our health are basic goods." GEORGE & TOLLEFSEN, *supra* at 99. Individuals who preserve or protect "our lives and our health" are rightly celebrated; actions that preserve or protect "our lives and our health" are considered beneficial. These basic goods, discernable through nothing more than an exercise of reason, inform which rights we enjoy by virtue of our humanity.

Based on the existence of objective goods, it follows that "[h]uman rights exist if . . . there are principles of practical reason that direct us to act or refrain from acting in certain ways out of respect for the well-being and dignity of the human being," who, as we have just established, has "legitimate interests" that "may be affected by what we do." GEORGE & TOLLEFSEN, *supra* at 101. Because our lives and our health are goods, it follows that a "basic human right" considered "absolute and inviolable" includes "the right of an innocent human person not to be directly killed or maimed."[6] *Id*. at 105.

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[6] As an example, rights against, and punishment for, murder are codified in the positive law in every State of the United States. *See, e.g.,* VA. CODE ANN. §§ 18.2–32; D.C. CODE §§ 22–2101 *et seq.*; CAL. PENAL CODE §§ 187–199.

Based on the self-evident, objectively true premises that (1) there exist certain goods that apply universally (*e.g.*, life and health) and (2) these goods create natural rights in humans by virtue of their humanity alone, it necessarily follows that there are "moral norms which are" also "true for everyone." Bradley, *supra* at 1321. These include the "Golden Rule, which requires fair treatment of other human beings, rather than an arbitrary favoring of some over others." GEORGE & TOLLEFSEN, *supra* at 101. It also follows, quite necessarily, that infringing on an innocent human's "absolute and inviolable" right "not to be directly killed or maimed" is a violation of a universally applicable moral norm. *Id.* at 105.[7]

Like many philosophical concepts, natural law has generated some confusion and misunderstanding since it emerged as a philosophy. The fog has not cleared much since natural-law theory entered the arena of the legal academy. Some view it as akin to theological dogma,[8] others as merely a way to impose conservative orthodoxy through extra-judicial means.[9] But the foregoing shows that neither

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[7] *See also* Gene Outka, *The Ethics of Human Stem Cell Research*, 12 KY. INST. ETHICS J. 175, 193 (2002) ("One may directly kill when two conditions obtain: (a) the innocent will die in any case; and (b) other innocent life will be saved.").

[8] Peter Hammond Schwartz, *Originalism is Dead. Long Live Catholic Natural Law*, NEW REPUBLIC (Feb. 3, 2021), https://newrepublic.com/article/161162/originalism-dead-long-live-catholic-natural-law.

[9] Kathryn Joyce, *The Man Behind the State Department's New "Natural Law" Focus*, NEW REPUBLIC (Jun. 14, 2019), https://newrepublic.com/article/154204/man-behind-state-departments-new-natural-law-focus.

criticism is accurate. And, notwithstanding the nuanced debates among natural-law philosophers, what remains true is that any exercise of sound moral reasoning compels the same conclusion: Human persons have a natural right to life and any legitimate government has an obligation to protect it.

B. Our Nation was created to animate the natural law.

Because this "universal aspect[] of human flourishing" is "the anchor point[] of a genuinely *common good*," Bradley, *supra* at 1321 (emphasis in original), it follows that "public authority ha[s] an inalienable duty to promote" the public good "for the sake of everyone's flourishing." *Id.* at 1321. In other words, objectively good government has an obligation to preserve natural rights and enforce the natural law. This was true at the time of Aristotle, who wrote that "virtue must be a care for every city, or at least every one to which the term applies truly and not merely in a manner of speaking." ARISTOTLE, POLITICS bk. III, 1280b (Univ. of Chi. Press 2d ed. 2013) (350 BCE). It was true at the time of the Roman Republic, when Cicero wrote that "those who have been endowed by nature with reason have also been endowed with right reason, and hence with law, which is right reason in commanding and forbidding." CICERO, THE REPUBLIC AND THE LAWS 107–08 (Oxford Univ. Press 2011) (56 BCE). It was true at the time of Aquinas, who believed that, like the human body, a human community requires "a general ruling force" that "watches over the common good of all members." THOMAS AQUINAS, ON KINGSHIP TO THE KING OF CYPRUS 4 (Aeterna Press 2015)

(1267). And it was true at the time of the American Founding.

