No. 21-463

In the Supreme Court of the United States

Whole Woman's Health, et al., *Petitioners*,

v.

Austin Reeve Jackson, Judge, District Court of Texas, 114th District, et al., *Respondents.*

ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE CALIFORNIA PROLIFE COUNCIL IN SUPPORT OF RESPONDENTS

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The California ProLife Council is the California affiliate of the National Right to Life Committee, a non-profit, non-partisan, non-sectarian grassroots organization dedicated to restoring legal protection for vulnerable individual lives, particularly those at risk of abortion, infanticide, and euthanasia.

SUMMARY OF ARGUMENT

Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8") creates a private right of legal action against anyone who aids or abets in the abortion of an unborn child once a fetal heartbeat is detected. As, "[i]t is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error," *American Communications Association v. Douds*, 339 U.S. 382, 442-43 (1950), this grant of authority to private citizens is a valid exercise of the Tenth Amendment's authority reserved to the States or to the people.

Abortion precedents *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992) (*aff'g. Roe*) should be overturned. Due process liberty interests must be deemed fundamental and supported by tradition and history.

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[1] Rule 37 statement: All parties consented to the filing of this brief. No counsel for any party authored this brief in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* or its counsel funded it

Michael H. v. Gerald D., 491 U.S. 110, 122-123 (1989). The Court's key abortion precedents fail this test in five significant respects. Specifically, the right to abortion announced in *Roe*, the viability standard of *Casey*, and the health exception to abortion bans asserted in *Doe* have no historical basis and should be rejected. In addition, the text of the Constitution and the historical record in England and America from the common law era up to the mid-twentieth century support the legal personhood of the unborn. Finally, *Roe*'s unwarranted rejection of the historical Hippocratic Oath, *Roe* at 130-132, has led to the ethical degradation of the medical profession. Because the *Roe/Doe/Casey* trifecta are "egregiously wrong" and have had "significant negative jurisprudential or real-world consequences," and any "reliance interests" involved are in fact false expectations set in place by these erroneous rulings, they should be overturned. *Ramos v. Louisiana,* 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring). S.B. 8 should not be rejected on the basis of the constitutionality of abortion. It should be upheld as a constitutional means of protecting unborn children.

ARGUMENT

I. The Common Law and the Nineteenth Century Abortion Statutes Refute the Right to Abortion Announced in *Roe*

A. The Common Law Refutes *Roe's* Abortion Right

The *Roe* decision is based upon a distortion of the common law. *Id. at 132-36.* A proper understanding of English common law is integral to constitutional interpretation. *Smith v. Alabama*, 124 U.S. 465, 478-479 (1888). The *Roe* Court based its holding that a woman has a constitutional right to abort her child on the view that "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century . . . a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today." *Roe* at 140. The Court found that it was unlikely that either pre- or post-quickening abortions were a crime at common law. *Id.* at 132-6. These assertions are untrue and are based on the Court's misreading of the common law commentators and the paucity of common law precedents available for review at the time of the *Roe* decision. An accurate reading of the common law undermines the abortion right.

1. The English Commentators

A brief review of the English commentators disproves *Roe's* view of the common law. In their writings concerning crimes that constitute murder, the English commentators mentioned by the *Roe*

Court -- Bracton, Fleta, Coke, Hale, Blackstone -- all stated that abortion of a "quick" child was criminal, and in some cases, homicide or murder. They did not discuss the criminality of pre-quick abortions, which generally were not charged as murder.

Bracton and Fleta held that abortion of a "formed and quickened" fetus was homicide whether it was self-induced or the result of an attack. 2 Henry de Bracton, *The Laws and Customs of England,* "The crime of homicide and the divisions into which it falls" 341 (George Woodbine ed.,S. Thorne trans. 1977 & 1982) (c. 1256); 1 Fleta ch. 33 (reprt. in 53 Selden Society 60-61 (H.G. Richardson & G.O. Sayles eds. 1953) (c. 1290). The word translated "quickened" is the Latin "animatum," and referred to ensoulment, which it was then believed occurred at fetal formation. It was thought that the unborn became a living human being at this point. Philip Rafferty, *Roe v. Wade: The Birth of a Constitutional Right* 149-150 (University Microfilm International Dissertation Information Service, Ann Arbor, MI 1993) (citing John Connery, *Abortion: The Development of the Roman Catholic Perspective* 96-7 (Chicago, 1977)); *Roe* at 160-61. Before this stage, the unborn were considered to have vegetative life only and could not therefore be the victim of murder, although pre-quick abortions were also charged criminally. Rafferty at 71-2.

Coke, while citing Bracton and Fleta, deviated from them in that he required that the child be born alive and then die of the abortion in order for the crime to be charged as murder. If the child died in the womb, it was charged as a "great misprision."[2] Both

[2] Early common law cases agree with Bracton. *Rex v. Clouet* (Guernsey 1304), Calendar of Chancery Warrants in the Pub.

voluntary and involuntary abortions were chargeable offenses. 3 Edward Coke, *Institutes of the Laws of England,* "Of Murder" 50-51 (1644). The purpose of the born alive rule was evidentiary, to prove that the child had been alive and died as a result of the abortion attempt. *Regina v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601); Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* 199-200 (Carolina Academic Press, 2006). The born alive rule, therefore, did not tend to negate the personhood of the child before birth, but only reflected the limitations in forensics at the time.

