The Constitutional Court of Chile

[Case name & number]

Brief of Americans United for Life

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Interest of the Amicus Curiae

Founded in 1971, two years before the U.S. Supreme Court's decision in *Roe v. Wade*, as the first national legal organization in the United States devoted to protecting the inviolability of human life, Americans United for Life (AUL) has been the legal architect of the cause for life in the United States. AUL's mission is comprehensive legal protection of human life from conception to natural death. AUL or its lawyers have been involved in every abortion-related case before the U.S. Supreme Court since *United States v. Vuitch*, 402 U.S. 62 (1971), including AUL's successful defense of the Hyde Amendment before the U.S. Supreme Court in *Harris v. McRae*, 448 U.S. 297 (1980). At the state, national, and international levels, AUL has worked to advance the protection of human life through law and legislation. More information on AUL's work can be found at its website, www.aul.org.

Introduction

In deciding this case, the Constitutional Court should not rely in any way upon the abortion decisions of the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973) or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Roe v. Wade*, on which the 1992 decision in *Casey* is based, was wrongly decided and is a divisive, unworkable, and fragile decision, which has been weakened as precedent by intervening legal, political, and social changes in the United States. In light of the position of the current U.S. presidential administration promising to appoint justices to the U.S. Supreme Court who oppose *Roe* specifically and the philosophy of judicial activism that underlies *Roe* generally, it appears that *Roe* will eventually be overturned. Citing judicial decisions applying *Roe v. Wade*, scholarly criticism of *Roe v. Wade*, and legal developments in the U.S. since *Roe*, this brief details compelling reasons why the Constitutional Court should not rely upon the seriously flawed, unsettled, and unstable precedent of *Roe v. Wade*.

I. The Extreme Scope of *Roe v. Wade* Conflicts with International Standards.

The U.S. Supreme Court (Supreme Court) held in *Roe v. Wade*, 410 U.S. 113 (1973), that a woman has a federal constitutional right to "terminate pregnancy" before fetal viability, and that the states must allow abortion even after viability for any "health" reason as determined by the abortion provider. 410 U.S. at 164-65.[1] The Supreme Court has consistently defined the right created in *Roe* as the right to "terminate pregnancy."[2] *Doe v. Bolton*, 410 U.S. 179 (1973), the companion decision to *Roe*, defined "health" as "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." 410 U.S. at 192. The Supreme Court specifically said that *Roe* and *Doe* "are to be read together," 410 U.S. at 165. *Doe*, 410 U.S. at 189 ("What is said there is applicable here….").

Doe has been applied by several US federal courts as holding that the states must allow abortion after fetal viability for any "health" reason including emotional well-being.[3] The Court

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[1] See *Colautti v. Franklin*, 439 U.S. 379, 386-87 (1979) ("after viability, the State, if it chooses, may regulate or even prohibit abortion except where necessary, in appropriate medical judgment, to preserve the life or health of the pregnant woman" (citing *Roe*, 410 U.S. at 163-64); id at 394 ("to allow the physician to make his determination in the light of all attendant circumstances -- psychological and emotional as well as physical -- that might be relevant to the well-being of the patient"); *Planned Parenthood v. Danforth*, 428 U.S. 52, 61 (1976) ("viability, a point purposefully left flexible for professional determination.…").

[2] *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) ("to terminate her pregnancy" (quoting Casey); *Planned Parenthood v. Casey*, 505 U.S. at 846, 850, 852, 853, 859, 869, 870, 876, 887 (1992) ("terminate her pregnancy"); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983) ("terminate her pregnancy"); *Harris v. McRae*, 448 U.S. 297, 312, 316 (1980) ("the freedom of a woman to decide whether to terminate her pregnancy"); *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) ("her freedom to decide whether to terminate her pregnancy") *Roe*, 410 U.S. at 153 ("a woman's decision whether or not to terminate her pregnancy"), 163.

[3] See ACOG v. Thornburgh, 737 F.2d 283, 299 (3d Cir. 1984) ("It is clear from the Supreme Court cases that "health" is to be broadly defined. As the Court stated in *Doe v. Bolton*, the factors relating to health include those that are "physical, emotional, psychological, familial, [as well as] the woman's age." 410 U.S. at 192."), aff'd, *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747 (1986); *Women's Med. Prof. Corp. v. Voinovich,* 130 F.3d 187, 209 (6th Cir. 1997) ("*Doe* and *Vuitch*--which both involved regulations essentially prohibiting, as opposed to delaying, abortions--strongly suggest that a State must provide a maternal health exception to an abortion ban that encompasses situations where a woman would suffer severe mental or emotional harm if she were unable to obtain an abortion. Moreover, *Roe* and *Doe* were decided on the same day and "are to be read together." ***Roe***, 410 U.S. at 165. Therefore, *Roe*'s prohibition on state regulation when an abortion is necessary for the "preservation of the life or health of the mother," *id.*, must be read in the context of the concept of health discussed in *Doe*, *see* 410 U.S. at 191-92."), cert. denied, 523 U.S. 1036 (1998); *Schulte v. Douglas*, 567 F.Supp. 522 (D. Neb. 1981) (applying broad definition of "health" to strike down post-viability limits), aff'd sub. nom., *Womens Servs. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) (per curiam); *Margaret S. v. Edwards*, 488 F. Supp. 181, 196-97 (E.D. La. 1980) (applying broad definition of

has never explained or justified its "health" exception after viability. The Court has never explained whether the health exception is based on a balance of harms or relative safety or self-defense rationale. Stephen G. Gilles, *Roe's Life-or-Health Exception: Self-Defense or Relative-Safety*? 85 Notre Dame L. Rev. 525 (2010).

Roe and *Doe* eliminated all existing abortion laws in the 50 states. 410 U.S. at 166 ("the Texas abortion statutes, as a unit, must fall."). Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* 1 & nn.1-2 (2013) (citing sources). None were left standing, creating a serious public health vacuum that has never been filled. Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 Villanova. L. Rev. 45 (2012).

Roe has not been followed internationally. The U.S. is one of only four nations, of 195 around the world, which allows abortion for any reason after fetal viability, and one of only 7 nations that allows abortion after 20 weeks. Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 Nw. U. L. Rev. 249, 261-65 (2009); Ctr. for Reproductive Rights, The World's Abortion Laws 1-2 (2009), available at: http://fidakenya.org/wp-content/uploads/2011/03/Worlds-Abortion-Laws-2009.pdf. The sweeping edict at the heart of *Roe v. Wade* is inconsistent with international law.

II. *Roe v. Wade* was not well-reasoned or rightly decided

Roe is undoubtedly the most controversial decision of "the modern era" in the United States, perhaps since *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Jack M. Balkin, ed,, *What Roe v. Wade Should Have Said* (NYU Press 2005). Dissenting Justices in subsequent years recognized that "[t]his Court's abortion decisions have already worked a major distortion in this Court's constitutional jurisprudence." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). Over the past 44 years, *Roe* has been subjected to regular, severe and continuing criticism that it was wrongly decided. *Payne v. Tennessee*, 501 U.S. 808, 827-830 (1991).[4] "Many renowned constitutional scholars…have recognized the lack of any constitutional foundation for *Roe*." Clarke Forsythe & Stephen Presser, Restoring Self-Government on Abortion: A Federalism Amendment, 10 Tex. Rev. of Law & Pol. 301, 313-316 nn.62-72 (2005) (collecting sources).