1. In the very instrument through which America declared its independence, Thomas Jefferson provided perhaps the most recognizable endorsement of "the Laws of Nature," the benefit of which we are all "entitle[d]." THE DECLARATION OF INDEPENDENCE para. 1. Jefferson emphasized that there existed "truths" that are "self-evident," including that "all men are created equal." *Id.* para. 2. He further underscored that there exist certain "unalienable Rights" enjoyed by all *not* based on government decree but instead because we are "endowed" with them "by [our] Creator." *Id.* And the three natural rights recited by Jefferson are those that all people exercising reason recognize as inherent—"Life, Liberty and the pursuit of Happiness." *Id.*

That Jefferson would root the Declaration's most familiar proclamation in natural-law theory is unsurprising. The Founders were well versed in how "the laws of nature" governed, universally, the affairs of those with the natural and common rationality to understand them. John Locke, who provided one of the most influential philosophical bases for the American experiment, wrote "the law of Nature stands as an eternal rule to all men, legislators as well as others." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 71 (Hatchet Publishing Co. 1980) (1690). In his view, "the rules" that the sovereign "make[s] for other men's actions must . . . be conformable to the law of Nature." *Id.*

Locke's was not a solitary voice. William Blackstone, in his most influential work, announced

that a "law of nature" is "superior in obligation to any other" and "binding over all the globe, in all countries, and at all times." 1 WILLIAM BLACKSTONE, COMMENTARIES 41 (1765). "But," he noted, "in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office it is to discover . . . what the law of nature directs in every circumstance of life . . . ." *Id*. Indeed, one of England's most renowned jurists, Lord Edward Coke, put into practice natural-law jurisprudence when he wrote that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law[10] will controul it, and adjudge such Act to be void." *Dr. Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610).[11]

2. This natural-law vein extended from the Declaration's lofty proclamation to the Constitution's construction of our governmental pillars.[12] The

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[10] During this time, "the relationship between traditional Natural Law and the English Common Law was so close and profound that the latter was understood to be but the practical application of the former." Robert S. Barker, *Natural Law and the United States Constitution*, 66 THE REV. OF METAPHYSICS 105, 112 (2012).

[11] Another, Lord William Mansfield, echoed the same: "[a statute] can seldom take in all cases, therefore the common law that works itself pure by rules drawn from the fountain of justice is for that reason superior to an Act of Parliament." *Omychund v. Barker*, 1 Atk. 22, 26 Eng. Rep. 15 (1744).

[12] Abraham Lincoln described the relationship between the Declaration of Independence and the Constitution in the following way:

Preamble echoes both Aristotle and Aquinas by noting that it was established to advance the common good: *i.e.*, "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." U.S. CONST. pmbl. Writing in the *Federalist Papers*, Alexander Hamilton described this language as "a better recognition of popular rights[] than volumes of those aphorisms which make the principal figure in several of [the] State bills of rights." The FEDERALIST NO. 84 (Alexander Hamilton).

Though subtle, the first ten amendments reveal the Framers' understanding that the rights they recognized as fundamental were not rights that they were creating by government decree.[13] Instead, the language of each Amendment "clearly implies that

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> The expression of that principle in our Declaration of Independence . . . was the word "*fitly spoken*" which has proved an "apple of gold" to us. The *Union* and the *Constitution* are the *picture of silver*, subsequently framed around it. The picture was made, not to *conceal* or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the picture.

ROY P. BASLER, 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 169 (Rutgers University Press 1953) (emphases in original).

[13] Indeed, neither James Madison nor Alexander Hamilton believed that the Bill of Rights was necessary because there was no need to "declare that things shall be done which there is no power to do." *See* THE FEDERALIST No. 84 (Alexander Hamilton).

these freedoms and rights have existed prior to and independent of their mention in the Constitution." *Barker*, *supra* at 122.

