No. 19-1392

In The
Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., 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 ANTHONY HAWKS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STEPHEN C. LECKAR
Counsel of Record
KALBIAN HAGERTY LLP
888 17th St. NW, Twelfth Floor
Washington, DC 20006
sleckar@kalbianhagerty.com
(202) 223-5600

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

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

Anthony Hawks is an active member in good standing of the District of Columbia Bar and a licensed attorney since 1984. Since first reading *Griswold v. Connecticut*[2] in law school, he has had a scholarly interest in legal doctrine as it relates to unenumerated constitutional rights. He is filing this *amicus* brief to propose a more logical, consistent, stable, and predictive framework for recognizing and protecting non-economic liberty rights under the Due Process Clause, including but not limited to the right of abortion before viability.

SUMMARY OF THE ARGUMENT

The constitutionality of restrictive abortion statutes should be analyzed like other statutes that deny or restrict non-economic liberty rights, based on the following analytical framework:

> *1. Does the Due Process Clause provisionally recognize the unenumerated liberty right at issue?*

If the purported liberty right does not conflict with the equal rights of others, then it is implied by ordered

---

[1] This *amicus* brief is submitted under the Blanket Consents filed by both Petitioners and Respondents. Pursuant to Rule 37.6, no counsel for any party authored any part of this brief and that no person or entity other than *amicus* funded its preparation and submission.

[2] 381 U.S. 479 (1965) ("*Griswold*").

liberty and the answer is "yes": it should be recognized on a provisional basis. A *provisional* liberty right, however, does not become a *protected* liberty right unless the government's purported countervailing interests fail to meet the applicable level of scrutiny.

2. Is the state exercising a police power to secure and protect individual rights or merely to promote a preferred end?

As classically formulated, the police power consists of both a *primary* power to protect and secure individual rights and a *secondary* power to promote interests, values, goals, or ends that the state favors. The primary power is necessarily stronger than the secondary power because securing and protecting individual rights is the core political value in our system of government. Moreover, securing and protecting individual rights are permanent duties of government, whereas the preferred end that a government promotes at any given time is frequently ephemeral and rejected by future generations.

3. What level of scrutiny applies to provisional unenumerated liberty rights?

For unenumerated liberty rights deemed "fundamental" under *Washington v. Glucksberg*,[3] the answer is strict scrutiny. But there are also unenumerated liberty rights that do *not* qualify as "fundamental" under *Glucksberg*, which this Court has long protected under some form of "heightened scrutiny" in lieu of the highly

[3] 521 U.S. 702 (1997) ("*Glucksberg*").

deferential rational-basis test applied to post-New Deal economic rights. These cases implicate the personal autonomy of an individual, including *Roe v. Wade*[4] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[5]

> *4. When tested against the provisional unenumerated liberty right, does the purported state interest pass scrutiny?*

This final inquiry can lead to a range of outcomes. If the state is exercising its primary policy power to secure and protect individual rights, and only rational-basis review applies, then the government will likely win. Conversely, if the state is exercising its secondary police power to promote a transient interest, and strict scrutiny applies, then the government will likely lose. In personal autonomy cases, the individual is more likely to prevail because the state is exercising its secondary police power in a way that fails to overcome a heightened scrutiny standard.

Applying this framework, the holdings in *Roe* and *Casey* were correct. Absent any countervailing fetal rights, abortion is a provisional liberty right of the woman. Since neither *Roe* nor *Casey* involved states that recognized fetal rights, only the weaker secondary police power was being exercised in those cases. As a provisional liberty right, abortion is entitled to heightened scrutiny like other personal autonomy cases. Moreover, both the undue burden test in *Casey* and

---

[4] 410 U.S. 113 (1973) ("*Roe*").

[5] 505 U.S. 833 (1992) ("*Casey*").

viability rule retained from *Roe* are good faith constitutional constructions for implementing the "liberty" protected by the Due Process Clause. Accordingly, neither *Roe* nor *Casey* are erroneous holdings, and both should be reaffirmed on *stare decisis* grounds, but limited to states where fetal rights are not recognized.

Since *Roe*, as modified by *Casey*, should be retained as good law, and Mississippi does not recognize fetal rights, the Mississippi Gestational Age Act is governed by both the undue burden test and the viability rule. An outright ban prior to viability is necessarily an undue burden and thus fails to satisfy the heighten scrutiny required to deny or restrict abortion as a provisional liberty right. The Act is therefore unconstitutional, and the decision below must be affirmed.

ARGUMENT

I. Constitutional Protection for an Unenumerated Liberty Right Is Properly Analyzed Under a Four-Part Framework.

According to Petitioners, "[t]he Constitution's text says nothing about abortion."[6] But this is true of every unenumerated right protected by this Court, including the right to teach a foreign language to grade school children, *Meyer v. Nebraska*;[7] the right of parents to send their children to non-public schools, *Pierce v.*

[6] Brief for Petitioners at 12 (filed July 22, 2021) ("Pet. Br.").

[7] 262 U.S. 390 (1923) ("*Meyer*").