That criticism continued at *Roe*'s 40th anniversary in 2013. Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 Hastings Const'l L. Q. 187, 194 n.42 (2016) (citing symposia); Colloquium: The Fortieth Anniversary: *Roe v. Wade in the Wilds of Politics*, 74 Ohio St. L. J. 1 (2013); Symposium, *Roe v. Wade at 40*, 24 Stanford Law & Pol Rev. Issue #1 (2013);

"health" to invalidate post-viability limits), aff'd on other grounds, 794 F.2d 994 (5th Cir. 1986). To put it another way, the Court has stated that the States must give doctors discretion to use their medical judgment to determine whether an abortion is "necessary" to preserve the mother's "health." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 327 (2006) ("…our precedents hold, that a State may not restrict access to abortions that are '"necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" (citing *Casey*, 505 U.S. at 879, *Thornburgh*, 476 U.S. at 768-69 (facially invalidating post-viability limit)); *Casey*, 505 U.S. at 872 ("provided the life or health of the mother is not at stake"), 505 U.S. at 879 (reaffirming *Roe*'s holding that states may prohibit abortion after viability "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.")

[4] See Dellapenna, Dispelling the Myths 687 n.433 (2006) (collecting sources); Stephen Gilles, Why the Right to Elective Abortion Fails *Casey*'s Own Interest-Balancing Methodology—and Why It Matters, 91 Notre Dame L. Rev. 691 (2015); Richard S. Myers, Re-reading Roe v. Wade, 71 Wash. & Lee L. Rev. 1025 (2014); John M. Breen, Modesty and Moralism: Justice, Prudence and Abortion, 31 Harv. J. L. & Pub. Pol. 219, 260 n. 172 (2008) (citing sources); Richard Gregory Morgan, *Roe v. Wade* and the Lesson of the Pre-Roe Case Law, 77 Mich. L. Rev. 1724 (1979); Arnold H. Loewy, *Why* Roe v. Wade *Should Be Overruled*, 67 N.C. L. REV. 939 (1989); Horan, Grant & Forsythe, Two Ships Passing in the Night: The White-Stevens Colloquy on Roe v. Wade, 6 St Louis U. Pub. L. Rev. 229, 230 n.8 (1987) (collecting sources).

Symposium, Roe *at 40: The Controversy Continues,* 71 Wash & Lee L. Rev. Issue #2 (Spring 2014).

A. <u>There is No Historical Legal Foundation for a Right to Abortion</u>.

Roe adopted an historical rationale for the "right" to abortion that has been subjected to intense, exhaustive, and sustained criticism. Joseph Dellapenna, *Dispelling the Myths of Abortion History* 15 & n.71-72 (citing sources), 97-110, 125-84, 687-695 (Carolina Academic Press 2006); John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions,* 22 Issues L. & Med. 3 (2006); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15, 38 (1992); Horan, Forsythe & Grant, *Two Ships Passing in the Night: An Interpretavist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 St. Louis U. Pub. L. Rev. 229, 272-73 (1987) (compiling existing scholarly criticism). Like the rest of *Roe*, that historical rationale was not based on record evidence or subjected to the adversarial process. See Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (2013).

The Supreme Court did not justify abortion as a fundamental right in *Roe*. Abortion would clearly not qualify as a fundamental constitutional right if the *Roe* Court had applied the proper analysis for a fundamental constitutional right recognized before *Roe* and reaffirmed since *Roe*, because there is no evidence that any right to abortion was "deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); *Glucksberg v. Washington*, 521 U.S. 702, 721 (1997).[5]

The common law treated human life as special, and protected it extensively. One of the first U.S. Supreme Court Justices, James Wilson, a signer of both the Declaration of Independence and of the U.S. Constitution, noted:

> With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.[6]

The best available evidence—and the evidence of the history of Anglo-American law prohibiting abortion has grown considerably since *Roe*—indicates that abortion could not qualify as a constitutional right, let alone a fundamental right, at any point in Anglo-American history prior to *Roe*. *Roe*'s historical account was criticized at the time, 410 U.S. 113, 174-77 (Rehnquist, J., dissenting); Robert A. Destro, *Abortion and the Constitution: The Need for A Life-Protective*

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[5] See also *Duncan v. Louisiana,* 391 U.S. 145, 148-49 (1968) ("whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'"); *Griswold v. Connecticut,* 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) ("Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) ("Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'?")); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"); *Lochner v. New York*, 198 U.S. 45, 76 (Holmes, J., dissenting) ("I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.").

[6] 2 The Works of James Wilson 596-97 (R.G. McCloskey ed. 1967).

Amendment, 63 Cal. L. Rev. 1250 (1975); Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973)) and has been criticized since.[7]

The English common law prohibited abortion at the earliest point that the law could detect that a developing human was alive pre-natally. Numerous English common law cases treated abortion as a crime before the crime was first codified in the English abortion statute of 1803 (Lord Ellenborough's Law). Dellapenna, *Dispelling the Myths*, at 127-149 & n.18; John Keown, *Abortion, Doctors and the Law: Some Aspects of the Regulation of Abortion in England from 1803 to 1982* (1988); Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 Geo. L. J. 395 (1961) (Part 2). As one scholar has noted, "the authors of the [nineteenth] century's two leading American treatises on the law of crimes (Joel Prentiss Bishop and Francis Wharton) both concluded that abortion at any stage of pregnancy was a common law crime." Dellapenna, *Dispelling the Myths*, at 425.

In *Roe*, the Court pointed to two common law rules—the quickening rule and the born alive rule—as though they limited the common law's protection of human life, but the Court failed to understand them by ripping them out of their contemporary medical context. 410 U.S. at 132-136, 161-62. The quickening rule and the born alive rule were *evidentiary* rules, not *substantive* rules, necessitated by the primitive state of contemporary medical science. Dellapenna, Dispelling the Myths, 260, 298, 464; Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 562 (1987).

The common law progressively prohibited abortion as medical understanding allowed more comprehensive legal protection, culminating in the English statutory prohibition of 1803. John Keown, *Abortion, Doctors and the Law: Some Aspects of the Regulation of Abortion in England from 1803 to 1982* (1988). Whether abortion was a misdemeanor or a felony, it was a *crime* and not a right at any time of Anglo-American legal history. The best evidence of the common law is that abortion was a crime at least after quickening, and quickening was significant as the first legal evidence of life. Dellapenna, Dispelling the Myths, Chapter 3-4, pp. 125-228.

Fetal viability was never considered significant by the common law or statute law. Dellapenna at 593 & n.185; David Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639 (1980); Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus: A Case of Cessation of Constitutionality, 1664-1968*, 14 N.Y. L. Forum 411, 423, 424 (1968) ("viability was never mentioned by common-law judges or treatise writers."). Viability only began to surface as a rationale in judge-made tort law, but has since declined in significance. *Hamilton v. Scott*, 97 So.3d 728 (Ala. 2012) (Parker, J., compiling criticism of the viability rule).

Hence, the English statutory prohibition of 1803 extended existing legal protection (Keown, Abortion, Doctors, and the Law; Dellapenna, Dispelling the Myths, Chapter 5, pp. 229-262), and American state legislatures in the 19th century discarded the quickening rule and extended legal protection for prenatal human life throughout pregnancy. Dellapenna, Dispelling the Myths, Chapter 6, pp. 263-320; James Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L. J. 29 (1985).

