No. 19-1932

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,

Respondents.

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

BRIEF FOR *AMICI CURIAE* ILLINOIS RIGHT TO LIFE AND DR. STEVE JACOBS, J.D., PH.D., IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Contents

Table of Contents

Page

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

STATUTES AND OTHER AUTHORITIES

Page

Page

Page

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Illinois Right to Life (IRL) and Dr. Steve Jacobs, J.D., Ph.D. IRL is an educational not-for-profit corporation that has been dedicated to educating the American public about the medical facts and realities of abortion since 1968. IRL uses a grassroots approach to educate members of the public, legislative bodies, and the judiciary regarding advances in scientific research which demonstrates that a human's life begins at fertilization. Dr. Jacobs is a legal scholar who researches and publishes on the U.S. abortion debate and the case for fetal rights under the U.S. Constitution and international human rights declarations. These facts and principles bear directly on the issues presented in this case, and, for this reason, *amici* believe their brief will assist the Court in analyzing and deciding the case before it.

SUMMARY OF ARGUMENT

The Supreme Court's current viability standard prevents states from protecting previable, preborn human beings from abortion because the Court has not found that a state has a compelling interest to protect previable humans. The Court took this position in *Roe v. Wade*, 410 U.S. 113 (1973), primarily because it said there was no consensus on when a human's life begins, *id.* at 159, and because it said states had been reluctant to give legal protections to preborn human beings in non-

1. All parties have consented to the filing of this brief. In accordance with Rule 37.3, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

abortive contexts, *id.* at 161. However, the facts and laws underlying the justifications advanced by the Court in *Roe* have changed.

Today, the scientific literature and biologists generally, as evidenced by a recent international study of biologists' views, recognize that human beings are fully human biological organisms from the point of fertilization. Viability does not mark a line dividing a human from a non-human. *See* Argument II.B. And fetal homicide laws in 38 states, including Mississippi (Miss. Code Ann. § 97-3-37), recognize preborn human beings as worthy of legal protection. *See* Argument II.C.

This Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), recognized that changes in facts or law can justify reversing even long-entrenched, erroneous prior rulings. The Court in this case has ample grounds to conclude that Mississippi's interest in protecting humans from abortion is compelling at the beginning of a human's life—and thus constitutionally adequate to supersede what the Court found to be a constitutional right to abort—because any standard that prevents a state from providing equal protection to humans is an unconstitutional infringement on a state's Tenth Amendment right to protect life and its Fourteenth Amendment's duty to protect equally all humans, including previable human beings.

ARGUMENT

I. *CASEY* AND *BROWN* SUPPORT REVIEW OF *ROE'S* VIABILITY STANDARD GIVEN CHANGED FACTS AND LAW SINCE *ROE*.

Mississippi's petition for a writ of *certiorari* was granted on the question "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." The answer to this question requires evaluation of *Roe* and its progeny in light of the doctrine of *stare decisis*.

A. *Roe* left open revisiting the viability standard in the event of changed facts and law.

All decisions by the Court are subject to review and reversal since the doctrine of *stare decisis* is not an "inexorable command." *Casey*, 505 U.S. at 854 (citing *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405 (1932) (Brandeis, J., dissenting)). This is especially true of *Roe*, as the Court made several explicit references to how future developments might serve as a basis for overturning the decision, and key conclusions in *Roe* were voiced as tentative and therefore open to revision.

The Court in *Roe* said it could not[2] determine "when life begins . . . at this point in the development of man's

2. Some suggest scientists agreed on the fertilization view before *Roe*: "The New York *Times Magazine* published an extensive study of the new medical specialty of fetology, by the noted medical writer James C. G. Conniff. The author described the moment of conception this way . . . At that moment conception takes place and, scientists generally agree, a new life begins," Charles Rice, *The Vanishing Right to Live*. Garden City, NY: Doubleday & Company, Inc., 1969, at 31. However, there is also evidence that abortion advocates and scientists—who supported the repeal of state abortion

knowledge." *Roe*, 410 U.S. at 159. The Court justified its holding as consistent "with the demands of the profound problems of the present day" in regards to discrimination against pregnant women and the detriments posed by child-rearing. *Id.* at 165. The Court said that the law had "been reluctant to endorse any theory that life . . . begins before live birth or to accord legal rights to the unborn" in non-abortive contexts. *Id.* at 161. And it admitted that if the case for "personhood is established, [Roe's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment," *id.* at 156-157. *See infra* Argument II.B.

These "fact- and time-sensitive move[s]" by the *Roe* Court "left open the possibility that if a sufficient consensus about the beginning of human life emerged, the parameters of abortion rights" and permissible state regulation of abortion "would have to shift with this consensus to protect human life in the womb."[3] Thus, the Court can find that the viability standard was issued as the Court's placeholder until the Nation arrived at a better understanding of the scientific and legal dimensions of abortion.

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bans—cast doubt on the fertilization view because they believed it was "necessary to separate the idea of abortion from the idea of killing." *See A New Ethic for Medicine and Society*, Editorial, California Medicine 113, Sep. 1970, at 67-68, https://perma.cc/D232-XM4G.