Coke used the phrase "quick with childe" in place of Bracton's "formed and quickened," thereby equating the two terms. The term "quick with child," up until the nineteenth century, was understood to be synonymous with fetal formation and animation or being pregnant with a live child, rather than the point of quickening, which occurs later in the pregnancy.[3]

Rec. Off. Prepared Under the Superintendence of the Deputy Keeper of the Rec., A.D. 1244-1326, at 232 (London, 1927)(defendant charged with felony for death "of a child in the womb"); *Rex v. Wodlake*, K.B. 9/513/m23 (1530) (defendant charged with felony); *Rex v. Hokkestere,* JUST 1/547A, m. 3. (1321) (defendant charged with felony); *Regina v. Webb* (Q.B. 1602), Calendar of Assize Rec., Surrey Indictments, Eliz I, at 512 (no. 3146) (*in utero* self-abortion of an unborn "child," charged as a felony).

[3] Rafferty at 163-164 (*citing* Elisha Coles, *A Dictionary. English-Latin. and Latin-English* (1677) ("quick with child" means "pregnant with a fetus or young child"; "to be quick with child" is "to conceive a child."); Samuel Johnson, *A Dictionary of the English Language* (1755), ("quick" as in "a woman quickens with child" means "The Child in the womb after it is perfectly formed.") George Mason, *A Supplement to Johnson's English*

2 Shorter Oxford English Dictionary 2436 (6th Ed., Oxford University Press 2007) ("quick" means "4.a. Orig., pregnant with a live fetus. Later *spec*. at a stage of pregnancy when movements of the fetus have been felt. Chiefly and now only in *quick with child."*). Later, nineteenth century cases in England and America conflated the term "quick with child" with quickening, when a woman feels the child move. It seems to have been the result of legal error or else was a rudimentary means of proving pregnancy. Rafferty at 186-90 (citing *Rex v. Pizzy* (Suffolk Assizes 1808); *Rex. v. Phillips,* 170 Eng. Rep. 1310 (N.P. 1811); *Rex v. Russell*, 168 Eng. Rep. 1302 (K.B. 1832)); *Roe* at 135 fn. 27.

Hale discussed abortion in two separate works. In one, he followed Coke's formula. Matthew Hale, *Pleas of the Crown: Or, A Methodical Summary of the Principal Matters Relating to That Subject,* "Murder" 53 (1678). In the other, he stated that it was not murder or manslaughter even if the child were born alive, though it was a "great crime." His position was based on the lack of sufficient evidence that the abortion attempt was the cause of death. 1 Matthew Hale, *History of Pleas of the Crown,* Ch. XXXII "Of Homicide" 433 (1736).

Blackstone agreed with Coke, employing Coke's term "quick with child" and equating it with the child's being "able to stir in the mother's womb," rather than with the woman's experience of the movement at quickening. 1 William Blackstone, *Commentaries on the Laws of England *129-130.* He

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Dictionary (1801), ("quick" as in, "a woman quick with child" means: "Pregnant with a live child.")

also followed Coke's born alive rule. 4 Blackstone *198.

To summarize, the commentators' writings on abortion were fairly consistent with each other. They all agreed that abortion of a quick (live) child was a crime, with the later commentators requiring, as a matter of proof, that the child be born alive and then die to sustain a murder charge. Therefore, the commentators refute the Court's conclusion that post-quickening, or post-quick with child, abortions were not common law crimes. *Roe* at 136. Furthermore, the commentators' silence on pre-quick abortions in these works discussing murder cannot be taken as evidence that pre-quick abortions were legal, as the *Roe* Court assumed. *Id.* at 132-34. The Court's conclusion that post-quick abortion was not a common law crime is directly contradicted by the commentators, who were themselves contemporaries of the common law.

2. English Common Law Cases

The English common law cases that have come to light since *Roe* confirm that abortion was a crime specifically against the life of the unborn child. Dellapenna at 126. While there were only six known cases at the time of *Roe*, records of well over one hundred English abortion cases have since come to light through the work of historians, in addition to more than a dozen ecclesiastical cases.[4]

In addition to the fact that "quick with child" abortions were criminal, per the commentators, there are numerous cases that refute the *Roe* Court's

[4] For texts of these cases, *See* Rafferty apps. 3-5, 9-19, 21, pp. 501-734.

assertion that abortion before quickening was not a crime. *Roe* at 132. *Rex v. Code*, JUST 1/789, m. 1 (Hampshire Eyre 1281) (defendants convicted of death of an "abortive child as if of the age of one month" and "of such an age that it was unknown whether it was male or female"); *Rex v. Beare,* 2 The Gentleman's Magazine 931-932 (Aug. 1732) (misdemeanor voluntary abortion of a "Child" of less than fourteen weeks gestation); Rafferty at 688 - 692 (citing *Russell*) (defendant charged as accessory to felony suicide in pre-quick abortion where mother died because, under common law, pre-quick with child abortion was an indictable offense). Despite the young age of the deceased child in *Code*, the defendants were convicted of the felonious killing of the "child" indicating that, at least in the early days of the common law, pre-quick abortions were chargeable as felonies. The *Code* defendants were at first imprisoned, but later received a pardon for the killing of a person, i.e., homicide, without malice. Dellapenna at 139.