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[7] See e.g., Dellapenna, Dispelling the Myths, at 125-34; John Keown, *Abortion, Doctors and the Law: Some Aspects of the Regulation of Abortion in England from 1803 to 1982* (1988); Gilles, 91 Notre Dame. L. Rev. at 737-753 (2015) (criticizing the historical account in *Roe*); Philip Rafferty, Roe v. Wade: The Birth of a Constitutional Right (University Microfirm, Ann Arbor Michigan 1993); Anthony M. Joseph, The "Pennsylvania Model": The Judicial Criminalization of Abortion in Pennsylvania, 1838-1850, 49 Am. J. Legal Hist. 284 (2007); John Keown, Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions, 22 Issues in Law & Med. 3 (2006); James S. Witherspoon, Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's L. J. 29 (1985).

With the born alive rule, the common law applied another evidentiary rule—not in property law but only in criminal law—to protect people from being punished for a capital crime in a time of uncertain evidence. Dellapenna at 192, 464.[8] Moreover, the practical application of the born alive rule shows how the common law recognized that the prenatal fetus was a human being at the earliest point that it could be determined to be alive: if the child was injured at any point in pregnancy and died after live birth from those injuries, the law treated that as a homicide. See e.g., *Morgan v. State*, 148 Tenn. 417, 421, 256 S.W. 433, 434 (1923) (injury to pre-natal child while pre-viable that resulted in death after birth was a homicide); *Regina v. West*, 175 Eng. Rep. 329 (N.P. 1848) (injury to pre-viable child in the womb that resulted in death after live birth was a homicide). It was a gross misunderstanding of the born alive rule to say, as the *Roe* Court did, that "the law has been reluctant to endorse any theory that life…begins before live birth…." 410 U.S. at 161. To the contrary, if the child was injured at *any* point of gestation, and born alive (instead of stillborn) and died thereafter, a homicide charge could be brought for the injury in the womb at any time of fetal development. The born alive rule was about location (inside or outside), not gestation.

There is no reliable historical evidence that abortion was ever considered a right—in contrast to a crime progressively prohibited as medical knowledge allowed—at common law. To the contrary, the States had progressively extended legal protection for the unborn child. Dellapenna, Dispelling the Myths, at 315-321; Witherspoon, 17 ST. MARY'S L.J. 29 (1985).

These numerous problems suggest why the U.S. Supreme Court abandoned any historical justification for *Roe* by the time of its decision in *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989).

B. *Roe* adopted a key medical assumption—that abortion is safer than childbirth—that is not verified by existing medical data.

Without any support in any evidentiary record, the *Roe* Court rested several elements of the structure of *Roe* on the assumption that "abortion is safer than childbirth." 410 U.S. at 149. In *Akron*, the Court referred to this as "*Roe*'s factual assumption" and held that the states retained an interest in verifying its continued validity. *Akron,* 462 U.S. at 430 n.12. As with all the other sociological and medical premises of *Roe*, there was no record evidence on this point. And the *Roe* Court did not cite reliable data that verified that factual assumption; there was none in the record in either case. It was a factual assumption that the Court adopted on appeal. Clarke D. Forsythe, *The Medical Assumption at the Foundation of Roe v. Wade and Its Implications for Women's Health*, 71 Wash. & Lee L. Rev. 827 (2014).

In any case, there is little reliable medical evidence that abortion is safer than childbirth. Calhoun, *The Maternal Mortality Myth in the Context of Legalized Abortion*, 80 Linacre Quarterly 264 (2013); John Thorp, *Public Health Impact of Legal Termination of Pregnancy In the US: 40 Years Later*, Scientifica, Article ID 980812, available at http://dx.doi.org/10.6064/2012/980812 (January 2013). That assumption collapses certainly with late term abortions. Bartlett, et al., Risk Factors for Legal Induced Abortion-Related Mortality in the United States, 103 Ob & Gyn. 729, 729 (2004) ("Compared with women whose abortions were performed at or before 8 weeks of

[8] "[P]roperty and probate law held a child en ventre sa mere ("in its mother's womb") was "in esse [in actual existence] from the time of conception…." Roden, 16 St. Thomas L. Rev. at 212-213. Allaire v. St. Luke's Hospital, 56 N.E. 618, 641-42 (Ill. 1900) (Boggs, J., dissenting).

gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes.").

This is reflected, in part, by Chile's own experience. As one of this brief's authors noted:

> A 2012 study of maternal mortality in Chile relied on fifty years (1957–2007) of official data from Chile's National Institute of Statistics. The authors looked at factors likely to affect maternal mortality, such as years of education, per capita income, total fertility rate, birth order, clean water supply, sanitary sewer, and childbirth delivery by skilled attendants. They also looked at pertinent educational and maternal health policies, including legislation that has prohibited abortion in Chile since 1989, to assess the effects of these policies on maternal mortality. One of the most striking findings is that, contrary to widely held assumptions, prohibiting abortion in Chile did not result in an increase in maternal mortality. In fact, maternal mortality declined after Chile's 1989 abortion prohibition was enacted. From 1957 to 2007, the overall Maternal Mortality Ratio or MMR (the number of maternal deaths related to childbearing divided by the number of live births) declined by 93.8%, from 270.7 deaths per 100,000 live births in 1957 to 18.2 deaths per 100,000 live births in 2007. After abortion was made illegal in 1989, the MMR continued to decline—from 41.3 to 12.7 per 100,000 live births (-69.2%). Chile has the lowest maternal mortality ratio in Latin America.

Clarke D. Forsythe, The Medical Assumption at the Foundation of *Roe v. Wade* and Its Implications for Women's Health, 71 Wash. & Lee L. Rev. 827, 855-56 (2014) (citing Elard Koch & John Thorp et al., *Women's Education Level, Maternal Health Facilities, Abortion Legislation and Maternal Deaths: A Natural Experiment in Chile from 1957 to 2007*, PLOS ONE, May 2012, at 2; internal citations omitted).

Consequently, major premises of the *Roe* opinion—the historical assumptions about abortion, the prohibition of health and safety regulations in the first trimester, the deference to doctors, the strength of the state interests, the viability rule, the health exception after viability—were based on this unreliable medical assumption.

C. ***Roe*** **Lacked a foundation in precedent.**

Roe also lacked any support in precedent. *Hellerstedt*, 136 S.Ct. at 2327 (Thomas, J., dissenting).[9] Cases preceding *Roe* did not establish a right to abortion. The *Roe* Court strung together a group of cases, and called them "privacy" cases, even though "privacy" was not the rationale contained in those decisions. In fact, the Supreme Court in *Maher v. Roe*, 432 U.S. 464 (1977), frankly referred to them as "a group of disparate cases restricting governmental intrusion, physical coercion, and criminal prohibition of certain activities…." 432 U.S. at 471.[10]

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[9] See also Philip Bobbit, *Constitutional Fate* 159 (1982) ("The two principal propositions on which it rests are neither derived from precedent nor elaborated from larger policies that may be thought to underly such precedent. And the precedent it establishes is broader than the questions before the Court, while at the same time disclaiming having decided issues that appear logically necessary to its holding."); John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L. J. 920 (1973); Richard A. Epstein, Substantive Due Process by Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159.