3. Jonathan English, *Abortion Evolution: How Roe v. Wade Has Come to Support a Pro-Life & Pro-Choice Position*, 53 Creighton L. Rev. 157, 158 (2019-2020), https://perma.cc/VEV7-C6F2; for a longer discussion, *see* Steven A. Jacobs, *The Future of Roe v. Wade: Do Abortion Rights End When a Human's Life Begins*, 87 Tenn. L. Rev. 769, 780-796 (2020), https://dx.doi.org/10.2139/ssrn.3550442. (cited hereafter as Jacobs I).

B. *Casey* agreed that *Roe*'s viability standard could be updated or overturned given changes in the facts supporting the standard's original justifications.

Roe's tentative approach was echoed in *Casey* since the Court acknowledged that applying the rule of *stare decisis* would not be justified if the circumstances underpinning *Roe*'s jurisprudence changed: "[I]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations." *Id.* at 864. Relevant *stare decisis* factors laid out by the Court included: "[W]hether related principles of law have so far developed[4] as to have left the old rule no more than a remnant of abandoned doctrine" (citing *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173–174 (1989)); and "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855.[5]

This brief identifies changes in facts and law which bear, not on the nature of the so-called "right" to abortion,[6] but on the cogency of Mississippi's claimed

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4. This factor, today, is seen as simply "changed law since the prior decision," *Ramos v. Louisiana*, 140 S.Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring).

5. "[In c]ases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions," *Burnet*, 285 U.S. at 406-407 (Brandeis, J., dissenting). In the present case, if the Court finds that correction is needed, the Court could reasonably follow that practice, as correction through legislation has proved impossible. Attempts by state and federal legislators to legislate are immediately struck down by the courts because previable abortion bans are preempted by *Roe*.

6. While recent developments have eroded *Roe's* cited justifications for abortion rights relating to discrimination against

compelling interest in protecting preborn human life. This is a constitutionally sound analytic path wherein the Court could accept *Roe* as a reasonable holding in light of the facts available to the Court in 1973, but then ask whether *Roe*'s stated justifications for its viability standard survive factual and legal changes over the past 48 years, as evaluated against the factors outlined in *Casey* and recently clarified by the Court in *Ramos*. 140 S.Ct. 1390. If the cited justifications cannot survive, *Roe*'s viability standard would not prevent Mississippi from articulating a compelling interest in protecting preborn human life in the legislation it enacted.

C. The Court's analysis of *Roe*'s viability standard should mirror its approach in *Brown v. Board of Education*.

Since the issue before the Court today is as important in terms of human dignity and the rule of law as it was in *Brown v. Board of Education*, the Court should follow a similar mode of resolution. The Court in *Casey*, recognizing the connection between *Brown* and *Roe,* viewed both as falling into a unique group of cases in which the Court endeavored to resolve a national controversy: "The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe.*" 505 U.S. at 867. For that reason, the Court in *Casey* asked whether it should refuse to follow the *Roe* precedent like the earlier Court had refused to follow *Plessy* when it decided *Brown*. *Id.* at 863-864.

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pregnant women and the detriments posed by child-rearing, *see* Jacobs I at 784-787, 799-803, justifications based on health risks associated with pregnancy and childbirth have not undergone as much change.

The *Brown* Court based its refusal to follow *Plessy* on new facts discovered by social science research cited in the now-famous footnote 11. *Brown*, 347 U.S. at 494, n.11. The research showed that race-based school segregation imposed by the so-called "separate but equal" standard stamped a constitutionally unacceptable badge of inferiority and inequality on African-Americans. The Court concluded that new facts required a new constitutional doctrine that would replace earlier, erroneous precedent that was based on obsolete factual justifications. *Casey*, 505 U.S. at 863-864. Then-Judge Kavanaugh—in the confirmation hearing on his nomination to the U.S. Supreme Court[7]—said that *Brown* was important because "it lived up to the text of the equal protection clause" and took notice of research that proved the "real-world consequences of the [effect of] segregation on the African American students who were . . . stamped with a badge of inferiority."[8] The *Casey* Court underscored the Court's responsibility to change the law in *Brown*: "[T]he *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required." *Id.* at 863.

As it did in *Brown*, the Court should again review changes in facts and law in the almost 50 years since *Roe* in light of its constitutional duty to uphold human dignity

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7. Veronica Rocha, Sophie Tatum, & Brian Ries, *The Kavanaugh Hearing,* CNN, (Sep. 7, 2018), https://perma.cc/X84V-C63B.

8. Justice Kavanaugh had also described *Brown* as "the greatest moment in Supreme Court history." Mark Walsh, *Kavanaugh: 'Brown v. Board of Education' Is Supreme Court's 'Greatest Moment'*, EducationWeek, (Sep. 5, 2018) https://perma.cc/7NQ5-7ATF.

and to treat human beings with equality under the law. *See infra* Argument III. *Amici* believe these changes justify a similar change in constitutional doctrine.

II. FACTS AND LAWS THAT PROVE THE PREBORN ARE NOW RECOGNIZED AS BIOLOGICAL HUMANS AND LEGAL PERSONS CONSTITUTE SPECIAL JUSTIFICATIONS FOR OVERTURNING *ROE*'S VIABILITY STANDARD.

Amici recognize that "[t]o reverse a decision, [the Court] demand[s] a 'special justification,' over and above the belief 'that the precedent was wrongly decided.'" *Allen v. Cooper*, 140 S.Ct. 994, 1003 (2020) (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). The Court in the present case must assess whether the changes in facts and law described are "special justifications" for overturning *Roe*'s viability standard.