Society of Sisters;[8] the right of married couples to use contraceptives, *Griswold*;[9] and the right of same sex persons to engage in intimate sexual conduct, *Lawrence v. Texas*.[10]

These are just a few of the more famous examples,[11] but they have been singled out for a reason: *Pierce* invoked *Meyer* as supporting precedent; *Griswold* invoked *Meyer* and *Pierce*; and both *Roe* and *Lawrence* invoked all three. In short, they represent two continuous lines of case precedents where "personal autonomy" (in the sense of self-governing moral agency and independence) is at stake: (1) *Meyer* → *Pierce*→ *Griswold* → *Lawrence*; and (2) *Meyer* → *Pierce*→ *Griswold* → *Roe.* Yet in attacking *Roe*, Petitioners let *Meyer*, *Pierce*, *Griswold*, and *Lawrence* stand unchallenged as widely accepted precedent. The burden is therefore on Petitioners to explain why *Meyer* and its other progeny should remain good law, yet *Roe* supposedly should not.

There is indeed a difference between *Roe* and these other personal autonomy cases, but it is not found in the source or nature of the unenumerated right. Rather it is found in the nature of the asserted countervailing state interest. Petitioners have failed to grasp this difference, causing them to wrongly deny

---

[8] 268 U.S. 510 (1925) ("*Pierce*").

[9] 381 U.S. 479 (1965).

[10] 539 U.S. 558 (2003) ("*Lawrence*").

[11] *See generally Casey*, 505 U.S. at 849-851 (discussing other cases that can fairly be described as protecting personal autonomy rights).

abortion as a provisional unenumerated liberty. The source of an unenumerated right is analytically distinct from an assessment of the state interest, and it is this distinction that provides the proper framework for determining when unenumerated liberty rights should be protected under the Due Process Clause. This framework consists of four inquiries:

A. Does the Due Process Clause Provisionally Recognize the Unenumerated Liberty Right at Issue?

This question rarely occurs with enumerated rights because the enumeration itself usually answers the question. With unenumerated rights the issue arises frequently because, whereas the Court has articulated in *Glucksberg* when a liberty right is "fundamental," there is no established test for when a non-fundamental liberty right exists under the Due Process Clause. This question is different from when a liberty right is *protected* under the Due Process Clause. The former asks when an activity is presumptively or provisionally accepted as a liberty right, subject to being denied or constrained by an exercise of state police power. Whether this provisional right should then be protected depends on the strength of the state interest being asserted and the level of scrutiny that must be satisfied.

Distinguishing provisional rights from protected rights is necessary not only for locating the constitutional source of an unenumerated right, but also for avoiding mistakes like the one that occurred in *Bowers*

v. Hardwick.[12] The issue presented in *Bowers* was misconstrued as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . ." This phrasing wrongly implied that a right had to be *fundamental* before it could be protected, which as the *Lawrence* Court later noted, was a "failure to appreciate the extent of the liberty at stake."[13]

In fact, this Court has protected many unenumerated rights under the Due Process Clause *without* applying the strict scrutiny required for fundamental rights. Indeed, this was the case in *Lawrence* itself, which struck down the challenged Texas statute under what appears to be rational-basis review because Texas had "no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[14] But if the *Lawrence* Court correctly found that intimate same sex activity was a liberty right that Texas could not overcome, it gave insufficient guidance as to when other types of conduct will qualify as a provisional liberty right.

Providing the correct answer should not be a difficult question. To the contrary, it can be resolved by a commonsense approach to the oft-used phrase "implicit in the concept of ordered liberty." This phrase appears to have first surfaced in *Palko v. Connecticut*,[15]

---

[12] 478 U.S. 186, 190 (1986) ("*Bowers*").

[13] 539 U.S. at 567.

[14] *Id.* at 578.

[15] 302 U.S. 319 (1937) ("*Palko*").

which used the phrase to limit those federal constitutional rights that qualified for "incorporation" against the states. To accomplish that goal, *Palko* gave the phrase a highly restrictive meaning that only referred to those enumerated rights in the Bill of Rights which deserved to be "incorporated" because "neither liberty nor justice would exist if they were sacrificed."[16] Using the word "implicit" in this way gives it much narrower scope than its more obvious meaning of "implied by." It is more akin to saying that a right must be "integral" or "essential" to the concept of ordered liberty.

This phrase and its narrow meaning were later imported as one of the tests in *Glucksberg*[17] for determining when an unenumerated liberty right is deemed "fundamental" and thus worthy of strict scrutiny protection. In doing so, the Court did not explain what "ordered liberty" meant, but the plain meaning of the phrase (in the sense of "implied by") is not difficult to understand: it is simply a way of recognizing that individuals have an infinite number of natural liberty rights to live their lives as they choose – *the "liberty" component* – so long as they do not infringe the equal rights of others to do the same – *the "ordered" component*. Thus, rather than limiting the "concept of ordered liberty" to some highly restricted set of fundamental strict scrutiny rights, the rights that should be "implicit" in ordered liberty are any liberty rights that do

---

[16] *Id.* at 326.

[17] 521 U.S. at 721.

not, by their nature, conflict with the equal liberty rights of others.[18]

Although the Court has not analyzed "liberty" under the Due Process Clause in precisely this way, the approach is fully consistent with the "explication of individual liberty" given in *Casey*,[19] and later applied in *Lawrence*,[20] where the Court struck down statutes under the broader concept of "liberty" rather than a narrower right of privacy. Applying such a standard for recognizing a provisional liberty right is also effectively what happened in each of the *Meyer* line of cases, including *Roe*, *Casey*, and *Lawrence*. None the rights asserted in these cases involved violations of anyone else's liberty rights.