Self-abortion was virtually unheard of at the early common law as no reliably safe methods existed before 1700. Women more commonly resorted to infanticide. Dellapenna at 126. Nevertheless, many prosecutions have come to light which refute the *Roe* Court's assertion that, at common law, a woman possessed a broad right to terminate her pregnancy. *Roe* at 140-41; *Beare*; *Regina v. Webb* (Q.B. 1602), Calendar of Assize Rec., Surrey Indictments, Eliz I, at 512 (no. 3146) (*in utero* self-abortion of an unborn "child," charged as a felony).

Cases involving prosecutions of accessories to self-abortion where the mother accidentally died also

undercut the Court's assertion that women were free to terminate their pregnancies. The law could not, with consistency, sanction the potentially lethal act of self-abortion while simultaneously condemn the accidental suicide that often occurred. *Russell; Rex v Anonymous* (1670), 1 Hale, *History of Pleas of the Crown* 429-30) (defendant charged with murder for mother's death by self-abortion attempt)*; Rex v. Tinckler* (1781), 1 Edward Hyde East, *A Treatise on the Pleas of the Crown* 354-56 (1803) (defendant charged with murder for assisting abortion); *Rex v. Anonymous* (1750) 1 G.L. Scott & Dr. Hill, A Supplement to Mr. Chamber's Cyclopaedia: Or a Universal Dictionary of Arts and Sciences sub tit. Abortion (London, 1753) (defendant executed for performing abortion on a woman). If self-abortion was an unlawful act leading to criminal charges of murder or accessory to murder when the mother died, it could not also have been a common law right.

To summarize, the English common law cases substantiate the writings of the commentators regarding the criminality of abortion. Contrary to the *Roe* Court's conclusion, both voluntary and involuntary abortions were criminal acts and could be charged as murder in some cases. *Id.* at 136. Furthermore, abortion was an indictable offense both before and after the "quick with child"/quickening stage.

3. American Colonial Cases

Colonial abortion case law similarly disproves the *Roe* Court's assertion that abortion was not a common law crime. *Id.* at 136. American colonial cases were based on the common law. *Roe* at 138. The colonial

cases that have been found indicate that abortion was indeed a crime, whether the child was "quick" or not.

In colonial times, voluntary and involuntary abortions were chargeable offenses, both before and after the "quick with child" stage. *Commonwealth v. Mitchell,* 10 Md. Archives 171-86 (1652, published 1891) ("murtherous intention" in abortion of "child"); *Commonwealth v. Lambrozo,* 53 Md. Archives 387-91 (1663) and *Commonwealth v. Brooks*, 10 Md. Archives 464-65, 486-88 (1656) (murder charge, pre-quickening abortion); *Rex v. Allen*, Newport Cnty. Gen. Ct. Trials: 1671-1724.A n.p. (Sept. 4, 1683 sess.) (woman convicted of attempted self-abortion); *Rex v. Hallowell*, 9 Super. Ct. Records Nos. 113, 173, 175 (Wyndham Cntry., Conn., Super. Ct. Files, box 172 (1745-47) (attempted abortion of "child," no quickening allegation). These American precedents, which followed the English common law, also refute the *Roe* Court's false conclusions about the common law.

B. Nineteenth Century Statutes

1. *The Offences against the Person Act*

England's nineteenth century abortion laws continued the common law practice of criminalizing abortion both before and after a woman was quick with child. England first enacted its comprehensive codification of the common law crimes against persons in 1803 when Parliament passed *Lord Ellenborough's Act,* also known as *The Offences against the Person Act.* Dellapenna at 245-246; 43 Geo. III ch. 58 (1803). According to the Preamble to the Act, its purpose was to provide "adequate means. . . for the prevention and

punishment of" certain "heinous offenses" including poisoning "with intent to procure the miscarriage of women." 43 Geo. III ch. 58, § 1. Clearly a "heinous offence" could not also be a common law right, but instead was considered a crime against an unborn "person," per the title of the Act.

The Act included two sections on abortion and criminalized them both before and after the woman was "quick with child." Section 1 of the abortion provision made it a *capital* felony to attempt to use poison to "procure the miscarriage of any woman then being quick with Child." *Id.* Section 2 made it a non-capital felony to give poison or to use other means "with intent to procure miscarriage or abortion where the woman may not be quick with child at the time, or it may not be proved that she was quick with child." 43 Geo. III ch. 58, § 2. Section 2 of the Act therefore followed the common law cases that prosecuted abortions before the "quick with child" stage and clarified that these were also to be charged as felonies. By punishing abortion attempts, these statutes eliminated the need to prove the child died as a result of the abortion. Section 2 was later interpreted as not applying if the woman was found not to be pregnant. Since abortion procedures posed a serious risk to a woman, applying them only in the case of pregnancy made clear that the purpose of the statute was the protection of fetal life. Dellapenna at 252 (citing *Rex v. Scudder*, 168 Eng. Rep. 1246 (1829))

The 1803 statute was subsequently revised in 1828, in 1837 and in 1861. The 1837 revision removed the quick with child distinction and made all attempts to procure a miscarriage non-capital felonies. 7 Will. 4, 1 Vict., ch. 85 § 6 (1837)). The removal of the "quick

with child" distinction was in response to a growing movement of physicians who recognized that human life began at fertilization, not at quickening or at fetal formation. Rafferty at 70-71; *See also Roe* at 141-42 (physician campaign in America). The 1861 statute added the crime of self-abortion when the woman was pregnant and charged it as a felony, therefore disproving the notion that abortion was a woman's right. 24 & 25 Vict., ch. 100, §§ 58 & 59 (1861).