A. The Court in *Roe* justified its viability standard on both the lack of a scientific consensus on when a human life begins and an absence of uniform legal protection of preborn humans.

At *Roe's* oral argument[9] and reargument,[10] Texas's assistant attorneys general were unable to defend Texas's

9. After Justice Thurgood Marshall questioned Attorney Jay Floyd, who represented Texas, about the scientific basis for Texas's stance on when a human's life begins, Floyd eventually said: "Mr. Justice, there are un-answerable questions in this field." Transcript of Oral Argument, *Roe v. Wade*, 1971, at 45.

10. Justice Blackmun similarly interrogated Floyd's replacement during the Roe reargument session, but Texas Assistant Attorney General Robert C. Flowers also cast doubt on

legal position that a human's life begins at fertilization. The Court ultimately rejected the state's position, labeling it as indicating merely "one theory of life." *Roe*, 410 U.S. at 162. The Court also claimed this view had "[s]ubstantial problems" because recent data had raised questions on whether conception is a process or an event.[11] *Id*. at 161. The Court held that "the judiciary, at this point in the development of man's knowledge" was "not in a position to speculate as to the answer" because it could find no consensus of experts trained in "medicine, philosophy, and theology" on the "difficult question of when life begins." *Id* at 159. The Court then looked to the law for guidance.

The Court first noted that it could find no previous case "that holds that a fetus is a person within the meaning

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the fertilization view: "QUESTION: . . . Is it not true, or is it true that the medical profession itself is not in agreement as to when life begins? . . . MR. FLOWERS: I think that's true, sir. But from a layman's standpoint, medically speaking, we would say that at the moment of conception from the chromosomes, every potential that anybody in this room has is present, from the moment of conception . . . . QUESTION: But then you're speaking of potential of life . . . . MR. FLOWERS: Yes, sir." Transcript of Oral Reargument of *Roe v. Wade*, 1972, at 23.

11. Some do not recognize that a human zygote is classified as a human until his or her genome is identified at the end of the 24-hour fertilization process, even though all of the zygote's genetic material is present in the pronuclear stage; however, sperm-egg binding is the very first instant at which a human starts his or her life as an organism and one can even be frozen—before the 24 hours of fertilization is complete—and transferred by a clinician before eventually being born. See, e.g., Donna Dowling-Lacey, Jacob F. Mayer, Estella Jones, Silvina Bocca, Laurel Stadtmauer, & Sergio Oehninger, *Live birth from a frozen–thawed pronuclear stage embryo almost 20 years after its cryopreservation*, Fertility and Sterility, Mar. 2011, Vol. 95:3, https://perma.cc/T5DT-48T7.

of the Fourteenth Amendment." *Id.* at 157.[12] Next, it conducted a textual analysis of the constitution to assess whether a fetus should be recognized as a person but decided that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[13] *Id.* at 157. Finally, the Court then looked to the states for guidance on the status of the preborn under the law, but concluded that "in areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn." *Id.* at 161.

The Court could be said to have made a practical decision[14]—or a decision the members felt had the best chance of resolving the abortion debate[15]—in holding that

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12. While the *Roe* Court cited Steinberg v. Brown, 321 F. Supp. 741, 746–47 (N.D. Ohio 1970), it failed to note that the case held that a preborn human is a person within the meaning of the Fourteenth Amendment. For further discussion on the Court's omission, *see* Jacobs I at 848-849.

13. *Cf.* Jacobs I at 797: "Using the [*Roe*] majority's standard for assessing whether a fetus is a 'person,' one could similarly argue that none of the thirteen sections [of the Constitution they analyzed] indicated with any assurance that 'person' has any possible application to infants."

14. The Court's implicit reasoning seems to have been: "If the attorneys for Texas cannot defend the fertilization view and states do not charge a man with homicide after he attacks a pregnant woman and causes the death of her previable child, then why should states be allowed to charge and convict a physician for performing a medical abortion on a consenting pregnant woman?"

15. *See supra* n.3 at 193-194 for a discussion of Justice Blackmun's memoranda in *Roe*. In his first draft opinion of *Roe*,

a state's interest is compelling at viability because "the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications." *Roe*, 410 U.S. at 163. However, the facts and laws underlying those justifications have decisively changed, and the Court can and should reconsider *Roe* in light of the relevant changes.

B. The scientific consensus on the fertilization view has been established by biological observations, the biological and life sciences literature, and an international study on the views of thousands of biologists.

In *Roe,* the Court said that the facts available in 1973 failed to establish a scientific consensus on when a human's life begins. However, a scientific consensus has since been reached and constitutes a "changed facts since the prior decision." *Ramos*, 140 S.Ct. at 1414 (2020). *Amici* have briefed the Court twice[16] on the scientific

Blackmun found no constitutional right to abortion. In his second draft opinion, he found a right to abortion in the first trimester. However, he admitted that while he found "the end of the first trimester is critical," he recognized this point was "arbitrary" and suggested that "any other selected point, such as quickening or viability, is equally arbitrary," Memorandum from Justice Blackmun to United States Supreme Court (Nov. 21, 1972) (on file with the Library of Congress). Justice Blackmun finally settled on viability after Justice Powell advised him that viability would be more "generally accepted" than other standards, Memorandum from Justice Powell to Justice Blackmun (Nov. 29, 1972) (on file with the Library of Congress).