B. Is the State Exercising a Police Power to Secure and Protect Individual Rights or Merely to Promote a Preferred End?

To repeat: a provisional right is not a protected right. It must still be tested against any countervailing interest asserted by the government (state or federal)

---

[18] To avoid confusion with *Palko*'s use of "implicit in the concept of order liberty," this *amicus* brief will use the phrase "implied by ordered liberty" to indicate its broader meaning of any liberty rights that do not infringe or conflict with the equal liberty rights of others.

[19] 505 U.S. at 853 ("It was this dimension of liberty that *Roe* sought to protect. . . .").

[20] 539 U.S. at 567 ("The [anti-sodomy] statutes do seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.").

in the exercise of a specific police power. Whether a provisional right should become a protected right will depend not only on the level of scrutiny being applied, but also on the strength of police power being asserted. Significantly, not all police powers are equal.

The classic formulation of the police power holds that it may be used for the "safety, health, morals, and the general welfare of the people."[21] This early formulation, however, fails to distinguish between safety and health, on the one hand, and morals and the general welfare, on the other hand. Simply put, the former are stronger exercises of the police power because they secure or protect individual rights; the latter are weaker exercises of the police power when they serve only to promote those interests, values, goals, or ends preferred by the government as reflected in duly enacted statutes and regulations.

This distinction between a stronger primary protective police power and a weaker secondary promotional police power is derived from how the scope of the police power developed over time. Historically, limitations on the police power originated in "the common law principle of *sic utere tuo ut alienum non laedas* (you should use what is yours so as not to harm what is others'), implying that legitimate regulation existed only to prevent concrete harm to specified interests."[22]

---

[21] Samuel Williston, *Freedom of Contract*, 6 Cornell L. Q. 365, 375-376 (1921).

[22] Glenn H. Reynolds and David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 Hastings Constitutional Law Quarterly 511, 511 (2000).

This *sic utere* principle is the source of the primary protective police power. It was only later, at the beginning of the Twentieth Century, that a promotional element was added to the police power under "the new principle of *salus populi est suprema lex* (the good of the public is the supreme law) suggesting that states could regulate as they chose so long as they claimed to be working to promote the public safety, welfare, or morality."[23]

But the primary police power is not simply the stronger power because it developed first. It is stronger because securing individual rights is the core political value in our system of government, as famously captured in the Declaration of Independence: "That to secure these Rights [to Life, Liberty, and the Pursuit of Happiness], Governments are instituted among Men." More than that, securing and protecting individual rights are permanent duties of government, whereas the preferred end that a government promotes at any given time is often ephemeral and rejected by future generations.[24]

Moreover, this Court has itself recognized the weaker nature of the secondary police power in personal autonomy cases like *Lawrence*, where the dissenting view of Justice Stevens in *Bowers* was expressly adopted: " . . . the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for

---

[23] *Id.*

[24] *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967).

upholding a law prohibiting the practice."[25] The same sentiment was also expressed in *Casey* itself, which stated that "[O]ur obligation is to define the liberty of all, not to mandate our own moral code."[26] This now leaves the question of what particular level of scrutiny should govern the (stronger or weaker) police power being exercised.

C. What Level of Scrutiny Applies to Provisional Unenumerated Liberty Rights?

Petitioners are adamant that the appropriate level of scrutiny in this case is not any form of heightened scrutiny, but rational-basis review only.[27] What Petitioners ignore, however, is that all of the *Meyer* line of cases – none of which they challenge other than *Roe* – applied a form of heightened scrutiny greater than the highly deferential rational-basis test that is associated with restrictions on economic and commercial rights.

Here is the operative language in *Meyer*[28] (and followed in *Pierce*[29]): "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." Similarly, as noted above, *Lawrence* struck down

---

[25] 539 U.S. at 577.

[26] 505 U.S. at 850.

[27] Pet. Br. at 19-22, 36-38.

[28] 262 U.S. at 399-400.

[29] 268 U.S. at 534-535.

the Texas statute because it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[30] Ironically, *Lawrence* agreed with *Bowers* that intimate sexual conduct between same sex partners was *not* a "fundamental right" since the Court concluded that it was a protected right without the application of strict scrutiny.[31]

Superficially, these cases sound like rational-basis review, but the rational-basis test that currently applies to economic and social welfare legislation was *not* the test used in *Meyer*, *Pierce*, or *Lawrence*. The standard description of rational-basis review is whether the law in question is "rationally related to legitimate government interests,"[32] but over time three codicils have been added to the rational-basis test that make it inappropriate to characterize *Meyer*, *Pierce*, or *Lawrence* as rational-basis review cases.

First: The Court placed the burden of proof on the challenger. In refusing to strike down an insurance regulation, the Court held in *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*[33] that "the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." Since the record in *O'Gorman* was "barren of any allegation of fact tending to show unreasonableness,"

---

[30] 539 U.S. at 578.

[31] *Id.* at 590 n.2 (Scalia, J., dissenting).

[32] *Glucksberg*, 521 U.S. at 728.

[33] 282 U.S. 251, 257-258 (1931).

the burden was on the challenger to show that the statute was unreasonable.[34]

Second: The Court made the presumption of constitutionality virtually irrebuttable. In *Williamson v. Lee Optical of Oklahoma, Inc.*,[35] the Court upheld a law that only allowed licensed optometrists or ophthalmologists to replace broken lenses, and which prohibited out-of-state eyeglass retailers from advertising in Oklahoma. It did not matter what justification the state actually offered to support the constitutionality of the statute; it was enough for the court to simply *imagine* why the legislature could have enacted the law.[36] Any conceivable reason would do, even if the "law . . . exact[ed] a needless, wasteful requirement . . . ," or the law was "not . . . in every respect logically consistent with its aims. . . ."[37] Under *Williamson*, it was now "enough that there is an evil at hand for correction, and that it *might* be thought that the particular legislative measure was a rational way to correct it."[38]

Third: The plaintiff must now affirmatively rebut every conceivable state justification for the challenged law. In *FCC v. Beach Communications, Inc.*,[39] the Court explained that "[i]n areas of social and economic policy,

---

[34] *Id.* at 258.