In summary, the various versions of *The Offences against the Person Act* were a continuation of common law precedent, and reflected a societal rejection of abortion, regardless of the stage of pregnancy. The notion that abortion was a common law right is nowhere to be found in eight hundred years of English common law or statutory history.

2. American Statutes

America's nineteenth century abortion statutes were not "of relatively recent vintage," *Roe* at 129, but were included by the various states in their codifications of the common law in effect from colonial times. Dellapenna at 269. The statutory enactments cured defects, real or perceived, in the common law, in particular the supposed failure to punish abortions performed prior to quickening. Rafferty at 74-75.

The abortion statutes were passed as a direct result of the nineteenth century American Medical Association's crusade to bring abortion law in line with medical science, which had come to recognize fertilization as the beginning of human life. The A.M.A. opposed laws based on "mistaken and exploded medical dogmas" which underlay the quickening distinction and failed to fully protect "the

independent and actual existence of the child before birth, as a living being." *Roe* at 141 (citing *12 Trans. of the Am. Med. Ass'n*. 778 (Twelfth Annual Meeting, 1859)). The concern for unborn life was reiterated in a report by the A.M.A. in 1870. *Roe* at 142; (citing *22 Trans. of the Am. Med. Ass'n*. 268 (1871) ("We had to deal with human life. In a matter of less importance, we could entertain no compromise."). This purpose was confirmed in case law as well. Contrary to the *Roe* Court's assertion that the purpose of the abortion laws was the protection of the mother's health, *Id.* at 151, forty-four appellate decisions from thirty-two states prior to 1973 confirmed that one of the purposes of the abortion statutes was the protection of unborn life. Rafferty at 76, 330-332, fn. 137. Indeed, many doctors involved in the nineteenth century physician's crusade saw in abortion a scourge equal to slavery and the loss of life in the Civil War. Dellapenna at 370.

In response to the physician's campaign, by the time the Fourteenth Amendment was passed in 1868, thirty out of thirty-seven states and six territories had criminal abortion statutes, with twenty-seven of them prohibiting abortion throughout pregnancy. Six of the seven states that lacked abortion statutes in 1868 subsequently adopted criminal abortion statutes by 1896. Kentucky enacted its legislation in 1910. Prior to that, in 1879, the high court of Kentucky had declared abortion a common law crime. Dellapenna at 315 - 18; *Roe* at 174-175 (Rehnquist, J., dissenting). Seventeen states and the District of Columbia classified the crime as "manslaughter," "murder," or "assault with intent to murder" for the death of the unborn child. Most states eliminated the quickening distinction as the basis for a criminal

charge by the end of the century. Dellapenna at 319. Arkansas, Mississippi and Kentucky eliminated the quickening distinction in the twentieth century. *Id.* at 315-16, fn. 10.

Leading nineteenth century American legal commentators Francis Wharton and Joel Prentiss Bishop also concurred that the common law did not require quickening. 1 Francis Wharton, *The Criminal Law of the United States*, § 1220 (5th Rev. Ed. 1861); 1 Joel Prentiss Bishop, *Criminal Law* § 386 (2nd ed. 1858)). Although the *Roe* Court correctly noted that there was disagreement in the nineteenth century caselaw regarding whether pre-quick abortion was criminal at common law, *Id.* at 135 fn. 27, the legal consensus, as reflected in the statutes and by the major American commentators, rejected that view.

The English common law, the nineteenth century statutes, and the writings of Wharton and Bishop make clear that abortion was rejected by the legal community and, through the democratic process, by society in general. The history disproves that in the nineteenth century "prevailing legal abortion practices were far freer than" in 1973. *Roe* at 158. The widespread rejection of the quickening distinction supports the understanding that the common law intended to protect unborn life whenever it could be shown to exist. Medical science simply resolved the factual issue of when human life began. The purported right to abortion asserted by the *Roe* Court was neither "fundamental" nor "rooted in history and tradition." *Michael H. v. Gerald D.* S.B. 8, which protects unborn children from the point that a heartbeat is detected, is much more in line with American and English legal history than the abortion

precedents. Therefore, it should be upheld as a critical step towards providing full legal protection for unborn children.

II. *Casey*'s Viability Standard Is Unsupported

The viability standard of *Casey, Id.* at 870, is not supported by the common law, which instead drew a legal distinction at the point that a woman was "quick with child." Whether "quick with child" referred to fetal formation or quickening, when the mother feels the child's movements, the common law standard clearly was earlier in pregnancy than the *Casey* viability standard, which occurs roughly at twenty-four weeks. Furthermore, the legal consensus in the nineteenth century was that, at common law, abortion was still a chargeable offense before quickening. The nineteenth century statutes discarded the distinction as a basis for a criminal charge, once it became known that the child in the womb was human from fertilization.