[10] See e.g., Michael J. Gerhardt, The Power of Precedent 86-87 (2008) ("The path of the Court's privacy decisions, to the extent there has been a discernible one, is far from clear and highly contentious. While some scholars might claim the path begins with the Court's 1920s decisions in Meyer v. Nebraska and Pierce v. Society of Sisters, the connections between those cases and *Roe*

The *Roe* Court itself recognized that these decisions were not precedent for the holding in *Roe*. The Court in *Roe* cited *Botsford*, *Stanley*, *Griswold*, *Meyer*, *Loving*, *Skinner* and other cases, for the *ipse dixit* that the "right of privacy" is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," 410 U.S. at 152-53, but then proceeded to recognize that a woman "carries" another human life and that "[t]he situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned." 410 U.S. at 159. The *Roe* Court thereby expressly admitted that abortion was inherently different from any of those prior cases.

Nothing before *Roe* established any right to "terminate pregnancy." Many constitutional scholars have agreed.[11]

D. *Roe*'s Viability Rule is contradicted by American Law & International Law

Without any support in an evidentiary record, the Court in *Roe* held that a woman has a right to terminate her pregnancy up to fetal viability and a right to terminate a pregnancy after fetal viability for any "health" reason as determined by the provider. *Roe*, 410 U.S. at 164-65; *Doe*, 410 U.S. at 192; *Thornburgh*, 476 U.S. at 769 (deferring to doctor on "health" reasons). Neither the Texas statute in *Roe* nor the Georgia statute in *Doe* was limited by gestational age. Viability was not ruled on by the lower courts. No party or *amicus* in *Roe* or *Doe* urged the Court to adopt a viability rule or extend the right to viability. Dellapenna, *Dispelling the Myths*, at 594; Randy Beck, *Gonzales, Casey and the Viability Rule*, 103 Nw. U. L. Rev. 249 (2009); Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. Rev. 713 (2007). The viability rule was "self-conscious dictum"—unnecessary to the decision in *Roe* and *Doe*—and the *Roe* Court knew it. Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework*, 51 Am. J. Legal Hist. 505 (2011).

Scholars generally agree that *Roe* didn't adequately defend or justify the viability rule. Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 Hastings Const'l L. Q. 187, 203-204 (2016) (citing sources); Randy Beck, *Fueling Controversy*, 95 Marq. L. Rev. 735, 741 n.39 (2012) (citing sources); Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 Const. Comm. 75, 83 (1991) ("using the line of viability to distinguish the time when abortion is

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are dubious because they did not directly involve a person's autonomy over his or her body, much less procreative or sexual activity.")

[11] Many constitutional scholars who support the legalization of abortion have agreed that the Court's decision adopted "extraconstitutional" values that have no cognizable roots in the text or history of the Constitution. *See, e.g.*, M. Perry, *supra* note 6, at 1 *(Roe* "cannot be explained by reference to any value judgment constitutionalized by the framers."); John Hart Ely, Democracy and Distrust 2-3, 248 n.52 (1980); Archibald Cox, *supra* note 8, at 113 ("The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations **....** "**);** Alexander Bickel, The Morality of Consent 27-29 (1975); Kurland, *Public Policy, The Constitution, and the Supreme Court*, 12 N. KY. L. REV. 181, 196 (1985) ("But for a capacity to make constitutional bricks without any constitutional straws, certainly no prior case can be equaled by that of the abortion decisions. However much I like the results-and I do--I can find no justification for their promulgation as a constitutional judgment by the Supreme Court."); Ely, *supra* note 8, at 932 ("All of this **. . .** has nothing to do with privacy in the Bill of Rights sense or any other the Constitutional suggests."); Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 U. DAYTON L. REV. 579, 583 (1983) ("Roe cut fundamental rights adjudication loose from the constitutional text."); Symposium, Constitutional Adjudication and Democratic Theory, 56 N.Y.U.L. REV. 525, 532 (1981) (comments of Dean John Hart Ely: "I don't think *Lochner* and *Roe* can be distinguished. It seems to me they are equally illegitimate uses of the Court's power."); Gerald Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 WASH. U.L.Q. 817, 819; Robert Burt, The Constitution of the Family, 1979 Sup. CT. REV. 329, 371-73; Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 YALE L.J. 221, 297-311 (1973).

permitted from the time after viability when it is prohibited (as *Roe v. Wade* does), is entirely perverse.")[12]

The Supreme Court has never explained or justified its viability rule. Randy Beck, *Twenty-Week Abortion Statutes*; Linton, 13 St. Louis U. Pub. L. Rev. 15 (1992); John Hart Ely, the Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L. J. 920 (1973). As Justice O'Connor noted in *Akron:* "The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting). The *Casey* Court declared that "a decision without principled justification would be no judicial act at all." 505 U.S. at 865. The viability rule has always failed this test.

Roe's viability rule is increasingly incoherent. The Court tied the viability line to the state's interest in fetal life. The *Roe* Court, however, gave virtually no consideration to the relationship between viability and the state's interest in *maternal health*. The *Roe* Court never considered the implications for maternal health of extending the "right" to viability, and had no record evidence to consider those medical implications. Indeed, it now seems clear that permitting abortion until viability extends the right beyond the point where abortion is more dangerous than childbirth. Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Ob & Gyn. 729 (2004). This has created further incoherence, and helps explain why approximately 20 states have enacted 20 week limits.

The Court's viability rule has become increasingly isolated in American law. It has been rejected by a majority of states in the law of prenatal injuries. Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law*, 6 U. St. Thomas J. Law & Pub. Pol. 141, 146-48 (2012); Linton, 13 St. Louis at 52-53. It is not followed in the law of wrongful death. *Hamilton v. Scott*, 97 So.3d 728 (Ala. 2012), and has not been for decades. *Hudak v. Georgy*, 634 A.2d 600 602 (Pa. 1993) ("no jurisdiction accepts the…assertion that a child must be viable at the time of birth in order to maintain an action in wrongful death"). Eventually, courts have applied prenatal injury torts throughout pregnancy, and have extended wrongful death causes of action earlier in pregnancy. David Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639 (1980). *Roe*'s viability rule is not followed in the law of fetal homicide. Linton, 6 U. St. Thomas J. Law & Pub. Pol. at 143-46. The Court's "viability" doctrine in abortion law has been virtually abandoned in property, tort and criminal law. This is one example of how *Roe*'s rule—the essence of *Roe*—has become a doctrinal anachronism.

E. *Planned Parenthood v. Casey* Dramatically Overhauled *Roe v. Wade*

After two decades of controversy and confusion, the *Casey* Court in 1992 recognized serious problems with *Roe* and attempted to fix them by expressly rejecting the notion that abortion was a "fundamental" constitutional right and adopting, instead, an "undue burden" standard for assessing state legislation. *Casey* substantially overhauled *Roe*. Linton, 13 St. Louis U. Pub. L. Rev. at 34-37 (detailing the differences between *Roe* and *Casey*); Stephen G. Gilles, Why the Right to Elective Abortion Fails *Casey*'s Own Interest-Balancing Methodology—and Why It Matters, 91 Notre Dame L. Rev. 691, 701 (2015) ("It is not generally appreciated that *Casey* reinvented the doctrinal foundation of the right to elective abortion….").