[35] 348 U.S. 483 (1955).

[36] *See* Randy E. Barnett, *Scrutiny Land*, 106 Michigan Law Review 1479, 1485 (June 2008; "*Scrutiny Land*").

[37] *Williamson*, 348 U.S. at 487.

[38] *Id.* at 488 (italics added).

[39] 508 U.S. 307, 313 (1993).

a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Thus, it now became the burden of those challenging a law "to *negative every conceivable basis* which might support it."[40]

These three codicils make the rational-basis test a standard of extreme deference that *Meyer*, *Pierce*, *Griswold*, and *Lawrence* plainly did not follow or deem worthy of consideration. Thus, even though these seminal cases used language that resembles rational-basis review, it was not the type of review mandated by the current rational-basis test. Instead, the Court requires greater scrutiny than rational-basis review for personal autonomy cases like *Meyer* and its progeny, but not the strict scrutiny that would apply if these cases concerned "fundamental" rights under the two-prong *Glucksberg* test.[41]

Since *Meyer*, *Pierce*, and *Lawrence* all applied a form of heightened scrutiny, Petitioners are not simply challenging *Roe* and *Casey* by arguing that "heightened scrutiny" should be replaced with "the rational-basis review that applies to all laws";[42] they are also unabashedly undermining the results and reasoning in *all* of these personal autonomy cases. Consequently,

---

[40] *Id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (italics added).

[41] 521 U.S. at 721.

[42] Pet. Br. at 13 (citing *Glucksberg*, 521 U.S. at 728).

Petitioners must either show that *Roe* and *Casey* are not personal autonomy cases at all or concede that they are asking the Court to adopt a scrutiny standard under which the *Meyer*, *Pierce*, *Griswold*, and *Lawrence* plaintiffs would now lose.

This is not to say that the meaning of "heightened scrutiny" requires no refinement. To the contrary, the analysis above suggests that "heightened scrutiny" can and should differ from rational-basis review by discarding the three codicils. Instead of positing a presumption of constitutionality for personal autonomy cases, the Court should clarify that under "heightened scrutiny" the government carries the burden of proof in denying or restricting these liberty rights. No longer should the government be allowed to prevail without putting on evidence of at least a prima facie case. No longer should it be allowed to make up theoretical justifications after the fact. No longer should judges be invited to supply justifications that the government failed to conceive. And no longer should the plaintiff be required to negate every possible reason that could be imagined propping up the government's case like a potemkin village.

What would be the effect of removing the three codicils from modern rational-basis review in personal autonomy and other non-economic liberty cases? It would resemble how courts currently protect the First Amendment natural rights of free speech, press, and peaceable assembly.[43] Under this approach, wrongful

[43] *Scrutiny Land*, note 36, *supra*, at 1499.

acts like fraud, defamation, or trespass can be prohibited, while rightful exercises of speech or assembly can be regulated by "time, place, and manner" rules.[44] But in all cases, exercises of police power must incorporate a suitable means-ends fit that does "not place an *undue burden* on the exercise of these rights, and [shows] they are not pretexts for prohibiting" liberties disfavored by the legislature.[45] In short, the government would have to justify restrictions on personal autonomy rights as in *Lawrence*, which protected "liberty" generally and treated same sex intimate conduct as a provisional liberty right rather than a "fundamental" right under *Glucksberg*.[46]

In *Lawrence*, even without a "fundamental" right at stake, Texas was not given the benefit of an irrebuttable standard of constitutionality; instead, it was required to justify its statute. When the only excuse Texas could provide was moral disapproval by the governing majority that enacted the statute, it lost.[47] This result underscores how differently the Court treated the moral disapproval rationale in *Bowers*. Having initially rejected the "fundamental rights" argument, the *Bowers* Court accepted the same rationale later rejected in *Lawrence* essentially as a platitude requiring no justification by the state under rational-basis review.[48] The fact that Texas had to provide a convincing

---

[44] *Id.*

[45] *Id.* (italics added).

[46] 539 U.S. at 562.

[47] *Id.* at 577-578.

[48] 478 U.S. at 196.

justification in *Lawrence* under a heightened scrutiny standard made all the difference.

D. When Tested Against the Provisional Unenumerated Liberty Right, Does the Purported State Interest Pass Scrutiny?

To be protected under the Due Process Clause, [1] a provisional liberty right must prevail against [2] the police power being exercised [3] in the context of heightened scrutiny. This determination of course is the essence of judging and can only be done on a case-by-case basis after weighing the consequences of denying or restricting the liberty right. Still, *Meyer*, *Pierce*, *Griswold*, and *Lawrence* all show how well this analytical framework applies to personal autonomy cases.