The "quick with child" standard indicated the common law's concern with protecting human life whenever it was known to exist, whether at fetal formation or at quickening. There was no concern regarding the child's ability to live independently of the mother. The viability standard sets a dangerous precedent not only for the unborn but also for the medically dependent and disabled. It subjects inalienable human rights to proof of "independence" and exposes vulnerable human beings to exploitation by those who have power over them.

Casey's viability standard is without historical support. For this reason, and because it represents a rejection of the inalienable right to life and promotes

exploitation of vulnerable dependents, it should be rejected. S.B. 8, which protects unborn children before viability, should therefore be upheld.

III. *Doe's* Health Definition Undermines States' Interest in Protecting Unborn Life

The Doe decision provided an expansive definition of the "health" exception, which *Casey* requires for abortion bans after viability. It was without precedent in the history of American abortion laws. *Doe* at 192; *Casey* at 879.

By 1965, forty-eight states plus Puerto Rico permitted abortion only to save the life of the mother. Massachusetts, Alabama and the District of Columbia alone allowed a health exception. 39 *McKinney's Consolidated Laws of New York Annotated,* Penal Laws §§ 1.00 to 139.end 373 (1975)). The liberalization of state abortion laws did not begin to occur until 1967, starting with the state of Colorado. Dellapenna at 600. The Georgia statute at issue in *Doe* was a liberalized statute that allowed abortion if continuation of the pregnancy "would seriously and permanently injure her [mother's] health." *Doe* at 183 (citing Ga. Crim. Code § 26-1202(a)(1) (1968)). However, the definition given for health by the *Doe* Court went beyond even the liberalized Georgia statute to include physical, emotional, psychological, familial, and age factors with no requirement that the health concern be serious or permanent. *Doe* at 192. Virtually any reason a woman might have for aborting her child could be covered by the subjective socio-psychological reasons allowed by the Court. As noted by Justice White, a woman needed only to find a willing abortionist. *Doe* at 221 (White, J.,

dissenting). As a result, the health definition effectively eviscerates any state ban even after viability, giving a single abortionist the right to make a subjective determination of non-physical, non-objective health risks. It effectively prevents any State from furthering its "compelling," *Roe* at 163, "substantial" or "profound," *Casey* at 876-78, interest in protecting unborn life, thereby creating an internal incoherence in the abortion precedents.

The health definition given in *Doe* has no historical basis, creates internal contradictions in the abortion cases, and prevents states from furthering their interest in protecting unborn life. It should be rejected. S.B. 8, which allows abortions for medical emergencies only, properly protects the unborn child's life from unwarranted destruction and should be upheld.

IV. Legal History and the Constitution Support the Personhood of the Unborn Child

A. The Personhood of the Unborn Can Be Inferred from the Criminality of Abortion

The criminality of abortion throughout English and American legal history implicitly affirms the personhood of the unborn. The *Roe* Court reasoned both that the right to abortion would collapse if the unborn were Fourteenth Amendment persons and that the unborn were not persons because of the Court's belief that women were freer to abort in the nineteenth century than in 1973. *Roe* at 156-58. In other words, the right to abortion exists if and only if the unborn are not constitutional persons. By the Court's own reasoning, the proven criminality of

abortion throughout English and American legal history affirms the personhood of the unborn.

English and American common law and statutes consistently referred to the unborn in human terms in legal commentaries, statutory law and case law since the thirteenth century. *See infra* Sec. I. Furthermore, the charges of *man*slaughter, murder, or attempted murder for abortions, also underscore the personhood of the unborn child. *Sims; Code; Mitchell; Lambrozo; Brooks.* One cannot murder a "thing."

The criminalization of abortion as a crime against the "child" infers that the unborn were understood to be legal persons when the Fourteenth Amendment was passed.

B. The Text and History of the Constitution Support Personhood

1. The Term "Person" in the Constitution

The *Roe* Court employed flawed reasoning when it found that the term "person" in the Fourteenth Amendment did not apply to the unborn. *Roe* at 157-59. The Amendment forbids states from depriving "any person" of life without Due Process, and from denying "any person" Equal Protection of the laws. *U.S. Const.* amend. XIV, § 1.

Since the term "person" is not defined in the Constitution, the *Roe* Court reviewed other provisions of the Constitution to determine whether the term had any prenatal application and concluded that it did not. *Roe* at 157-159. However, the constitutional provisions cited by the Court are inapplicable to the unborn not because they are not persons, but rather because the unborn are, as a practical matter,

incapable of serving as Representatives, Senators, President, etc. *E.g., U.S. Const.* art. I, § 2, cl. 2; § 3, cl. 3; Art. II, § 1, cl. 5. These provisions are therefore not germane to the use of the term "person" in the Due Process and Equal Protection clauses, which apply non-exclusively to "any person" without limitations of age, activities, or abilities. While the citizenship clause of the Fourteenth Amendment applies to "All persons born or naturalized in the United States," birth is not a requirement of the Due Process and Equal Protection Clauses. If the drafters of the Fourteenth Amendment had intended that only born persons were to be protected, they simply could have said so.