The First Amendment does not bestow rights; it is instead written in a way that forbids Congress from "abridging" freedoms that existed long before the First Amendment was memorialized on parchment (and that would exist even if it never was). U.S. CONST. amend. I. The Fourth Amendment speaks of a preexisting "right to be secure . . . against unreasonable searches and seizures" that "shall not be violated." U.S. CONST. amend. IV. "[C]ruel and unusual punishment" has always been wrong; the Eighth Amendment simply reduced to writing the right to be free from it. U.S. CONST. amend. VIII. The Fifth Amendment prohibits the government from depriving an individual, without due process of law, of the same self-evident and unalienable natural rights of "life, liberty, [and] property" alluded to in the Declaration. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV. And lest there be any doubt about the Second Amendment, Justice Scalia, in his *District of Columbia v. Heller* majority opinion, observed that "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. 554 U.S. 570, 592 (2008) (emphasis in original).[14]

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[14] Justice Alito's opinion in *McDonald v. City of Chicago* is in accord. *See* 561 U.S. 742, 809 (2010) ("[T]he reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution's adoption—was the very reason citizens could not enforce it against States through the Fourteenth.").

The Ninth and Tenth Amendments serve as twin natural-law capstones to the Bill of Rights. The former promises that "[t]he enumeration . . . of certain rights . . . shall not be construed to deny or disparage others *retained by the people*," U.S. CONST. amend. IX (emphasis added), while the latter "reserves to the States *or the people*" the "powers not delegated to the United States," U.S. CONST. amend. X (emphasis added). As a matter of logic and grammar, "these Amendments acknowledge and mean, at least, that fundamental rights do not owe their existence or exercise to the state or to any government." *Barker*, *supra* at 125. Instead, "they are derived immediately from the Common Law tradition, and ultimately from the Natural Law." *Id.*

Justice Joseph Story, in his *Commentaries on the Constitution of the United States*, confirmed this understanding of the Tenth Amendment. In his work, he stated that it "is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833). Because the Constitution is "an instrument of limited and enumerated powers," Justice Story concluded that "it follows irresistibly that what is not conferred is withheld" and retained, ultimately, "by the people, as part of their residuary sovereignty." *Id.* (emphasis omitted).

3. Once drafted, the Constitution needed to be ratified, and the men who tasked themselves with persuading the several States appealed to concepts in natural law to explain the document. For example, Alexander Hamilton, one of the *Federalist Papers*' authors, wrote that there exists "an eternal and

immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatsoever." ALEXANDER HAMILTON, *The Farmer Refuted, in* THE WORKS OF ALEXANDER HAMILTON 55, 62 (G.P. Putnam's Sons 1904). He continued:

> This is what is called the law of nature . . . . Upon this law depend the natural rights of mankind. The sacred rights of mankind . . . are written, as with a sunbeam, in the whole volume of human nature, . . . and can never be erased or obscured by mortal power.

Id. at 82–83.

James Madison, another of the *Federalist Papers*' authors, wrote in Federalist 10 about the dangers of factionalism and why a republican form of government, rather than pure democracy, provided a better solution. THE FEDERALIST No. 10 (James Madison). In so doing, Madison "reveals a classical Natural Law understanding of the nature of man and of government." *Barker*, *supra* at 128. Specifically, Federalist 10 defends the proposition that "[g]overnment exists neither to perfect man (which it cannot do) nor to repress him (which it should not do), but rather to pursue the limited goal of promoting the common good by acting or refraining from acting, . . . always in accordance with

its own nature and the nature of man." THE FEDERALIST No. 10 (James Madison).[15]

4. Finally, natural-law theory abounded throughout the opinions of this Court and in the other writings of the Justices who decided cases close to the Founding. In *Fletcher v. Peck*, an opinion written by Chief Justice John Marshall, the Court struck down Georgia's attempt to cancel a grant in lands that amounted to the impairment of a contract. 10 U.S. (6 Cranch) 87 (1810). But rather than simply citing the Contracts Clause, Chief Justice Marshall instead "showed how the Contracts Clause could be drawn deductively—with the logical force of a syllogism—from the deeper principle of *ex post facto* laws, a principle of lawfulness that would have to be part of any regime of law." Hadley Arkes, *The Natural Law Challenge*, 36 HARV. J. LAW & PUB. POL'Y. 961, 964 (2013).