First, the asserted liberty right in each case was "implied by ordered liberty" in that none of these rights infringed or conflicted with other individual rights. Whether it was the right to teach a foreign language (*Meyer*); the parental right of school choice (*Pierce*); a married couple's right to use contraceptives (*Griswold*); or the right of intimate sexual conduct between same sex partners (*Lawrence*), none of these rights implicated, much less infringed the individual rights of any other person. Except for *Griswold*, which eschewed Justice Harlan's due process analysis, each of these rights was therefore presumed to be a Due Process Clause liberty interest worthy of protection unless the

state could furnish a stronger countervailing interest.[49]

Second, none of the governmental interests asserted in these cases were for the purpose of securing or protecting individual rights. Rather they were all exercises of the secondary promotional police power. In *Meyer*, the enactment of the Nebraska statute had the "obvious purpose . . . that the English language should be and become the mother tongue of all children reared in this state."[50] In *Pierce*, Oregon imposed compulsory public education to "reasonably regulate all schools" for the purpose of promoting "good citizenship" and ensuring that "nothing be taught which is manifestly inimical to the public welfare."[51] In *Poe v. Ullman*,[52] and *Griswold*,[53] Connecticut was ostensibly banning contraceptives to "minimize 'the disastrous consequence of dissolute action,' that is fornication and adultery." Lastly, in *Bowers*[54] and *Lawrence*,[55] the state was only claiming to prevent what purportedly was "unacceptable" to most of its populace on grounds of morality.

Thus, in all these personal autonomy cases, there was a provisional liberty right pitted against an

---

[49] *See Meyer*, 390 U.S. at 399; *Pierce*, 268 U.S. at 534; *Lawrence*, 539 U.S. at 567.

[50] 262 U.S. at 398.

[51] 268 U.S. at 534.

[52] 367 U.S. 497, 545 (1961) (Harlan, J., dissenting) (*"Poe")*.

[53] 381 U.S. at 498 (Goldberg, J., concurring).

[54] 478 U.S. at 196.

[55] 539 U.S. at 571.

exercise of the weaker police power to promote what at the time was a majoritarian concept of public morality or welfare. Given the heightened scrutiny applied in each case, *Meyer*, *Pierce*, and *Griswold* all protected the liberty right and *Lawrence* overruled *Bowers* to achieve the same result. More importantly, this analytical approach explains why each of these cases has been broadly accepted into the constitutional canon as well-justified in their results, if not their reasoning. The question now raised by Petitioners is whether *Roe* and *Casey* also fit within this framework as protected personal autonomy liberty rights.

II. *Roe* and *Casey* Should Be Upheld on *Stare Decisis* Grounds Because Their Holdings Were Correct When Limited to Their Facts.

A. Petitioners Fail to Distinguish Provisional Constitutional Rights from Protected Constitutional Rights.

Petitioners begin with the dual assertions that the "Constitution's text says nothing about abortion" and "[n]othing in the Constitution's structure implies a right to abortion or prohibits States from restricting it."[56] But if this is true, then it is equally true of the *Meyer* line of cases, which still protected their respective personal autonomy rights without treating them as fundamental rights worthy of strict scrutiny. The constitutional source of the abortion right is the Due Process Clause, but Petitioners have led themselves

[56] Pet. Br. at 12.

astray by their failure to distinguish provisional constitutional rights from protected constitutional rights. As this Court stated in *Casey*, the "controlling" constitutional text is the word "liberty,"[57] but "liberty" does not in itself mean that the abortion right must be protected. It only suggests that the abortion right is provisional in nature as long as it does not conflict with the equal rights of others. Absent such a conflict, the abortion right would be implied by ordered liberty and thus would qualify as a provisional liberty right that the state must overcome if it wishes to deny or restrict it.

B. Abortion Is a Provisional Unenumerated Liberty Right Because It Is Implied by Ordered Liberty in the Absence of Conflicting Fetal Rights.

Whether the abortion right conflicts with other liberty rights was only discussed tangentially in *Roe* when the Court addressed whether a fetus was a "person" under the Federal Constitution.[58] *Roe* concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn,"[59] and this issue was not re-visited in *Casey* or since. In neither case, however, did the Court address whether fetuses could be "persons" or even citizens with their own liberty rights *under state law*.

---

[57] 505 U.S. at 846.

[58] 410 U.S. at 156-158.

[59] *Id.* at 158.

In fact, both Texas and Pennsylvania failed to raise this issue, and Mississippi does not do so now. Nor is it easy to see how they could have made such a far-ranging claim. The Texas Bill of Rights (then or now) does not reference unborn life and reserves many of its most important rights to "citizens."[60] Even when "person" is used,[61] there is no definition or construction of "person" to suggest that fetuses are included. The Pennsylvania Declaration of Rights follows suit by reserving freedom of the press and speech to "every person";[62] securing the "people" from unreasonable searches and seizures;[63] and granting "citizens" the right of assembly and petition[64] and the right to bear arms.[65]

An *amicus* for Petitioners suggests that the widespread enactment of "fetal homicide laws" shows that these states "recognize that preborn human fetuses are human beings entitled to protection under law."[66] Similarly, the claim is made that fetuses "are recognized as human persons in numerous contexts," including *inter*

---

[60] *See, e.g.*, Tex. Const. Art. 1, Sec. 19 (Due Course of Law); Art. 1, Sec. 23 (Right to Keep and Bear Arms); Art. 1, Sec. 27 (Right of Assembly; Petition for Redress).

[61] *See, e.g.*, Tex. Const. Art. 1, Sec. 8 (Freedom of Speech and Press).

[62] Pa. Const., Art. 1, Sec. 7.

[63] *Id.* at Sec. 8.