16. Brief of Amicus Curiae Illinois Right to Life Supporting Respondent-Cross-Petitioner at 9-20, June Med. Services, L.L.C.

evidence[17] the Court could point to that establishes the scientific consensus[18] that a human life begins at fertilization. The scientific consensus would serve as a "special justification" and as "strong grounds" to overrule *Roe*'s viability standard. *Id.*

As explained by biologists in an *amici curiae* brief submitted to the Court in this case[19], fertilization marks

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v. Gee, Nos. 18-1323, 18-1460, https://perma.cc/D88E-8U7F; Brief for Amicus Curiae Illinois Right to Life In Support of Petitioners at 10-17, Dobbs v. Jackson Women's Health Org., No. 19-1392, (U.S. *petition for cert. filed* July 20, 2020), https://perma.cc/C5CQ-3FY4.

17. *See, e.g.,* Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and Terminology Revisited*, 8 U. St. Thomas J.L. and Pub. Pol'y 44-81 (2013), https://perma.cc/JP33-Y8BH; *see also:* Rita L. Gitchell, *Should Legal Precedent Based on Old, Flawed, Scientific Analysis Regarding When Life Begins, Continue To Apply to Parental Disputes over the Fate of Frozen Embryos, When There Are Now Scientifically Known and Observed Facts Proving Life Begins at Fertilization?*, 20 DePaul J. Health Care L. 1, 1-10 (2018), https://via.library.depaul.edu/jhcl/vol20/iss1/2.

18. A consensus does not imply unanimity, so the presence of alternative views is not sufficient to suggest there is no consensus view. The fertilization view is the consensus view, which means it is the leading view that is generally agreed upon; this is so because 96% of thousands of biologists have affirmed the fertilization view, and 68% of biologists wrote about the fertilization view—in response to an essay question on when a human's life begins—at a far higher rate than the second-leading view, birth (12%). Jacobs I at 817-818.

19. Brief of Biologists as *Amici Curiae in Support of Neither Party*, Dobbs v. Jackson Women's Health Org., No. 19-1392. The brief was signed by biologists who take various positions on abortion rights and represent top universities such as Cambridge University, Cornell University, and Georgetown University Medical Center. One signatory is a Nobel Laureate in the category of Physiology or

the point at which an organism with a human genome[20] first comes into physical existence and begins developing[21] in the human life cycle[22]. Few disagree and do so on spurious[23] or ableist[24] grounds.

Medicine, who also signed the Humanist Manifesto whose platform recommends unrestricted access to abortion, https://perma.cc/6CR7-CBPF. The brief may be found on the Supreme Court's website.

20. *See supra* n.19 at n.42 for discussion on when the genome first forms.

21. Upon binding of the sperm and egg, the new organism is in the zygotic stage and begins its march along its developmental trajectory by performing fertilization's many sub-processes; within the first five minutes, "the zygote acts rapidly to incorporate the molecular components required for its continued development," Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and Terminology Revisited*, 8 U. St. Thomas J.L. & Pub. Pol'y 44, 56 (2013), https://perma.cc/A22Q-HLX8.

22. To differentiate humans from mere human cells, biologists assess whether a life form with a human genome is developing in the human life cycle. If it is, then it is a human (*noun*) and it is just human (*adjective*) if it is not developing in the human life cycle. This factor is used to distinguish a human's skin cell, liver cell, sperm, egg, or other body cell from a human zygote, embryo, fetus, infant, and other humans.

23. *See* Jacobs I at 827-829 (for a discussion on how "[m]ost opposing arguments to the scientific consensus that a human's life begins at fertilization typically confuse some aspect of the view or focus on aspects of life that are not relevant to the biological classification of humans).

24. Ableism is "[a]ny statement or behavior directed at a disabled person that denigrates or assumes a lesser status for the person because of their disability," Andrew Pulrang, *Words Matter, And It's Time To Explore The Meaning Of "Ableism.*," Forbes, (Oct 25, 2020), http://perma.cc/7S5J-7526. As noted by abortion advocates,

The Court has ample evidence to recognize that—given the consensus on the fertilization view as established by biological classification principles[25], the biological literature[26], and biologists[27]—it is reasonable to hold that human zygotes, embryos, and fetuses are, from a biological perspective, humans since they are undoubtedly members of the *Homo sapiens* species and are classified as such in the same way as all other humans on life's developmental trajectory, including human infants, teenagers, and adults. And this recognition of the humanity of the preborn from the moment of fertilization has legal precedent in state[28] and federal statutes[29].

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people often "portray disability as a tragic state justifying abortion—even for wanted pregnancies," while "[o]n the other side of the debate, anti-abortion advocates use much more empowering language about the experience of parenting children with disabilities and living as an adult with disability." Sujatha Jesudason & Julia Epstein, *The paradox of disability in abortion debates: bringing the pro-choice and disability rights communities together*, CONTRACEPTION 84 (2011) 541–543, https://perma.cc/3GNP-FXED.

25. Biologists use observable genomic DNA to biologically classify an organism as a member of the species to which it belongs. *See generally,* Mariko Kouduka, Daisuke Sato, Manabu Komori, Motohiro Kikuchi, Kiyoshi Miyamoto, Akinori Kosaku, Mohammed Naimuddin, Atsushi Matsuoka, & Koichi Nishigaki, *A Solution for Universal Classification of Species Based on Genomic DNA*, INT'L J. PLANT GENOMICS, 2007, https://perma.cc/X3YT-W4X6.