[12] See also Isaacson v. Horne, 716 F.3d 1213, 1231 (9th Cir. 2013) (Kleinfeld, J., concurring) (pointing out problems with the viability rule), cert. denied, 134 S. Ct. 905 (2014); *MKB Management Corporation v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (criticizing the viability rule); *Hamilton v. Scott*, 97 So.3d 728 (Ala. 2012) (Parker, J., compiling criticism of the viability rule).

The *Casey* Court did not defend *Roe* as originally decided. Instead, the *Casey* Court relied almost exclusively on *stare decisis* for its reaffirmation of *Roe*, hoping that *Roe* could be fixed, as substantially modified. *Casey*, 505 U.S. at 854-869. The *Casey* Court created a new rationale for *Roe*, switching from history to sociology and the claim of reliance interests, *Casey*, 505 U.S. at 855, L.A. Powe, Jr., *Intergenerational constitutional Overruling*, 89 Notre Dame L. Rev. 2093, 2094 (2014) (a "newly minted version of Roe"). But the new rationale is no more rooted in the Constitution than the original rationale in *Roe*.

Casey's failure to justify *Roe* as an original matter and its reliance on *stare decisis* was severely criticized by numerous scholars.[13] The rationale for stare decisis that the Court created in *Casey* was largely ad hoc and has not been followed in subsequent cases. Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?* 86 N.C. L. Rev. 1165 (2008).

Ever since *Roe*, scholars and academics have been looking for an alternative rationale for *Roe*. Very few if any scholars will defend *Roe* as originally decided. See e.g., Jack Balkin, ed., *What Roe v. Wade Should Have Said* (NYU Press 2005); Dahlia Lithwick, *Foreword: Roe v. Wade at Forty*, 74 Ohio St. L. J. 5, 6 (2013) ("both sides tend to agree secretly that the original *Roe* opinion rested on rather shaky constitutional grounds"); Dellapenna, *Dispelling the Myths*, at 687 n.433 (collecting sources); Donald H. Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569, 1569 n.1 (1979) (citing earlier attempts to re-write *Roe*).

None of these alternative sources for a constitutional right to abortion is any more rooted in the Constitution than the rationale offered in *Roe*. See e.g., Richard Posner, *Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Rights*, 59 U Chi. L. Rev. 433, 441 (1992).[14] The proposed equal protection rationale, for example, simply assumes one particular view of women's interests. Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 Harv. J.L. & Pub. Pol'y 889, 897 (2011).[15]

This constant search for a new rational is yet another reason that makes *Roe v. Wade* properly subject to correction and overruling. *Cf. Citizens United*, 558 U.S. at 379 ("when the precedent's underlying reasoning has become so discredited that the Court cannot keep the

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[13] Mary Ann Glendon, A Nation Under Lawyers 114- (1994); Robert Nagel, The Implosion of American Federalism 99-113 (2001); Joseph Dellapenna, Dispelling the Myths, at 856 ("its utter intellectual incoherence"), 856-885; L.A. Powe, Jr., Intergenerational Constitutional Overruling, 89 Notre Dame L. Rev. 2093, 2094-2099, 2112 (2014) ("Casey's intentional failure to mention what appears to be the principal factor in overruling seriously undermines the credibility of its treatment of stare decisis."); Michael Stokes Paulsen, The Worst Constitutional Decision of All Time, 78 Notre Dame L. Rev. 995 (2003); Morton Horowitz, Forward: The Constitution of Change, 107 Harv. L. Rev. 30, 71(1993) (criticizing the plurality's characterization of *Lochner* and *Plessy*); Paul Linton, Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court, 13 St. Lou. U. Pub. L. Rev. 15, 38 (1992); Earl Maltz, Abortion, Precedent, and the Constitution: A Comment on *Planned Parenthood v. Casey*, 68 Notre Dame L. Rev. 11 (1992); David Smolin, The Jurisprudence of Privacy in a Splintered Supreme Court, 75 Marq. L. Rev. 975, 1029 (1992).

[14] "Roe v. Wade is the Wandering Jew of constitutional law. It started life in the Due Process Clause, but that made it a substantive due process case and invited a rain of arrows. Laurence Tribe first moved it to the Establishment Clause of the First Amendment, then recanted. Dworkin now picks up the torch but moves the case into the Free Exercise Clause, where he finds a right to autonomy over essentially religious decisions. Feminists have tried to squeeze Roe v. Wade into the Equal Protection Clause. Others have tried to move it inside the Ninth Amendment…still others (including Tribe) inside the Thirteenth Amendment…It is not, as Dworkin suggests, a matter of the more the merrier; it is a desperate search for an adequate textual home, and it has failed." Richard Posner, Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Rights, 59 U Chi. L. Rev. 433, 441-42 & nn. 26-32 (1992).

[15] See also Mary Catherine Wilcox, Why the Equal Protection Clause Cannot "Fix" Abortion Law, 7 Ave Maria Law Review 307 (2008); David Smolin, Why Abortion Rights are not Justified By Reference to Gender Equality: A Response to Professor Tribe, 23 J. Marshall L. Rev. 621 (1990). James Bopp, Jr., "Is Equal Protection a Shelter for the Right to Abortion? In J. Butler & David Walbert, eds., Abortion, Medicine and the Law (4th ed. 1992); James Bopp, Jr., Will There by a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade? 15 J. Contemp. Law 131 (1989).

precedent alive without jury-rigging new and different justifications to shore up the original mistake"); *Montejo v. Louisiana*, 556 U.S. 778, 788, 792 (2009) ("we do not think that stare decisis requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies.").

All of these factors demonstrate that *Roe v. Wade* was not derived from text, history, tradition, structure, or precedent, which is the only source of constitutional legitimacy.

III. Roe v. Wade Has Not been Workable.

Roe is a unique precedent in U.S. law. *Roe* (and *Doe*) did not merely invalidate the laws of Texas and Georgia, *Roe* also prescribed, in great detail, a national abortion rule that states must follow. 410 U.S. at 163-65. *Cf. Webster*, 492 U.S. at 518-21 (Rehnquist, White & Kennedy, plurality op, criticizing rule); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. Chi. L. Rev. 381, 427 (1992) (criticizing *Roe*'s "detailed regime"). And, in doing so, the *Roe* Court recognized that what it was doing was *dictum*. Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework*, 51 Am. J. Legal Hist. 505 (2011).

By prescribing a national rule, the Supreme Court assumed a unique role of judicial administration over one medical procedure—which it has never exercised in any other areas of medical jurisprudence—"as the nation's 'ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.'" *Akron*, 462 U.S. at 456 (O'Connor, dissenting); *Hellerstedt*, 136 S.Ct. at 2326 (Thomas, J., dissenting) (noting significance of *Hellerstedt* resurrecting appointment as "the nation's ex officio medical board"). The Supreme Court has failed in that self-appointed role.

Medicine has been a profession regulated by the U.S. States since they were colonies. *Dent v. West Virginia*, 129 U.S. 114 (1889). Abortion is the only medical procedure that has been declared to be a *constitutional right*, making it uniquely immune from state oversight that applies to every other medical procedure.

The *Roe* Court announced that there were two major state interests in regulating abortion: fetal life and maternal health. *Casey*, 505 U.S. at 869; *Akron*, 462 U.S. at 427 ("two such interests that may justify state regulation of abortions."). But there was no evidentiary record to guide the Court's recognition or understanding or definition of these state interests, or the value to be given to them, or whether any other state interests existed.