[64] *Id.* at Sec. 20.

[65] *Id.* at Sec. 21.

[66] *Brief for Amicus Curiae Illinois Right to Life in Support of Petitioners* at 17 (filed July 20, 2020).

alia prohibitions on capital punishment for pregnant women and tort recovery under fetal wrongful death statutes.[67]

This line of reasoning is faulty because these types of laws do not declare the fetus to be full autonomous persons in their own right. Rather, they protect the fetus for a particular limited purpose that more accurately falls within their primary police power to protect the rights of *parents* to have their unborn child reach birth unharmed. It would be a *non sequitur* to conclude that protecting parental rights to ensure the safety of their unborn children in and of itself creates a right to life belonging independently to the fetus.

The passage of these types of fetal protection laws also says nothing about where the power to declare fetuses as full persons or citizens resides under state law. It may be that a state constitution vests this power in the state legislature, but it would be bootstrapping to assert that the police power to secure and protect rights implies a power to *create* rights in order to protect them. Presumably the power to grant personhood or citizenship rights under state law is "reserved" under the Tenth Amendment, but whether it is reserved to state legislatures or only "to the people" is an open question.

To date, four states have ratified so-called "Human Life Amendments" ("HLAs") to their constitutions,

---

[67] *Id.* at 18.

including Tennessee,[68] Alabama,[69] West Virginia,[70] and Louisiana.[71] Three of these enactments (Tennessee, West Virginia, and Louisiana) are simply rules of construction to clarify that their respective constitutions do not "secure or protect" an abortion right. Most notably they do not grant, or even purport to grant, fetal personhood or citizenship status. The novel and unique enactment is the Alabama HLA, which contains the same rule of construction, but goes further in both (1) recognizing "the rights of unborn children, including the right to life" and (2) giving constitutional protection to "the rights of the unborn child in all manners and measures lawful and appropriate."[72]

The Alabama HLA is not a model of drafting because it obscures the origin and source of the fetal rights being protected. Instead of forthrightly stating that the HLA itself is granting personhood status, it obliquely "recognize[s] and support[s]" fetal rights on the apparent (and controvertible) assumption that such rights have always existed as natural rights.[73] Still, this HLA is quite clear that an "unborn life" has rights under state law, which can be protected by Alabama's primary police power to secure and protect

---

[68] Tenn. Const., Art. 1, Sec. 36 (approved November 4, 2014).

[69] Ala. Const., Amdt. 930 (approved November 6, 2018).

[70] W.Va. Const., Art. 6, Sec. 57 (approved November 6, 2018).

[71] La. Const., Art. 1, Sec. 20.1 (approved November 3, 2020).

[72] Ala. Const., Amdt. 930, Sec. (a) and (b).

[73] The Alabama HLA also fails to clarify whether the fetus has independent standing to enforce these rights and who could sue on behalf of the fetus.

individual rights. Not surprisingly, Alabama has now exercised that police power to enact the stringent Alabama Human Life Protection Act.[74]

Significantly, none of these fetal "personhood" issues are raised in this case because Mississippi has not passed a Human Life Amendment or otherwise created fetal personhood or citizenship rights. Consequently, Petitioners have not and cannot argue that the fetus in Mississippi has independent liberty rights in conflict with those of the pregnant woman. The abortion right therefore qualifies as a provisional liberty right that Mississippi must overcome to justify its Gestational Age Act as constitutional.[75]

C. The States in *Roe* and *Casey* Were Asserting Their Weaker Police Power to Promote Fetal Life, Not Their Stronger Police Power to Protect Fetal Rights.

The lack of fetal personhood or citizenship not only justifies finding that abortion is a provisional liberty right; it is also the determining factor on whether a state is exercising its weaker secondary police power or stronger primary police power. The Texas criminal statute at issue in *Roe* sought to prevent abortions

---

[74] Alabama Act 2019-189 (enacted May 15, 2019), codified at Ala. Code, Title 26, Sections 26-23H-1 to 26-23H-8. Enforcement of the statute was preliminarily enjoined on October 29, 2019. *Robinson v. Marshall*, Civil Action No. 2:19cv365-MHT, M.D. Ala. (filed May 24, 2019).

[75] Miss. Code Ann. § 41-41-191.

from being "procure[d]" or "produced."[76] The only reference to the fetus itself was in the definition of abortion as meaning "that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."[77]

In stark contrast, the one time that the Texas statute referred to an "unborn child" was in Article 1195 (titled "Destroying unborn child"), which banned the destruction of "the vitality or life in a child in a state of being born and before actual birth. . . ."[78] Thus, the statutory scheme at issue in *Roe* itself considered the "fetus or embryo" and the "unborn child" to be legally distinct. Significantly, Article 1195 was the one provision in the Texas abortion statute *not* challenged in *Roe*,[79] suggesting that both sides recognized that the fetus became a person with rights once childbirth began – but not before.

If Texas was not protecting fetal rights in *Roe*, what state interests were considered? The first was suggested by the Court itself and quickly dismissed: "Victorian social concern to discourage illicit sexual conduct."[80] Such moral disapproval by a bare majority was not even advanced by Texas as a justification in *Roe*, and any doubt was removed in *Casey* when it

---

[76] 410 U.S. at 117-118 n.1 (citing Tex. Pen. Code, Articles 1191-1194, 1196 (1911)).

[77] Tex. Pen. Code, Art. 1191.

[78] *Roe*, 410 U.S. at 118 n.1 (citing Article 1195).