Specifically, Chief Justice Marshall began with the proposition that "[t]he state legislatures can pass no *ex post facto* law," which "is one [that] renders an act punishable in a manner in which it was not punishable when it was committed." *Fletcher*, 10 U.S. at 138. Because the land-grant cancellation "would have the effect of an *ex post facto* law," and

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[15] Lesser-known delegates to the Constitutional Convention, like John Dickenson of Delaware, expressed similar adherence to the natural law: "Our liberties do not come from charters; for these are only the declarations of preexisting rights. They do not depend on parchment or seals . . . ." *See* MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING 75 (Encounter Books 2002).

because *ex post facto* laws are forbidden, Chief Justice Marshall asked "why, then," would the same result (unjustified loss of property) be "allowable in the form of a law annulling the original grant?" *Id.* at 138–39. For this reason, Chief Justice Marshall held that "the state of Georgia was restrained, either by *general principles which are common to our free institutions*, or by the particular provisions of the constitution of the United States," from cancelling the land grant at issue. *Id.* at 139 (emphasis added). By so doing, Chief Justice Marshall held, in effect, that "even if Georgia were a separate, sovereign State, outside the Union—and therefore outside the Constitution and Article One, Section Ten—this law in Georgia would still be wrong," because "its wrongness was rooted . . . in a principle that did not depend at all for its validity on being mentioned anywhere in the text of the Constitution." *Arkes*, *supra* at 964–65.

Years later, Chief Justice Marshall embraced the logic of law, the quintessential feature of the natural-law tradition, when he held, in *McCulloch v. Maryland*, that Congress's Article I, Section 8 powers, which include the right to "lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies," 17 U.S. (4 Wheat.) 316, 407 (1819), implied that the federal government had the lesser authority to charter a national bank, *id.* at 425. In reaching this conclusion, Chief Justice Marshall relied not only on the Necessary and Proper Clause but also on the exercise of sound reason.

First, he observed that "[i]f any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action." *Id.* at 405. Next, he analogized to other aspects of constitutional law, noting that "the government may, legitimately, punish any violation of its laws," even though the Constitution only expressly granted Congress the authority "'to provide for the punishment of counterfeiting the securities and current coin of the United States,' and 'to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." *Id.* at 416–17. Finally, Chief Justice Marshall concluded that if "the end be legitimate" *and* if "it be within the scope of the constitution," then a congressional act would be "constitutional." *Id.* at 421.

Chief Justice Marshall was not the only member of this Court to embrace natural-law theory or to employ natural-law reasoning. Justice James Wilson, a signatory of the Declaration who was "considered by everyone to have been the second or third most influential delegate at the Constitutional Convention," *Barker*, *supra* at 109, relied on similar natural-law reasoning in his *Chisholm v. Georgia* opinion.[16] 2 U.S. (2 Dall.) 419, 453 (1793). The

[16] Justice Wilson wrote prolifically on the natural law, opining that "[g]overnment . . . should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind." JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D 466 (Lorenzo Press 1804).

question in *Chisholm* was whether Article III, Section 2 of the Constitution abrogated State sovereign immunity. To resolve this question, Justice Wilson first commented that "[a] State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance." *Id.* at 455. And he then declared that "laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require"; in other words, "[t]he Sovereign, when traced to his source, must be found in the man." *Id.* at 458 (emphasis in original). Stated differently, Justice Wilson recognized that *persons* have natural rights, and that the powers and privileges of a State (including immunity from suit) extend only as far as the true sovereign (the people) allow it to. Two years later, the Constitution was amended to create State sovereign immunity, *see* U.S. CONST. amend XI, which only underscores Justice Wilson's point—consent of the governed dictates the authority of the government, and not the other way around.

Finally, one of the most explicit endorsements of the natural law came through an opinion written by Justice Bushrod Washington while he was riding circuit. In *Corfield v. Coryell*, Justice Washington was tasked with resolving whether New Jersey could prevent non-State residents from gathering oysters. 6 F. Cas. 546, 550 (C.C.E.D. Pa. 1823). To answer this question, Justice Washington examined whether the prohibition violated "that section of the constitution which declares that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?'" *Id.* at

551. In so doing, he "fe[lt] no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental"; in other words, those that "belong, of right, to the citizens of all free governments." *Id*. These fundamental rights, according to Justice Washington, form a list that all those who reason their way to good governance would create:

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . .

Id. at 551–52.

* * *

Natural law has been with our Country since its founding, and some of this Court's most revered

members applied it without hesitation. Although the exact contours of natural law, and the exact ways in which it interacts with the positive law, vary enough to warrant judicial prudence,[17] those concerns are not implicated in this case. Every natural-law theory recognizes that the right to life is a bedrock natural right. And the complicated interaction between natural law and the positive law in general is not implicated by examining whether the Constitution contains an unenumerated right to terminate an innocent life when the document itself, indeed the country itself, is grounded in the same right to life that is at the heart of natural law. For these reasons, the Court need not, and should not, shy away from the natural law as it resolves this case.

III. PROTECTING HUMAN LIFE FROM THE MOMENT OF CONCEPTION IS PART OF THE GOOD THAT THE LAW MUST ADVANCE.

The foregoing discussion established the following premises:

First, as a matter of scientific, objective fact, human life, genetically distinct from the mother in whose womb he or she is located, comes into existence at the moment of conception.

Second, objective reasoning can, and does, dictate what norms must follow from the realization that a genetically distinct human life exists from the moment of conception.

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[17] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 6 (1990).

Third, no matter the precise natural-law theory or natural-law theorist, all agree, as a matter of self-evident objective truth, that the preservation of human life is a profound good and an inherent right of all persons.

Fourth, violation of an innocent human's right to be free from arbitrary violence is a violation of the natural law.[18]

And *fifth*, our Nation was founded, our national law was drafted, and (historically) our organic law was interpreted by individuals who took as a given that government action, in order to be legitimate, must harmonize with the natural law.

Against this backdrop is the question the Court must answer: does the Constitution recognize a right to abortion given that (1) science establishes that human life begins at conception and (2) our governing charter, and our government itself, incorporates (at a minimum) the natural-law idea that government exists to protect innocent life from arbitrary violence?

The answer to that question must be a resounding "No." As noted above, one of the many flaws in *Roe* was the Court's explicit decision to avoid "resolv[ing] the . . . question of when life begins," 410 U.S. at 159, which, at the time, was based on the belief that "those trained in the respective disciplines

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[18] *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 71 (Hatchet Publishing Co. 1980) (1690) ("The fundamental law of Nature" is "the preservation of mankind.").

of medicine, philosophy, and theology are unable to arrive at any consensus." *Id.* *Casey* repeated this error by holding that "the heart of liberty" includes "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). The idea that a person can *subjectively* change the *objective* fact as to when life begins is a contradiction in terms. In a word, it is irrational. Beyond that, it violates the natural law.

Setting aside what may have been known or knowable in 1973 (or 1992, for that matter), this Court need no longer "speculate as to the answer." *Roe*, 410 U.S. at 159. Embryology has provided the facts and natural law has provided the result that flows from those facts. For that reason, the Court can, and should, resolve this case with the sober awareness that what is at stake here is the question of whether one person has the right to end the innocent human life of another. The only answer in accord with moral rationality is a categorical "No."

CONCLUSION

In *Rhetoric*, Aristotle declared that "*[u]niversal* law is the law of *nature*. . . . *there* really exists, as all of us in some divine, a natural form of the just and unjust which is common to all men, even when there is no community to bind them to one another." ARISTOTLE, RHETORIC bk. I, 1373b (350 BCE) (emphasis in original). In the Declaration of Independence, Jefferson affirmed that "the Laws of Nature and of Nature's God *entitle*" all people to enjoy "certain unalienable Rights," and "that among these are," first and foremost, "[l]ife." THE DECLARATION OF INDEPENDENCE paras. 1–2 (emphasis added). These "truths," held by our Founders to be "self-evident," are nothing short of an endorsement that all persons, no matter their developmental stage, possess an inalienable right to life that the government is duty-bound to protect.

For the foregoing reasons, the Fifth Circuit's decision should be reversed.

Respectfully submitted,

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