The application of *Roe* to state regulations of abortion to protect the state interests in fetal life and maternal health has been difficult and haphazard. The fact that *Roe* has been unworkable was immediately demonstrated in *Doe v. Bolton*, the companion case to *Roe*, where the Court did not apply the same standards as the Court purported to apply in *Roe*, as Justice Powell pointed out in his concurring opinion in *Carey v. Population Services Inter'l,* 431 U.S. 678, 704 (1977) (noting that in contrast to what *Roe* purported to adopt, *Doe* did not refer to the 'compelling state interest' test" but instead used the "reasonably related" test).

The Supreme Court has repeatedly stated—in the abstract—that the states have an "interest" in protecting "maternal health." *Hellerstedt*, 136 S.Ct. at 2309 ("the 'State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." (quoting *Roe*, 410 U.S. at 150). However, the Court has actually examined record evidence of the impact of abortion or abortion regulations on maternal health in very few cases.

In contrast to the normal capacity of public health administrators, the Supreme Court cannot conduct investigations or gather evidence. The Court has no capacity to oversee operative procedures or to assess safety. The Court cannot regulate or monitor or intervene. It cannot anticipate medical developments or medical data. Instead, the Court, through *Roe* and *Doe* and *Casey* and *Hellerstedt*, has tied the hands of state and local public health officials who do have the capacity to create and effectively enforce adequate health and safety standards.

One example of the Court's misapplication of the state's interest in maternal health is in relation to the five month limits on abortion passed since 2007 by 20 states. The Court created the viability rule in *Roe* based in large part on the mistaken notion that abortion is safer than childbirth. In creating the viability rule, the Court looked only at the state interest in fetal life, and downgraded it, but did not consider the state interest in maternal health when it extended the right to terminate pregnancy that late into pregnancy. The viability rule allows abortion beyond the point where abortion is more dangerous than childbirth (at least in the vast majority of cases). Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Ob & Gyn. 729 (2004). And yet when states have asserted their interest in maternal health to limit abortion before viability, the federal courts following *Roe* and *Casey* have invalidated those limits by rigidly applying the viability rule. *Isaacson v. Horne*, 884 F.Supp.2d 961 (D. Ariz. 2012) (upholding state's 20 week limit), rev'd, *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. May 21, 2013) (invalidating state's 20 week limit), cert. denied, *Horne v. Isaacson*, 134 S. Ct. 905 (2014).

Judicial administration has been made more difficult by the fact that the Court issued *Roe* in a medical vacuum: the U.S. had no reliable system of abortion data collection, reporting, and analysis in 1973, and has none today. The Court invalidated such reporting laws in *Thornburgh*, 476 U.S. at 764-72, and state passage of such laws since 1986 has not been completed. There is no federal law mandating the collection and reporting of abortion data. Basic data, such as the annual number of abortions, is based merely on *estimates*. Byron Calhoun, *The Maternal Mortality Myth in the Context of Legalized Abortion*, 80 Linacre Quarterly 264 (2013); John Thorp, *Public Health Impact of Legal Termination of Pregnancy In the US: 40 Years Later*, Scientifica Volume 2012, Article ID 980812, available at http://dx.doi.org/10.6064/2012/980812 (January 2013). The Supreme Court cannot reliably know the annual number of abortions, nor the number of complications, nor the number of maternal deaths. The Supreme Court issued *Roe* without such a system in place, and the Court has no capacity to legislate an effective system of abortion data collection, reporting and analysis. Congress' power to require that every provider report public health data about abortions, unless tied to federal funds, is uncertain. *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). In any case, Congress has never enacted such a system. This makes adequate judicial administration difficult, if not impossible.

Justice O'Connor observed in *Akron* that the trimester scheme was "a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context." 462 U.S. at 454 (O'Connor, J., dissenting). And the Court discarded the trimester scheme in *Casey*. In *Casey*, the Court found *Roe* to be unworkable, and overruled *Akron* and *Thornburgh*, attempting to make *Roe* more workable.

But the decisions since *Casey* have not demonstrated greater clarity or produced greater coherence among the federal courts. The federal courts have not been able to apply the "undue burden" standard created in *Casey* with coherence, consistency or clarity. Paul Quast, Note, *Respecting Legislators and Rejecting Baselines: Rebalancing Casey*, 90 Notre Dame L. Rev. 913 (2014). In *Casey*, the Supreme Court did not address the problem head-on, but only tinkered with it.

Since *Casey*, the essential problem has been in reaching the judgment of what's "undue." What is "undue" is in the eye of the beholder. That has led inevitably to inconsistency. The "undue burden" standard created in *Casey* was vigorously criticized by the dissenters. As Justice Scalia characterized the problem with the new undue burden standard:

> The joint opinion explains that a state regulation imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"…Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation. The ultimately standardless nature of the "undue burden" inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis.

505 U.S. at 986-87 (Scalia J., dissenting). The problems forecast by that dissent have proven true.

Roe and *Casey* have been repeatedly criticized by numerous federal judges for standards that cannot be consistently applied. *Jackson women's Health Organization v. Currier*, 760 F.3d 448, 466 (5th Cir. 2014) (Garza, J.. dissenting) ("The majority does not even attempt to explain how this case's 'factual context,' the 'statutory provision' at issue, and the 'nature and process' of the admitting-privileges requirement purportedly combined to make this burden 'undue.'"); *Horne v. Isaccson*, 716 F.3d 1213, 1231 (9th Cir. 2013), (Kleinfeld, J., concurring), *cert. denied*, 134 S. Ct. 905 (2014); *Richmond Medical Center for Women v. Herring*, 570 F.3d 165, 181 (4th Cir. 2009) (Wilkinson, J., concurring) ("matters of such medical complexity and moral tension as partial birth abortion should not be resolved by the courts, with no semblance of sanction from the Constitution they purport to interpret. Indeed, the sheer mass of medical detail summoned in this case has led us far beyond the ambit of our own professional competence.").[16]

Since *Casey*, it has become apparent that federal courts treat the two states interests identified by the *Roe* Court—maternal health and fetal life—as at odds with one another. See 505 U.S. at 987 (Scalia, J., dissenting). The protection of fetal life invariably inhibits maternal health, as the Court defines it. And the State interest in maternal health has been continually diluted over the years by numerous factors. The Court prohibited the states from enacting health and safety standards during the first trimester, when 90% of abortions are done, and reaffirmed that throughout the 1970s. The Court tied the hands of the states to enact health and safety regulations after the first trimester. See *Chicago Board of Health v. Friendship Medical Center*, 420 U.S. 997 (1975) (denying certiorari); *Sendak v. Arnold*, 429 U.S. 968 (1976) (affirming invalidation of first trimester clinic regulations); *Greenville Women's Clinic v. Bryant,* 531 U.S. 1191 (2000) (denying

[16] See also National Abortion Federation v. Gonzales, 437 F.3d 278, 290 (2d Cir. 2006); (Walker, J.) ("I can think of no other field of law that has been subject to such sweeping constitutionalization as the field of abortion……"); McCorvey v. Hill, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring) ("if courts were to delve into the facts underlying *Roe*'s balancing scheme with present-day knowledge, they might conclude that the woman's "choice" is far more risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew."), cert denied, 543 U.S. 1154 (2005); *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (Easterbrook, J.) ("When the Justices themselves disregard rather than overrule a decision—as the majority did in *Stenberg*, and the plurality did in *Casey*—they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books."); *Women's Medical Prof Corp v. Voinovich*,130 F.3d 187, 212 (6th Cir 1997) (Boggs, J.) ("Some choices, however, remain within the state's legislative power. These choices have not always been well delineated by the Court…), id at. 218 ("The post-Casey history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy….."), cert. denied, 523 U.S. 1036 (1998); *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1115 (5th Cir. 1997) (Garza, J., specially concurring); *Margaret S. v. Edwards*, 794 F.2d 994, 995 (5th Cir. 1986) (Higginbotham, J.) ("It is no secret that the Supreme Court's abortion jurisprudence has been subjected to exceptionally severe and sustained criticism."), Id. at 996 n.3 ("While we are unquestionably bound to obey the Supreme Court, we are not obliged to give expansive readings to a jurisprudence that the whole judicial world knows is swirling in uncertainty.").

cert); *Greenville Women's' Clinic v. Comm'r, S.C. Dept of Health & Envtl. Control*, 538 U.S. 1008 (2003) (denying cert).