[79] *Id.*

[80] 410 U.S. at 148.

re-affirmed that its "obligation is to define the liberty of all, not to mandate our own moral code."[81] Even if moral disapproval is deemed a proper state purpose, it would merely be an exercise of the state's weaker secondary police power.

The second proffered justification was to protect pregnant women from a potentially hazardous medical procedure, and here Texas had "a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient."[82] Protecting this interest would be a proper exercise of the primary police power to secure the woman's right to personal health and safety. What would *not* be proper are medical safety laws that are no longer needed to secure or protect this right,[83] but which instead were enacted as a pretext to deny abortion as a woman's provisional liberty right. Even if a law were adopted only to discourage, but not deny, a woman's right to a particular medical procedure, such a law would merely be an exercise of the state's secondary promotional police power.

The final rationale was "protecting prenatal life," which *Roe* recognized as an "important and legitimate interest in protecting the potentiality of human life,"[84] and which *Casey* stressed was "a substantial state

---

[81] 505 U.S. at 850.

[82] 410 U.S. at 150.

[83] *Id.* at 149.

[84] *Id.* at 162.

interest in potential life throughout pregnancy."[85] Both decisions accepted the protection of fetal life as a "compelling" state interest at the point of viability.[86] Assessing the strength of this state interest in fetal life prior to viability is why abortion has been so difficult to resolve as a legal matter. It is also why so many opponents of *Roe* and *Casey* believe abortion is qualitatively different from *Meyer*-type personal autonomy cases. As Chief Justice Rehnquist framed the argument in *Casey*, "[u]nlike marriage, procreation, and contraception, abortion 'involves the purposeful termination of a potential life.' . . . The abortion decision must therefore 'be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy'."[87]

This is the most acute criticism of *Roe* and *Casey*, but it still misses a key point: No matter how strong the state interest is in protecting fetal life prior to viability, *if there are no fetal rights to secure*, the state is only exercising its secondary police power to promote an interest ostensibly favored by a political majority in a given state. Consequently, it does not matter whether this pre-viability state interest is labelled "legitimate," "substantial," or even "compelling." If the state in question has not recognized the fetus as a "person" or citizen under state law, with rights of its own to protect,

---

[85] 505 U.S. at 876.

[86] *Roe*, 410 U.S. at 163; *Casey*, 505 U.S. at 846, 870.

[87] 505 U.S. at 952 (Rehnquist, C.J., dissenting; citations omitted). *See also* Pet. Br. at 16-17.

an anti-abortion statute must be scrutinized as an exercise of the weaker secondary police power.

D. The Undue Burden Test and Viability Rule Are Good Faith Constitutional Constructions of Heightened Scrutiny for States That Do Not Recognize Fetal Rights.

Even though Texas and Pennsylvania were promoting fetal life rather than securing fetal rights, it could still be argued that their abortion statutes should have been scrutinized under rational-basis review, as Chief Justice Rehnquist did in his *Casey* dissent.[88] In doing so, however, he also acknowledged that "[a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause . . . ,"[89] effectively conceding that abortion is what this *amicus* brief is now calling a "provisional liberty right."

Petitioners reject the "undue burden" standard as "unworkable" because there is "no objective way to decide whether a burden is 'undue'," thereby supposedly preventing "administrability, clarity, or predictability."[90] Petitioners apparently want a standard that is essentially mechanical in application, reducing the art of judging to a paint-by-numbers canvas. Such an approach would eliminate all types of "heightened scrutiny," so that the only alternatives are rational-basis

---

[88] *Id.* at 966 (Rehnquist, C.J., dissenting).

[89] *Id.*

[90] Pet. Br. at 19.

review, in which it is eminently predictable that the government will win; and strict scrutiny, where it is equally predictable that the government will lose.

Petitioners' claim is a bridge too far. As the controlling opinion in *Casey* explained, a regulatory burden becomes "undue" when it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion" prior to viability.[91] This is another way of saying that the stated purpose of the regulation is pretextual and that its unstated but evident purpose is to prevent the exercise of the right. Heightened scrutiny is simply a way of exposing the pretext where the regulation is actually a silent ban.

Still, Petitioners claim that abortion is somehow different because heightened scrutiny fails to account "for the [government] interests at stake" and "broadly diminishes a State's pre-viability interests. . . ."[92] Mississippi, however, plainly is not trying to *accommodate* its stated interests with those of the pregnant woman wishing to exercise her provisional liberty right. It is imposing an outright ban after 15 weeks. Petitioners want a ruling that abortions after 15 weeks are *per se* wrongful conduct. The undue burden standard recognizes that pre-viable abortions are rightful conduct that can only be regulated to serve a state interest as long as the woman can "make the ultimate decision."[93] Under *Roe* and *Casey*, abortions only become wrongful

---

[91] 505 U.S. at 877.

[92] Pet. Br. at 20-21.

[93] 505 U.S. at 877.

conduct at viability (except where the mother's life or health is at risk). This is not a scrutiny issue, but whether abortion is actually a provisional liberty interest prior to viability, which goes to the legitimacy of the viability rule itself.