26. *See supra* n.19 at Argument III.B; *see also* WhenDoesLifeBegin.org, which is a database of over 300 sources on when a human's life begins.

27. *See* Jacobs I at 803-821.

28. *See* Jacobs I at nn.481,523; *see also*: MO. REV. STAT. § 188.026 (2019).

29. *See, e.g.,* Unborn Victims of Violence Act of 2004, 18 U.S.C § 1841 (2004). *Cf.* 1 U.S. Code § 8.

C. Preborn humans are now legally recognized and protected as human persons in abortive and non-abortive legal contexts.

1. Enactment of fetal homicide laws in the majority of states show that, outside of the abortion context, a preborn human is legally recognized as a human before viability.

In its 1973 decision, the *Roe* Court noted that "the unborn have never been recognized in the law as persons in the whole sense." *Roe*, 410 U.S. at 162. This situation has changed markedly since that time, and the Court can find these new laws as evidence of "changed law since the prior decision." *Ramos*, 140 S.Ct. at 1414 (2020). This would serve as a "special justification" or as "strong grounds" to update or overrule *Roe*'s viability standard. *Id.*

Thirty years after *Roe*, and over ten years after *Casey*, Congress passed the Unborn Victims of Violence Act of 2004, 18 U.S.C § 1841 (2004), which is nicknamed 'Laci and Conner's Law' to commemorate Laci Peterson and her unborn son Conner who were both killed by a man who was later convicted on two counts of murder for each of their deaths.

Today, 38 states have enacted laws that protect preborn humans yet apply only to non-abortive homicides. These fetal homicide laws recognize that preborn humans are human beings entitled to protection under the law and, thus, recognize preborn humans as persons from the moment of fertilization.[30] Altogether, preborn humans

30. A listing of the states with fetal homicide laws can be found in *supra* n.3 at English n.132.

are legally recognized and protected in eight abortive and non-abortive contexts. *See* Jacobs I at 847.

2. States are increasingly proposing and enacting laws protective of preborn humans even when abortion is curtailed as a result.

Today, 43 states have enacted laws that protect preborn humans although abortion is thereby restricted. All but one[31] restrict abortion access at the earliest point permissible by *Roe*, and states have recently[32] more emphatically asserted a state interest in the lives of previable human beings by seeking to protect them: (1) after the sixth week since that is recognized as the point at which a preborn human's heart first beats (AL HB314; IA SF359) and (2) after the twentieth week since that is recognized be the point at which a preborn human can feel pain (OH SB 127).

Given the Court's willingness to permit states to protect preborn humans from abortion, albeit solely after viability, and states' desire to do so, it seems to the *amici* that our Nation prizes the protection of humans over the right to abortion. 93% of Americans surveyed on when a human's life is first protectable said that a human's life is protectable once it begins. *See* Jacobs II at 205. This

31. *An Overview of Abortion Laws*, Guttmacher Institute, (Jul. 1, 2021), https://perma.cc/DM32-2N54.

32. Emma Bowman, *More Abortion Restrictions Have Been Enacted In The U.S. This Year Than In Any Other*, NPR, (Jul. 9, 2021), https://perma.cc/K4K6-33MU.

view corresponds[33] with their view on when a person's life begins and when they believe abortion should be restricted—thus, if someone believes that a human's life begins at viability, they likely also believe that a preborn human is a person at viability and believe abortion should be illegal at that point. Further, linear regression models show that an American's view on when a human's life begins is the strongest predictor of their views on legal abortion access.[34] If this is the case, then Americans' lack of knowledge on when a human's life begins[35]—whereby a 2019 poll showed only 38% of Americans affirm the fertilization view and only 9% of young Democrats do[36]—could be driving or intensifying the national controversy on abortion.

Where researchers have previously found the largest opinion differences[37] between Americans and scientists

33. *See* Jacobs II at 120.

34. *Id*. at 218-219.

35. One might think that Americans' rejection of the fertilization view is explained by their understanding of the question as a normative question on when a human first has value or is first deserving of rights, but most Americans rejected the fertilization view when asked when—from a biological perspective—a human's life begins; indeed, only 23% of those who identified as pro-choice affirmed the view and only 23% predicted that biologists would affirm the view. *See* Jacobs II at 209.

36. *See* National Tracking Poll #190555, Morning Consult (2019), https://perma.cc/Z2V4-XUP9.

37. Christie Aschwanden, *There's A Gap Between What The Public Thinks And What Scientists Know*, FiveThirtyEight, (Jan. 29, 2015), https://fivethirtyeight.com/features/theres-a-gap-between-what-the-public-thinks-and-what-scientists-know.

(the 'public/expert opinion gap') on whether it is safe to eat genetically modified foods (37% vs. 88%, respectively), *amici* argue the gap between Americans and scientists on the fertilization view is even greater (38% vs. 96%, respectively). Thus, lack of knowledge on when a human's life begins could be artificially propping up support for abortion rights and artificially suppressing support for fetal rights.

III. SINCE THE PREBORN ARE RECOGNIZED AS HUMANS IN FACT AND PERSONS UNDER THE LAW, THE COURT CAN FIND PREVIABLE ABORTION BANS CONSTITUTIONAL.

A. The Court has ample grounds to find that the Tenth Amendment reserves to Mississippi the right to pass legislation that protects preborn humans from abortion before viability.