The Supreme Court's decision in *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), did not resolve this confusion. Stephen G. Gilles, Restoring Casey's Undue-Burden Standard after Whole Women's Health v Hellerstedt (2017), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3011622. Until *Hellerstedt*, the Court had never approved state health and safety standards in the first trimester. See generally, Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 Vill. L. Rev. 45 (2012). *Hellerstedt* did nothing to fix the public health vacuum that exists on abortion in the U.S. Instead, it stymied the attempts of public health officials across the states to address substandard providers and substandard conditions in abortion clinics. Americans United for Life, *Unsafe: How The Public Health Crisis in America's Abortion Clinics Endangers Women* (December 2016), available at www.unsafereport.org.

Before *Hellerstedt*, federal courts had difficulty in applying the state's interest in maternal health when it seemingly conflicted with access to abortion. Which value were federal courts to adopt? For example, in *Planned Parenthood Southeast, Inc. v. Bentley*, 951 F. Supp. 2d 1280 (M.D. AL. 2013), subsequent decision, *Planned Parenthod Southeast, Inc. v. Strange*, 9 F.Supp.3d 1272, 2014 U.S. Dist. LEXIS 42876 (M.D. Ala., Mar. 31, 2014) (involving a challenge to Alabama's admitting privileges law), the court recognized that the American medical profession has largely abandoned abortion practice, that abortion providers are diminishing, that providers are often flown in from out of town, or out of state, or out of the country to do abortions, precisely the reason to require admitting privileges to protect patient safety and the physician-patient relationship.

The Court's latest abortion decision in *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), reflects the Court's inability to regulate or to administrate the rules laid down in *Roe*. Twenty-four years after *Casey*, members of the Court disputed fundamental elements of *Roe*'s abortion doctrine in *Hellerstedt*. 136 S.Ct. at 2321-2323 (Thomas, J., dissenting) (third-party standing). See also Stephen J. Wallace, *Why Third-Party Standing in Abortion Suits Deserves Another Look*, 84 Notre Dame L. Rev. 1369 (2009). The Court's decision in *Hellerstedt* was a unique decision—virtually the first in which the Court assessed regulations designed to protect maternal health, not fetal life, with record evidence. The majority in *Hellerstedt* did not examine the factual record, or apply the compelling state interest in maternal health, evenhandedly.

Basically, the majority exalted a new interest, sheer access, that wasn't developed in the caselaw since *Roe* and applied it to counter the state's interest in maternal health, in a case where the generally-applicable state regulations were reasonably-related to protecting maternal health. The Court spurned a "physician's veto" in *Carhart*, but resurrected it in *Hellerstedt*. Peter M. Ladwein, *Discerning the Meaning of Gonzales v. Carhart: The End of the Physician Veto*, 83 Notre Dame L. Rev. 1847 (2008).

Hellerstedt shows that the Court cannot perform its role as the "ex officio medical review board" because it cannot scrupulously examine the "benefits and burdens" of individual regulations. When faced with the obligation to carefully review multiple regulations, the Court threw up its hand and threw them all out, even medical regulations that are unquestionably sound and reasonable. *Hellerstedt* exemplifies the problem that, under the Supreme Court's abortion doctrine, judges use facial challenges to broadly sweep away abortion regulations because they are unwilling or incapable of analyzing the specific impact of specific regulations. *Hellerstedt* was as much an *ipse dixit* as *Roe* itself. 136 S.Ct. at 2326 (Thomas, J., dissenting).

The Court has repeatedly affirmed, in decisions stretching from *Roe* to *Gonzales*, that the states have compelling interests in fetal life, maternal health, and medical standards. Policing those interests over 44 years—or failing to—has demonstrated the institutional incapacity of the Court.

Forty-four years of litigation have provided ample evidence of the difficulty created by *Roe* for the states in protecting the two main state interests that the *Roe* Court held that the states had authority to protect: fetal life and maternal health. Numerous states have passed regulations to protect these state interests, and they have been challenged in hundreds of cases, and the states have been forced to defend them in litigation. *Casey* conceded that *Roe* was not workable as applied in subsequent cases, overruling *Akron* and *Thornburgh*, and announced a new standard. But the "undue burden" standard applied since *Casey* has not been workable, because it unavoidably motivates judges to apply their policy preferences and subordinates any state interests to "access." Because of the inherent institutional limits on the Supreme Court and its inconsistent application of the abortion doctrine over 44 years, *Roe* has been demonstrated to be unworkable.

The undue burden standard has done nothing to improve predictability, consistency, or coherence. Twenty-five years of experience since *Casey* demonstrate that *Casey*'s re-engineering of *Roe* has not made *Roe* any more workable. Quast, 90 Notre Dame L. Rev. 913 (2014). Clearly, *Roe* has never been a "simple limitation." *Casey*, 505 U.S. at 855. This has been a failure in judicial administration and it does not serve the rule of law.

IV. Changes in Fact Have Eroded *Roe v. Wade*

Many *assumptions* on which the *Roe* Court relied in 1973 have changed considerably, eroding *Roe*'s assumptions and the decision which rested on them.

Biological and technological developments, including the development of in vitro fertilization since the 1970s, have reinforced the medical conclusion of the 19th century that the life of the individual human being begins at conception. Maureen L. Condic, Ph.D., *When Does Human Life Begin? The Scientific Evidence and the Terminology Revisited*, 8 U. St. Thomas J. L. & Pub. Pol. 44 (2013). The States have increasingly relied on this biological evidence to increase legal protection from conception in prenatal injury, wrongful death, and fetal homicide law.

Ultrasound, a technological development that the *Roe* Court did not anticipate, came on the scene shortly after *Roe* and permanently changed medical practice and public opinion. See e.g., http://www.ultrasoundtechniciansnews.com/ultrasound-machine-changed-medical-world; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3119221 (describing introduction of ultrasound for clinical use in 1975).

Roe was premised on the assumption that legalization of abortion would end "the back alley" and allow abortion to be treated as "a medical procedure…governed by the same rules as apply to other medical procedures…with reasonable medical safeguards." Repeated and continuing scandals have contradicted that assumption. Randy Beck, *Prioritizing Abortion Access over Abortion Safety in Pennsylvania*, 8 U. St. Thomas J. L & Pub. Pol. 33, 34, (2013) (quoting brief of PPFA in *Roe* and *Doe*); Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 Vill. L. Rev. 45 (2012).