To determine its legitimacy, it is important to recall that the viability rule, like all levels of scrutiny and the scope of the police power itself, are *constitutional constructions* rather than constitutional interpretations. They are not referenced in any constitutional text, but instead have been developed as juridical tools to give legal effect to the meaning of the text.[94] As such, the viability rule should be retained unless Petitioners can show that it was a bad-faith exercise of constitutional construction, i.e., not faithful to the meaning of the text ("liberty") or its function or purpose.[95]

The viability rule was first adopted in *Roe* because "because the fetus . . . has the capability of meaningful life outside the mother's womb."[96] *Casey* expanded on this rationale by describing viability as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the *independent existence* of the second life can in reason and all fairness be the object of state protection that now

---

[94] *See generally* Randy E. Barnett and Evan D. Bernick, *The Letter and The Spirit: A Unified Theory of Originalism*, 107 Geo. L. J. 1, 10-13 (2018) (distinguishing constitutional interpretation from constitutional construction).

[95] *Id.* at 33-37 (distinguishing good faith construction from bad faith construction).

[96] 410 U.S. at 163.

overrides the rights of the woman."[97] *Roe* and *Casey* treated viability as the point at which the state interest in protecting fetal life becomes "compelling" enough to "override" the woman's provisional liberty right, except where the mother's life or health is endangered. But the more telling way to characterize viability is that since the fetus is now capable of "independent existence," the fetus should be treated as a "person" with its own right to life that the state can now protect with its primary police power.

This is why Article 1195 of the Texas Penal Code in 1973 was justified in calling the fetus an "unborn child" at parturition: there is no logical or ethical difference between a viable fetus and a newborn, except when the mother's life and health are threatened. Only then would a state's exercise of its primary police power to secure the fetus's post-viability right to life fail to "override" the woman's countervailing rights to life and health. By recognizing that the viable fetus should be treated the same as a "person" under state law, *Roe* properly instituted, and *Casey* properly upheld, the viability rule as a good faith constitutional construction.

---

[97] 505 U.S. at 870 (italics added).

E. *Roe* and *Casey* Should Be Re-Affirmed Because They Were Correctly Decided When Limited to Their Facts.

Stare decisis is about "when to overrule erroneous precedent."[98] *Stare decisis* was a contested matter in *Casey* because aspects of *Roe* were found erroneous, causing the Court to reject *Roe*'s trimester framework and adopt a new standard of scrutiny.[99] Here the application of *stare decisis* is straightforward because – given that neither case involved statutes to secure or protect fetal rights – *Casey*'s modification of *Roe* was correct on its merits. As adapted by *Casey*, the "essential holding" in *Roe*,[100] was a proper application of heightened scrutiny in which both of the following are true: (1) before viability the state's exercise of its secondary police power to promote fetal life failed to outweigh the woman's provisional liberty right, which could still be regulated in a way that preserved this right; while (2) after viability the state's exercise of its primary police power to protect fetal rights was sufficient to overcome the women's provisional liberty right, except where her life or health was at stake. Since *Roe* and *Casey* are not erroneous precedent, "the very concept of the rule of law" requires that these precedents be respected.[101]

---

[98] *Ramos v. Louisiana*, 140 S. Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring).

[99] 505 U.S. at 872-873.

[100] *Id.* at 846.

[101] *Id.* at 854.

III. The Decision Below Should Be Affirmed Because Mississippi Does Not Recognize Fetal Rights. Its Position Is Therefore Governed and Rejected by *Roe* and *Casey*.

Unlike Alabama, Mississippi does not recognize the fetus as human life with its own enforceable rights. To the contrary, Mississippi has a history of *rejecting* fetal personhood. Following approval by the Mississippi Legislature, a proposed constitutional amendment, Initiative 26, was placed on the 2011 general election ballot. This measure would have amended Article III of the Mississippi Constitution to define the words "person" or "person" to "include every human being from the moment of fertilization, cloning, or functional equivalent thereof." Instead, it was voted down by a 57.63% to 42.36% margin.[102]

Similarly, the Mississippi Gestational Age Act does not secure or protect any rights granted to fetal life under Mississippi law. The three goals identified in the Act may well be "valid state objectives,"[103] but only one – "protecting the health of women" – is an exercise of the state's primary police power. The *means* chosen to exercise this power, however, is overbroad because it is not limited to "protecting the health of women." The Act bans elective abortions after 15 weeks, but it does

---

[102] *See* https://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment,_Initiative_26_ (2011) (last accessed September 13, 2021).

[103] Pet. Br. at 36.

not make a legislative finding that this medical procedure is itself an unsafe medical practice. It only asserts that there are "significant physical and psychological risks to the maternal patient" inherent in abortion that "increase with gestational age." App. 67a. If abortions can be performed safely after 15 weeks despite these increased risks, then regulations to *reduce* such risks may be valid, but a 15-week ban to remove all risk only serves as a pretext to prevent women from making "the ultimate decision."

Since *Roe*, as modified by *Casey*, should be retained as good law, and Mississippi does not recognize fetal rights, the Mississippi Gestational Age Act is governed by both the undue burden test and the viability rule. An outright ban prior to viability is necessarily an undue burden and thus fails to satisfy the heighten scrutiny required to deny or restrict abortion as a provisional liberty right. The Act is therefore unconstitutional, and the decision below must be affirmed.

CONCLUSION

The Mississippi Gestational Age Act is unconstitutional under *Roe* and *Casey*, which should be reaffirmed on *stare decisis* grounds but limited to states where fetal rights are not recognized. Accordingly, the decision of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

STEPHEN C. LECKAR
Counsel of Record
KALBIAN HAGERTY LLP
888 17th St. NW, Twelfth Floor
Washington, DC 20006
sleckar@kalbianhagerty.com
(202) 223-5600