The Court's reasoning is an example of the logical fallacy of denying the antecedent. Bo Bennett, PhD., *Logically Fallacious: The Ultimate Collection of Over 300 Logical Fallacies* 205 (acad. Ed., 2020). The statement "if A is true, then B is true" does not imply that "if A is false, then B is false." Therefore, the true statement, "If an individual is qualified to be President, then that individual is a Fourteenth Amendment person," does not imply that anyone who cannot qualify to be president is not a Fourteenth Amendment person.

The Court's reasoning also begged the question. Since most of the provisions cited by the Court could not apply to infants either, the Court, consistent with its own logic, could have drawn the line of personhood at some point after birth. The Court's decision to draw the line at birth was arbitrary.

The Court's arbitrary finding that the term "person" in the Fourteenth Amendment does not apply to the unborn violated the rules of logic. The

Court should instead have focused its analysis on the use of the term "person" within the language and meaning of the Fourteenth Amendment itself.

2. Public Meaning of "Person"

The lack of a formal legal definition for a term generally indicates that the plain meaning is the intended meaning. *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929). It follows that the meaning to be ascribed to the term "person" in the Amendment is simply one that would have been understood by a member of the general public at the time of its adoption, i.e., the public meaning. This definition has not significantly changed with time.

The American dictionary in use in 1868 when the Fourteenth Amendment was passed was Webster's. The first two definitions of "person" are: "1. An individual human being consisting of body and soul . . . the body when dead is not called a *person.* It is applied alike to a man, woman or child . . . 2. A man, woman or child, considered as opposed to things, or distinct from them . . . ." Noah Webster, L.L.D., *An American Dictionary of the English Language Vol. II, 278* (S. Converse, 1st Ed., 1828). Therefore, in 1868, the term "person" was synonymous with: human being, man, woman, child. As the unborn were almost universally referred to as "child" in cases and statutes, this indicates that, at the time, the public meaning of "person" included them. *See infra* Sec. I

The second definition of "person" further underscores that the unborn must have been considered persons, as they are not things. Noah Webster, L.L.D. was surely aware of the legal distinction between human beings and things,

persons and property. The unborn must be one or the other. Yet, the *Roe* Court never provided any legal basis for the category of "potential human life" ascribed to the unborn. *Roe* at 150, 154, 156, 159, 163, 170. If, in natural reality, the unborn cannot legitimately be called "things," then legally they should be treated as persons, not property.

Science, the language of nature, teaches that the unborn are indeed persons, not things. While an ovum, a sperm, and a kidney are things, an unborn child from fertilization is at the beginning of a continuous process in the life of a human being until natural death. Ronan O'Rahilly and Fabiola Muller, *Human Embryology & Teratology* 8 (2nd ed., New York: Wiley-Liss, 1996). Because the unborn are living human beings, then, according to the public meaning of "person" in 1868, they would have been considered constitutional persons, not property, which is the only other legal alternative.

In disenfranchising the unborn, the *Roe* Court, by default, relegated them to the status of property over which a mother exercises a near absolute right to have them killed. Before viability, the state cannot place "a substantial obstacle in the path of a woman seeking an abortion," giving the child little chance of survival if the mother is determined. *Casey* at 878. Even after viability, any abortion ban must include *Doe*'s expansive health definition. *Id.* at 192; *Casey* at 879. To illustrate, although California's abortion statute mirrors *Casey*, Cal. Health and Safety Code §123468 (2014), Medi-Cal covers abortions regardless of fetal gestation and without medical justification. *Medi-Cal Provider Manual,* Pt. 2 - Obstetrics, "Abortions" at 1 (2020), *https://files.medi-*

cal.ca.gov/pubsdoco/publications/masters-mtp/part2/abort.pdf. By disenfranchising the unborn, the Court has indeed reduced them to the status of property to be disposed of at the mother's will, if she can find a willing abortionist.

In summary, acceptance of the public meaning of personhood avoids the *Roe* Court's logical and interpretive errors. Holding that natural personhood is sufficient for constitutional personhood maintains the appropriate legal distinction between persons and property. This distinction has been blurred by *Roe* for the unborn, as it was for the slaves before the Civil War and the passing of the Civil War Amendments.

Based on the public meaning of the Constitutional text, *Roe's* finding that the unborn are not entitled to Fourteenth Amendment protections is illogical, arbitrary, and discriminatory and should be rejected. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

3. Natural Law Includes all Natural Persons as Legal Persons

Natural law provides the foundation for our government and constitutional rights. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. -- That to secure these rights, Governments are instituted among Men . . . ." *The Declaration of Independence para. 2 (U.S. 1776).* Per the *Declaration,* the American government exists to secure the natural rights of persons.

These self-evident truths emanate from the "Creator" and the "Laws of Nature and of Nature's God", *Declaration* paras. 1-2, and inform us of the

nature of our rights as well as indicate to whom they belong. A self-evident truth is one that can be gleaned from direct observation. It is self-evident that the unborn are living human beings and that their lives do not emanate from the state. Therefore, their right to life exists by nature apart from the state. Any government that fails to protect human rights jeopardizes its legitimacy. *Declaration* para. 2.