1. The history of gestational limits on abortion reveals the centuries-old legal principle that abortion rights end when a human's life begins.

In "The Future of *Roe v. Wade*: Do Abortion Rights End When a Human's Life Begins?," *amici* detail the "history of the connection between abortion laws and contemporaneous views on when life begins."[38] To briefly summarize, for centuries, people believed that a human's life began when a woman first felt her child stir in the womb, so abortion was illegal at that point ('quickening') in English and U.S. common law because[39] "[q]uickening was

38. Jacobs I at 789.

39. This conditional logic—that abortion rights end when a human's life begins—is a simple extension of the principle "Your

a moment recognized by women and by law as a defining moment in human development." *Id*. The quickening view gave way to the fertilization view after early-19th century discoveries[40] of fertilization and embryos—the American Medical Association formed a committee to investigate these discoveries in 1857, and, in 1859, they found the committee "proved the existence of fetal life before quickening has taken place or can take place, and by all analogy and a close and conclusive process of induction, its commencement at the very beginning, at conception itself," so they were "compelled to believe unjustifiable abortion always a crime."[41]

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rights end when my rights begin." Indeed, linear regression models on the connection between Americans' views on when a human's life begins and when abortion should be illegal suggest that: "[A] feminist atheist who recognizes a fetus as a human is more likely to support abortion restrictions than an anti-feminist Catholic who believes a human's life begins at birth." Those who support abortion rights seem to be aware of this connection: "When pro-choice Americans were asked what would happen if the biological fact that a human's life begins at fertilization were to become common knowledge, 90% believed abortion rates would go down and 83% believed that support for legal abortion access would go down," Steve Jacobs, *The Fundamental Question of the Abortion Debate*, Secular Pro-Life Perspectives, (Feb. 1, 2021), https://perma.cc/F2K4-LFY6.

40. M. Elizabeth Barnes, *Karl Ernst von Baer's Laws of Embryology*, Embryo Project Encyc. (Apr. 15, 2014, 4:15 PM), https://perma.cc/3NNX-4ZUK; Dean Clift & Melina Schuh, *Restarting Life: Fertilization and the Transition from Meiosis to Mitosis*, 14 Nature Revs. Molecular Cell Biology, 549, 551 (2013), https://perma.cc/H9XE-83TU.

41. Horatio R. Storer, On Criminal Abortion in America, 13, (1860). The logic suggests that they viewed the elective killing of a preborn human as a crime under homicide statutes that addressed the killing of born humans. *See* Suffolk Dist. Med. Soc'y, Report

At *Roe*'s oral argument and reargument, the justices asked multiple questions[42] on when a human's life begins[43]. Justice Blackmun suggested that "[i]n assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone."[44] This seemed to lower the bar for Texas, but it might be more of a semantic sleight-of-hand that used the discussion of *potential life* as a way to pivot to *life with the potential to survive outside of the womb*, which necessitated the viability standard. Thus, by

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OF THE COMMITTEE ON CRIMINAL ABORTION 8 (1857) ("[T]he child is really alive from the very moment of its conception, and from that very moment is, and should be considered, a distinct being.").

42. *See supra* nn.9-10; "Now, how should that question be decided, is it a legal question, a constitutional question, a medical question, a philosophical question, or a religious question, or what is it?," Transcript of Oral Reargument, *Roe v. Wade*, 1972, at 23. However, according to 80% of the 4,107 Americans who were presented a list of possible authorities based on this question, it is a biological question since biologists are most qualified to determine when a human's life begins. *See* Jacobs I at 804.

43. This question the Court considered was the scientific and descriptive question of when a human is first biologically classified as a member of the *Homo sapiens* species and not the legal or normative question of when a human is protectable, as the Court used viability to determine the latter; it would not have said that it could not "speculate as to the answer" on when life begins, *Roe* 410 U.S. at 159, if it were referring to the legal question of when life is protectable—its legal judgment would have been the answer. The Court's words support a reading that it deemed the scientific question relevant to the case and that it can inform the Court's answer to the legal question, or even determine it. *See* Argument III.B.3.

44. *Id.* at 150.

using viability as a proxy for when a human's life begins, the *Roe* Court can be said to have followed the principle that gestational limits on abortion are appropriately set at the moment a human's life is understood to begin. This can also be used to argue that not only does any possible right to have an elective abortion end when a human's life begins, but that the Court held that the beginning of a human's life also marks the point that a state has a compelling interest in protecting life.

2. The Court can find that the Fourteenth Amendment's Equal Protection Clause establishes that a state's interest is compelling when a human's life begins.

If the Court recognizes that changed facts and laws have eroded *Roe*'s justifications for the viability standard, the Court would have to furnish new justifications for the viability standard. Alternatively, it would have to find that a state's interest in protecting life is compelling at some other point in fetal development.[45] Given the scientific consensus that a human's life begins at fertilization, it is difficult to imagine that the Court would retain the viability standard at all or set it at any point after fertilization, as the Court would then need to hold that states only have a compelling interest in protecting *some humans*.

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45. If the Court wanted to shift to a rational basis standard of review after finding there is no constitutional right to abortion (*see supra* n.6 for discussion), then the Court would merely need to find that Mississippi's law is rationally related to its legitimate purpose of defending life; as the Court in *Roe* held that the interest in protecting humans is important and legitimate, 410 U.S. at p. 163, nothing further would be required for the Court to uphold the law in the present case.