Abortion does not involve the medical *judgment* that *Roe* assumed. 410 U.S. at 165-66 ("the abortion decision in all its aspects is inherently, and primarily, a medical decision"). In nearly all cases, abortion is not a medically-indicated procedure; it is an elective procedure chosen for social reasons.

Most abortions today are not performed by doctors from "the Mayo Clinic" or by a woman's "own doctor." Abortion is largely separated from the rest of obstetrical and gynecological care and practice. *Stenberg v. Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting) ("Dr. Carhart has no specialty certifications in a field related to childbirth or abortion and lacks admitting privileges at any hospital"); *Akron*, 462 U.S. at 473 (O'Connor, J., dissenting) ("It is certainly difficult to understand how the Court believes that the physician-patient relationship is able to accommodate any interest that the State has in maternal physical and mental well-being in light of the fact that the record in this case shows that the relationship is non-existent.").

Contraception devices and methods have expanded in variety, availability, and effectiveness. Contraception increasingly has become less expensive. See e.g., John Bongaarts & Elof Johansson, Future Trends in Contraception in the Developing World: Prevalence and Method Mix (2000); Chaudhuri, Practice Of Fertility Control: A Comprehensive Manual (7th Edition 2007). Multiple methods, when used together, greatly increase the likelihood of preventing a pregnancy. https://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf.

There has been a growing body of international medical data from dozens of countries finding increased long-term risks to women from abortion. Erika Bachiochi, ed., *The Cost of "Choice": Women Evaluate the Impact of Abortion* (Encounter Books 2004); Clarke D. Forsythe, *The Medical Assumption of Roe and its Implications for Women's Health*, 71 Wash & Lee L. Rev. 827 (2014) (citing dozens of international, peer-reviewed medical studies finding increased medical risks after abortion).

Nations face population *implosion*, not population *explosion*. Population in the U.S. in 2016 "grew at its lowest rate since the Great Depression," below replacement levels (0.7%). https://www.census.gov/newsroom/press-releases/2016/cb16-214.html.

There have been fundamental changes in the provision of abortion (the abortion market). Since *Casey*, there has been only one major provider. Steven H. Aden, *Driving Out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion*, 8 U. St. Thomas J. L. & Pub Pol. 14, 19 (2013).

Few doctors do abortions. American medicine has largely abandoned abortion. *Planned Parenthood Southeast, Inc. v. Bentley*, 951 F. Supp. 2d 1280 (M.D. AL. 2013) (challenge to AL admitting privileges law), subsequent decision, *Planned Parenthood Southeast, Inc. v. Strange*, 9 F.Supp.3d 1272, 2014 U.S. Dist. LEXIS 42876 (M.D. Ala. 2014); Steven H. Aden, *Driving Out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion*, 8 U. St. Thomas J. L. & Pub Pol. 14 (2013).

In addition, there are the unintended consequences caused by *Roe*. The *Roe* Court hardly anticipated certain consequences of its sweeping decision. These include the creation of a commercial interest in fetal tissue from abortions. Jose L. Gonzalez, *The Legitimization of Fetal Tissue Transplantation Research Under Roe v. Wade*, 34 Creighton L. Rev. 895 (2001). The years after *Roe* saw an increase in infanticide (Dellapenna, Dispelling the Myths, at 122-124 nn.529-546) and the incidence of coerced abortion, and other negative implications for women's health and flourishing. Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 Tex. Rev. L. & Pol. 85 (2005). Abortion has not been mainstreamed in American society or medicine. David M. Smolin, *Cultural and Technological Obstacles to the Mainstreaming of Abortion*, 13 St. Louis U. Pub. L. Rev. 261 (1993). Another unintended consequence of the Court's abortion doctrine has been the negative impact on women's physical security in childbearing. The Court in *Roe* declared the unborn child

to be a non-entity. In the years since *Roe*, pregnant women have experienced an increased rate of assault and battery from unmarried partners. Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 Tex. Rev. L. & Pol. 85 (2005).

Legalizing abortion will have unintended consequences that no court can anticipate.

V. Changes in the Law Have Eroded *Roe v. Wade*

The legal assumptions on which the U.S. Supreme Court relied in *Roe v. Wade* have changed significantly. The legal disabilities that burdened pregnant women before 1970 have been repealed. Women's rights have expanded since the 1960s due to the protections accorded them by anti-discrimination statutes, like Title VII of the Civil Right Act, the Pregnancy Discrimination Act and a myriad of state civil rights and human rights statutes, and judicial interpretations of these. Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15, 38 (1992); Cunningham & Forsythe, *Is Abortion the "First Right" for Women? Some Consequences of Legal Abortion*, in Abortion, Medicine and the Law 154 (J. Douglas Butler & David Walbert, eds 4th ed. 1992). *All of these are independent of Roe.*

Despite *Roe*, states have expanded legal protection for the unborn child, in many states *from conception*. Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law*, 6 U. St. Thomas J. Law & Pub. Pol. 141 (2012). *Roe* limited what the states could do to protect fetal life in the context of abortion, but *Roe* said nothing about state protection of fetal life outside the context of abortion, in the areas of tort, criminal, property, or equity law. *Cf. Webster*, 492 U.S. at 506 (recognizing that "[s]tate law has offered protections to unborn children in tort and probate law").

The States have increasingly isolated *Roe* as an anomaly in the law's protection of prenatal life. Virtually all of the States now have prenatal injury laws that recognize the unborn child as an independent human being. Thirty-eight states now have fetal homicide laws, and 30 states have fetal homicide laws that extend protection from conception. At least 36 states now have wrongful death laws that protect the unborn child, and at least 10 extend protection from conception. The viability rule has been expressly rejected by most states in the areas of prenatal injury law and in the area of fetal homicide, and it has increasingly rejected in the area of wrongful death law. *Hamilton v. Scott*, 97 So.3d 728 (Ala. 2012) (applying state's wrongful death law from conception). And the states have moved ahead with legal protection of fetal life to a greater degree, creating a stark contrast between fetal protection inside and outside abortion law. Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law*, 6 U. St. Thomas J. Law & Pub. Pol. 141 (2012). *Roe* has become increasingly at odds with state tort law's treatment of the unborn child, with state criminal law's treatment of the unborn child, with limits placed on abortion by the states. This contradiction in *Roe*, and the subsequent developments in state and federal law, have created deep-seated incoherence between abortion law and all other areas of law affecting prenatal protection.

Conclusion

Roe v. Wade has been subjected to frequent, repeated, intense and comprehensive criticism that it was inconsistent with the original public meaning of the U.S. Constitution. *Roe v. Wade* was poorly reasoned and wrongly decided, without warrant in the U.S. Constitution. It is unsettled and unworkable. It is at odds with American and international public opinion and international law. It is contradicted by the growing body of U.S. State legislation that has increasingly protected the unborn child. It is unworkable as a matter of judicial administration. Each abortion decision demonstrates the Supreme Court's inability to monitor public health conditions, trends, and crises, and reinforces the traditional authority and greater capacity of the states to regulate the public health and to legislate to protect human life. The U.S. judicial experience applying *Roe* shows that retaining *Roe* has not promoted stability, predictability, or consistency. It is therefore a fragile precedent that should not be relied upon by the Constitutional Court.

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