William Blackstone's writings are of particular significance because he related the common law to natural law, which forms the philosophical basis of our founding documents. His *Commentaries on the Laws of England* were "the preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 706, 715 (1999). Blackstone asserted that all natural persons are legal persons. "PERSONS also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us . . . ." 1 Blackstone *119.

Regarding the right to life, the first class of persons Blackstone mentioned was the unborn:

> LIFE is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child

> dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor.
> 1 Blackstone *129-30.

The word "For" in the second sentence indicates that Blackstone inferred the legal personhood of unborn children and of their right to life from the criminality of abortion, despite the fact that an *in-utero* abortion did not constitute murder at the later common law. He understood legal personhood to begin "as soon as an infant is able to stir in the mother's womb," not as soon as the mother is able to feel the stirring at quickening. 1 Blackstone *129. This implies his understanding that fetal formation and animation was the beginning of human life.

Like Blackstone, American commentator Francis Wharton also explicitly affirmed the natural rights of the unborn. He stated that the quickening distinction was "neither in accordance with the result of medical experience, nor with the principles of the common law. *The civil rights of an infant in ventre sa mere [in the womb of its mother] are equally respected at every period of gestation."* Wharton (emphasis added). The writings of Wharton and Joel Prentiss Bishop, *supra,* who also rejected the quickening distinction, dated within a decade before the adoption of the Fourteenth

Amendment, "sum up the tenor of legal opinion around the time the abortion statutes were adopted." Dellapenna at 425.

The *Declaration* asserts that natural law is the basis of our rights. Blackstone, writing on natural law, viewed the unborn "infant" as a legal person possessing the right to life. His use of the term "infant" concurred with the public meaning of "person" in America in 1868. Francis Wharton in 1861 affirmed the civil rights of the unborn child throughout pregnancy. Therefore, natural law, which is the basis of the Constitution, supports the conclusion that the unborn child was considered to be a constitutional person when the Fourteenth Amendment was adopted.

4.The Purpose of the Fourteenth Amendment Was to Uphold Natural Rights

The purpose of the Fourteenth Amendment was to require the states to uphold the natural rights of their residents, which slavery had denied.

Abraham Lincoln appealed to natural law to support his opposition to slavery. "[T]here is no reason in the world why the negro is not entitled to all the natural rights enumerated in the *Declaration of Independence*, the right to life, liberty and the pursuit of happiness." *First Debate with Stephen Douglas,* at Ottawa, Illinois (Aug. 21, 1858); https://www.nps.gov/liho/learn/historyculture/debate1.htm. Lincoln's argument against slavery in his "Speech at Peoria" in 1854 applies equally to the unborn: "If the negro is a man, why then my ancient faith teaches me that 'all men are created equal'; and that there can be no moral right in connection with

one man's making a slave of another. *This Fiery Trial: The Speeches and Writings of Abraham Lincoln* 31-32 (William E. Gienapp ed., 2002). Lincoln understood that the *Declaration* guaranteed natural rights non-exclusively to all men. *Roe*'s denial of the natural rights of the unborn is also a denial of the tenet that all men, regardless of characteristics, are created equal.

Justice Curtis's dissent in *Dred Scott v. Sandford,* 60 U.S. 393 (1856) also underscored that slavery is a violation of natural law, the Constitution and the common law:

> Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, . . . but is inferable from the Constitution and has been explicitly declared by this court. . . . 'But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law.' *Id.* at 624 (Curtis, J., dissenting)

The passage of the Fourteenth Amendment was the consummation of this struggle for the natural rights of all persons. Rep. John Bingham was the main author of Section 1 of the Fourteenth Amendment. *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, Our Documents,

https://www.ourdocuments.gov/doc.php?flash=false&doc=43&page. He stated in his speech before Congress in support of the Amendment that man's rights are based on natural law. In particular, he asserted that the right of self-preservation is based on "the transcendent right of nature, and nature's God" and that the rights of life and liberty are "universal and independent of all State legislatures . . . by the gift of God." *Cong. Globe*, 39th Cong., 1st Sess. 1089 (March 1, 1866). He asserted that the "sacred rights of person" are "the rights of human nature" and that the right of Due Process in life, liberty, and property is "justice which is the highest duty of nations as it is the imperishable attribute of the God of nations." *Id.* at 1094. He believed constitutional rights are based on the natural rights of man which exist apart from any grant of government and which nations have the highest duty to uphold.

Bingham did not provide a technical definition of the term "person" in his speech but used words synonymous with the term's public meaning. *Id.* at 1089 ("man," "person," "people," "woman," "human being"). He did not mention children, but they are clearly included as human beings. Logically, the same would be true of unborn children -- human beings.

Finally, Bingham stated explicitly that the purpose of Section 1 of the Fourteenth Amendment was to require States to uphold the natural rights of all people:

> Is it surprising that essential as they [the framers] held . . . to all the people the *sacred rights of*

> *person*, that having proclaimed them they left their lawful enforcement to each of the States, under the solemn obligation resting upon every State officer to regard, respect, and obey the constitutional injunction?
>
> What more could have been added to that instrument [the Constitution] to secure the enforcement of these provisions of the bill of rights in every State, *other than the additional grant of power which we ask this day*? Nothing at all. *Id.* at 1090 (emphases added).