Thus, while most people discuss the Fourteenth Amendment only as pertinent to a woman's right to abort or to a preborn human's constitutional right to equal protection, the amendment can also be read as preventing the Court from restricting a state from carrying out its constitutional duty to provide equal protection to all humans.[46] Effectively, the viability standard not only violates the rights of preborn humans but also forces states to violate the rights of the preborn.

For if the Court refuses to follow these demands and finds that there is not a compelling interest in protecting *all humans*, it would reject the views of justices who formed *Roe*'s majority opinion and held that abortion rights would collapse and fetal rights would be guaranteed should it be shown that a fetus is a human. *See infra* Argument III.B. The Court would also establish a new precedent that stands for the principle that not all human beings are persons within the meaning of the Fourteenth Amendment. The specter of *Dredd Scott* would again walk in the land. States and courts could cite this precedent to defend the denial of equal protection to undocumented Americans[47], members of the LGBTQ community, African-Americans, and members of any other group.

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46. This is especially true due to the sordid history, in this Nation and throughout the world, related to the sometimes arbitrary and sometimes malicious denial of rights to some humans based on immutable traits. This is why human rights declarations are universal, as they stand for the rights of all humans and all humans' recognition as persons under the laws. *See infra* Argument III.B.4.

47. Some use the citizenship clause to suggest that preborn and previable humans are not persons within the meaning of the Fourteenth Amendment since they do not fit the clause's reference to "persons born." That logic could also be used to suggest that non-

While there is disagreement about whether those who passed and ratified the Fourteenth Amendment recognized preborn human beings as persons, any lack of recognition would have arisen from their scientific, rather than moral or constitutional, ignorance. The ratifiers' words and deeds show that they never envisioned a state of affairs, in the U.S., in which some humans are denied the amendment's guarantee of equal protection under law.

B. The Court has ample grounds to recognize that the Fourteenth Amendment applies to all humans, born and preborn, within the U.S. and guarantees each human due process, the right to life, and equal protection under the law.

1. The Fourteenth Amendment was intended to protect every human within the jurisdiction of the U.S.

U.S. Senators Jacob Howard, Lyman Trumbull, and Allen Thurman, who promoted the adoption of the Fourteenth Amendment, all stressed its intended *universal* impact of ensuring the constitutional right of equal legal protection to all conceivable humans without any distinction. Justice Marshall generally held that "[t]he words 'any person or persons' are broad enough to comprehend every human being," *United States v. Palmer*, 16 U.S. 610, 631 (1818), and Justice Black specifically argued that "[t]he history of the [Fourteenth] Amendment proves that the people were told that its purpose was to

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citizens are not persons deserving of equal legal protection because they do not fit the clause's reference to "persons born or naturalized in the United States."

protect weak and helpless human beings." *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting).

2. Overwhelming scientific evidence proves that the preborn are humans.

Today, as discussed in *supra* Argument II.A, the scientific consensus on the fertilization view on when a human's life begins is as clear and convincing as visual observations[48] of fetal development. Each human zygote, embryo, and fetus is a weak and helpless human being and, therefore, a person[49] guaranteed the right to life and to equal protection of the laws under the Fourteenth Amendment[50] of the U.S. Constitution.[51]

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48. A 14,250-page illustrated atlas of human embryology, dubbed The Virtual Human Embryo, documents the stages of human development called the Carnegie Stages of Embryonic Development, https://perma.cc/8F76-FXQH.

49. To argue against this proposition, or to claim that not all biological humans are persons, is to reject materialism and science in favor of a subjective, arbitrarily defined conception of personhood. As a general principle, the question is what could be the principled basis for only recognizing the rights of some biological humans or defining personhood in such a way that necessarily denies such recognition to a group of living humans.

50. Notably, several states criminalized abortion when ratifying the Fourteenth Amendment. Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 Issues L. & Med., 119, 185-186 (2006), https://perma.cc/T9N5-TPYW.

51. For a longer discussion, *see* Jacobs I at 848-854; for the originalist argument, *see* Joshua J. Craddock, *Protecting Prenatal*

3. Since the Fourteenth Amendment guarantees independent rights to human beings, the Court can find that the preborn are human beings guaranteed equal protection under the law.

In *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 779 (1986), Justice Stevens argued that "there is a fundamental and well-recognized difference between a fetus and a human being" but concluded that, "if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures."

In *Webster v. Reproductive Health Services*, 492 U.S. 490, 552-53 (1989), Justice Blackmun (with whom Justice Brennan and Justice Marshall joined, concurring in part and dissenting in part) said that he could not improve on Justice Stevens' statement. Thus, members of the Court who were part of the majority in *Roe* have confirmed that *all human beings* have constitutional rights. If preborn humans are recognized as human beings, then the Court can and must hold that all are guaranteed protection as persons under the Fourteenth Amendment. This step would render obsolete the viability standard. Previable humans would then be protected under each state's homicide laws since the abortion procedure entails the killing of a human person.[52]

Persons: Does the Fourteenth Amendment Prohibit Abortion?, 40 Harv. J.L. & Pub. Pol'y 539, 568–69 (2017), https://perma.cc/5QGV-NMSX.

52. In contemplating the consequences of recognizing a previable human as a person, the Court admitted that: "[i]f this

4. Fetal rights are supported by human rights documents and have been granted in countries within the Western legal tradition.