Therefore, according to its author, the purpose of Section 1 of the Fourteenth Amendment was to require states to enforce the natural/sacred rights of persons. This principle went beyond the immediate concern for the freed slaves and the Southern Unionists. If the drafters had intended to leave open the possibility that the Fourteenth Amendment could be used to disenfranchise a whole class of persons in the future, as *Roe* does, then the purpose of the Amendment would be undermined. No such intent is evident from the debates or the language of the Amendment itself. As human beings and natural

persons, the unborn are therefore constitutional persons.

Since they are constitutional persons, under Equal Protection, a state should no more be able to allow abortion than it should be able to legalize infanticide, honor killings by parents, or religious human sacrifice. Although these are private actions and the Constitution says nothing about them explicitly, such laws would still violate Fourteenth Amendment Equal Protection.

Roe has carved out an exemption from prosecution for the taking of innocent life for only one class of persons -- the unborn -- under cover of "privacy" and the doctor's "right to practice medicine." *Roe* at 153; *Doe* at 199-200. Yet, medical killing is in fact still killing and a deprivation of life. The failure of the Court to protect them is as much an abrogation of their rights as it would be for any other class of individuals. Therefore S.B. 8 should be upheld as a valid state protection of unborn persons.

V. *Roe*'s Rejection of the Hippocratic Oath Has Led to the Ethical Degradation of the Medical Profession

The *Roe* Court's rejection of the personhood of the unborn child in effect obscured what actually takes place in abortion. In the worldview of *Roe/Doe*, abortion did not involve the intentional killing of a human being, as it had been viewed historically. Rather, it was just another medical procedure done for health reasons of the mother alone, with the reality concealed behind euphemisms such as "potential life" and "privacy." The Court discarded what had been the ethical cornerstone of Western medicine for millennia

-- the Hippocratic Oath -- with its admonition to "not give to a woman a pessary to produce abortion." *Roe* at 131.

The importance of the Hippocratic Oath to modern medicine cannot be overstated. Famed anthropologist Margaret Mead observed:

> Throughout the primitive world, the doctor and the sorcerer tended to be the same person . . . He who had power to cure would necessarily also be able to kill. With the Greeks the distinction was made clear. [Physicians] were to be dedicated completely to life under all circumstances, regardless of rank, age or intellect—the life of a slave, the life of the Emperor, the life of a foreign man, the life of a defective child. Maurice Levine, M.D., *Psychiatry and Ethics* 324-325 (George Braziller, Inc., 1972).

Roe/Doe was an enormous step backward for the medical profession and Western culture. No longer can it be said that the medical profession is unequivocally dedicated to the life of the patient. *Roe/Doe* granted doctors a license to kill, and all the euphemisms in the world cannot erase that fact.

VI. The Private Right of Action Created by S.B. 8 Is a Valid Exercise of State Power and of Individual Responsibility

S.B. 8 properly asserts grounds for private legal action in the matter of abortion. The "State" is inherently a construct of human society, and the state's compelling interest to protect human life emanates from the *a priori*, moral obligation of individuals within society to respect and protect the lives of the vulnerable innocent. This moral imperative is a deduction of reason, not personal inclination or "revelation." Kant's Categorical Imperative of this moral necessity to view an individual human life as "an end in itself, not merely as a means to be used by this or that" is a summation of an ordered society's view of moral responsibility. Immanuel Kant, *Groundwork of the Metaphysics of Morals* 37 (Mary Gregor, ed., trans., Cambridge University Press 1997) (1785). The State's obligation to protect life, therefore, is the logical outgrowth of the individual responsibility to respect life. Supreme Court Justice Robert Jackson re-enforced the *a priori* nature of the citizen's role within society. "It is not the function of government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error." *American Communications Association*. The Tenth Amendment affirms that the government's authority originates from the intrinsic rights and duties of the individual.

It has been suggested that the right of private civil action would result in spurious lawsuits in civil courts. However, the local trial court must first

determine standing, as in all civil cases. This would obviate the threat of frivolous lawsuits.

Therefore, the Court should construe S.B. 8's private right of action as valid.

CONCLUSION

The *Roe/Doe/Casey* abortion trifecta fails the tests of law, language, and logic. The history of abortion law refutes the abortion precedents. The inclusive language of the Fourteenth Amendment -- "any person" -- easily includes the unborn as living human beings. There is no evidence that the Amendment's drafters intended to exclude them. It is illogical, arbitrary, and discriminatory to place the right to life at birth.

The abortion precedents are egregiously wrong and have had serious negative real-world consequences. *Ramos* (Kavanaugh, J., concurring). An estimated sixty-two million innocent children have been aborted since 1973. Sam Dorman, *An Estimated 62 million Abortions Have Occurred Since Roe v. Wade Decision in 1973*, FoxNews.com (Jan. 22, 2021), https://www.foxnews.com/politics/abortions-since-roe-v-wade. Women have been misled by the erroneous *Roe/Doe/Casey* decisions into a false reliance on abortion as a solution for contraceptive failure. Killing one's own child should never have been an option.

For these reasons, *amicus* urges the Court to uphold S.B. 8, overturn *Roe/Doe/Casey,* reinstate the status of the unborn as constitutional persons and restore our republic to its proper foundation.

Respectfully submitted,

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