The United Nations' Universal Declaration of Human Rights[53], the International Covenant on Civil and Political Rights[54], and the American Convention on Human Rights[55] are all statements by international bodies dedicated to human rights that have either explicitly affirmed fetal rights or provided support in principle by declaring that all members of the human family, regardless of any distinction, are persons guaranteed legal rights.

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suggestion of personhood is established, [*Roe*'s] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. [*Roe*'s attorneys] conceded as much on reargument." *Roe*, 410 U.S. at 157.

53. G.A. Res. 217 (III) A, art. 6 (Dec. 10, 1948); while the United Nations might not recognize fetal rights today, that is immaterial to the argument. The declaration was written to apply to all conceivable humans, regardless of any distinction, so it would be against the expressed, written principles and the spirit of the document to claim that it does not apply to all human zygotes, embryos, and fetuses, who are all humans according to biological classification principles, the biological literature, and biologists. For more, *see supra* Argument II.B.

54. G.A. Res. 2200A (XXI), at 4 (Dec. 16, 1966).

55. Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Indeed, 25 nations ratified the treaty, which stated that "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." *For more, see, e.g.,* Jacobs I at 834.

Additionally, Germany[56], Poland[57], Hungary[58], and Malta[59] have all shown that there is support for fetal rights in the Western legal tradition.[60]

5. 194 countries protect previable humans from elective abortion.

A perspective on the extreme nature of *Roe's* viability standard can be gained by examining the abortion laws of other nations. According to the Center for Reproductive Rights[61], one of the respondents in this case, 130 countries ban abortion at fertilization and 64 countries ban abortion at some point at or after fertilization but before viability. The U.S. is joined only by Canada, China, Guinea-Bissau, the Netherlands, North Korea, Singapore, and Vietnam as the only countries that do not restrict abortion before viability.

Thus, out of 202 countries, 194 ban abortion at some point between fertilization and viability (96%) while

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56. *See* Grundgesetz, [GG] [Basic Law], art. 2, § 2, translation at https://perma.cc/853J-HCVW.

57. The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of Jan. 7, 1993, art. 1, No. 17, Item 78 (1993).

58. *See Hungary's Constitution of 2011,* Constitute Project, https://perma.cc/3MV2-ESKA.

59. *See generally* Embryo Protection Act, ch. 524 (2013).

60. For a more extensive discussion of international laws protective of human life, *see* Jacobs I at 833-835.

61. *The World's Abortion Laws*, Center for Reproductive Rights, (Feb. 23, 2021), https://perma.cc/H2VQ-VVDT.

America is one of only 8 countries that do not ban previable abortions (4%). Since 64% of countries ban abortion at fertilization, most recognize that there is no right to have an elective abortion after a preborn human's life begins.

C. Reliance interests were not a bar in *Brown* and are not here.

In *Casey*, the Court did not argue that reliance interests would have prevented it from overturning *Roe*, but it did mention that it is a factor to consider: "[W]hile the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe*." 505 U.S. at 856.

While the Court described its decision in *Roe* as consistent "with the demands of the profound problems of the present day," 410 U.S. at 165, those cited by the Court[62] no longer avail as they have been significantly ameliorated through legislation such as Title IX of the Education Amendments of 1972,[63] the Pregnancy Discrimination Act,[64] the Family and Medical Leave Act ("FMLA"),[65] the Women, Infants, and Children program ("WIC"),[66]

62. Jacobs I at 781-787.

63. 20 U.S.C. §1681 et seq.

64. The Pregnancy Discrimination Act of 1978, U.S. Equal Employment Opportunity Commission, https://perma.cc/MH3S-MLFE.

65. Family Medical Leave Act, U.S. Department of Labor, https://perma.cc/W5XX-LJJP.

66. *Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)*, U.S. Dep't Agric, https://perma.cc/Y5G3-G4T8.

and the Pregnancy Assistance Fund ("PAF").[67] Finally, issues relating to child-rearing have been nullified with the passage of Safe Haven Laws in each state, as they relieve parents of the legal requirement to raise a newborn child.[68] Thus, formerly crucial detriments are now irrelevant to the Court's abortion jurisprudence.

CONCLUSION

For all of the foregoing reasons, *amici curiae* respectfully request the Court to reexamine *Roe* in light of changed facts and laws, to reverse the Court of Appeals' decision, and to uphold Mississippi's 15-week abortion ban. If it holds instead that a state's interest is not compelling at the outset of a human's life, it will in effect reverse a trend set by the ratifiers of the Fourteenth Amendment and supported by justices who wrote or endorsed the majority opinion in *Roe*. The Court's action would set an unprecedented standard that not all humans are persons and that not all humans deserve the Fourteenth Amendment's guarantee of equal protection of the laws. This would be grievously wrong. The Court should not take that step but should uphold Mississippi's law.

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67. Public Law 111–148. For more discussion on these developments, *see*: Jacobs at p. 595: "In 2020, a woman, despite her pregnancy, is often a productive member of society. She can work. She can hold a job . . . Thus, the reality of being pregnant in 1973 and most of the profound problems pregnant women faced at that time . . . no longer exist. The Court no longer needs to protect abortion rights simply to ensure a pregnant woman can be a productive member of society."

68. *See* Child Welfare Info. Gateway, Infant Safe Haven Laws (2016), https://perma.cc/J3YY-5QA8.

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