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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 23-0727
IN THE SUPREME COURT OF TEXAS

CAROLINE ANTOUN, PETITIONER

V.

GABY ANTOUN, RESPONDENT

Cause Number. 21-5535-367
APPEALED FROM THE 367TH DISTRICT COURT OF
DENTON COUNTY, TEXAS
and
NO. 02-22-00343-CV
FROM SECOND COURT OF APPEALS OF TEXAS
FORT WORTH, TEXAS

MERITS BRIEF FOR RESPONDENT

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RESPONDENT CONDITIONALLY REQUESTS ORAL ARGUMENT

Identity of Parties and Counsel

In order that the members of this Court may determine disqualification and recusal under the TEX. R. APP. P. Rule 38.1(a), and as required by amended Tex. R. App. P. Rule 9.8, Appellant certifies that the following is a complete list of the counsel and persons with an interest in the outcome of this lawsuit:

1. **Trial Judge:** The Honorable Margaret Barnes, presiding (now retired), The Honorable Brent Hill, now presiding.
2. **Court of Appeals panel:** Justice Kerr, Justice Bassel, and Justice Wallach.
3. **Appellant:** Caroline Antoun
4. **Counsel for Appellant:**

   a. **Trial Court**: Theresa Blake (*Blake Law Office*), and J. Edward Niehaus, *Bodkin Niehaus Dorris & Jolley PLLC*

   b. **Appeal:** J. Edward Niehaus, *Bodkin Niehaus Dorris & Jolley PLLC*, 6021 Morriss Rd #111, Flower Mound, TX, 75028.
5. **Appellee:** Gaby Antoun
6. **Counsel for Appellee:**

   a. **Trial Court:** James Horton and Brad Horton, *Horton Law Firm*, 1513 N. Locust St, Denton, TX 76201

b. **Appeal:** Patrick A. Wright, *The Wright Firm LLP*, 1760 S. Stemmons Fwy., Suite 100, Lewisville, TX, 75067

7. Counsel for Amicus Curiae:

a. **Appeal:** Allan E. Parker, Jr., State Bar No. 15505500 aparker@txjf.org and R. Clayton Trotter State Bar No. 20240500 The Justice Foundation, 8023 Vantage Dr., Suite 1275, San Antonio, TX, 78233

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STATEMENT OF THE CASE

The parties to the trial are listed in the Identity of Parties and Counsel. Tex. R. App. P. Rule 53.2(d)(5).

Trial Court: Divorce case tried in the 367th District Court, Denton County Texas. Tex. R. App. P. 53.2(d)(3).

The Court Trial court awarded embryos, as part of property division, to Husband. Tex. R. App. P. Rule 53.2(d)(1). The order for the property division was signed by Judge Barnes, (now retired) then presiding judge of that court, (CR p194). Tex. R. App. P. Rule 53.2(d)(2); Tex. R. App. P. Rule 53.2(d)(4).

Appeal: The Second Court of Appeals affirmed on July 13, 2023. Tex. R. App. P. Rule 53.2(d)(6). Justice Wallach, for a panel consisting of Kerr, Bassel, and Wallach wrote the majority opinion affirming the trial court classification and distribution of marital property. Justice Kerr wrote separately to concur in judgment. Tex. R. App. P. Rule 53.2(d)(7).

The citation is *Antoun v. Antoun*, No. 02-22-00343-CV, 2023 WL 4501875,

(Tex. App.—Fort Worth July 13, 2023, pet. Filed). See Tex. R. App. P. Rule 53.2(d)(8).

Motion for en banc consideration was filed July 22, 2023. That motion was denied on August 3, 2023. Tex. R. App. P. Rule 53.2(d)(9).

STATEMENT REGARDING ORAL ARGUMENT

Counsel does not request oral argument. However, should the Court determine that an oral argument is necessary, Respondent shall participate. Respondent argues that the Court of Appeals properly upheld the trial court's ruling based on existing law regarding the treatment of the embryos in question as property subject to contractual requirements between the parties. Respondent argues that in the post *Roe* world that the treatment of the embryos is for the elected representatives of the Texas Legislature to grapple with and provide guidance and policies, as referenced by the Court of Appeals.

STATEMENT OF JURISDICTION

This is a divorce case. The Court's jurisdiction derives from Article V Section 3 of the Texas Constitution. That section provides this Court's "appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law." Tex. Const. Art. V, § 3.

The deadline for filing this Respondent's Brief on the Merits is March 6, 2024. Tex. R. App. P. Rule 53.7.

REASONS TO DENY REVIEW

The Petition for Review should be denied because the legislation that Petitioner is using to attempt the review does not apply to frozen embryos. Petitioner states that since *Dobbs* was decided and the overturning of *Roe v. Wade*, frozen

embryos should be considered people rather than property. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). However, the *Dobbs* decision simply gave the decision regarding abortion back to the individual states stating that authority to regulate abortion must be returned to the people and their elected representatives. *Id.* In Texas, the legislation that was in place and that went back into effect after the *Dobbs* decision, could not have been intended to apply in the case of frozen embryos. *Texas* Legislators have yet to address if frozen embryos should be classified as people instead of property. This is a case that the Court should allow the legislature to have time to enact legislation that applies rather than the Court attempting to create law regarding frozen embryos.

SUMMARY OF THE ARGUMENT

The Court of Appeals upheld the Trial Court's judgment because *Dobbs* and the Trigger law had not occurred pretrial. The current case was pronounced and rendered on June 29, 2022, but signed on August 19, 2022. On July 26, 2022, the United States Supreme Court issued its final judgment in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). Texas' trigger law did not go into effect until August 25, 2022. Even so, the overturning of *Roe v. Wade* and the trigger laws going into effect would not have an impact on the current case as *Dobbs* and the trigger laws only returned abortion law to the law that was in effect pre-Roe and did not mention assisted reproduction or the storage of frozen embryos. The *Dobbs* decision took no position on when life began but left that decision to the states. The

Texas legislature's definition of unborn child in the Texas Health & Safety Code applies the definition of pregnant as having an unborn child within the female's body. This is not an abortion case. This is not a termination of rights case as defined in the Texas Family Code.

The Court of Appeals applied the current law and public policy of Texas regarding embryos because Texas' law applies to abortions and does not apply to frozen embryos. The current law does not apply to the assisted reproduction process prior to the transfer of the embryo to the woman's uterus. The Texas Family Code has a section on assisted reproduction in the Uniform Parentage Act. The law after Dobbs does not extend the definition of unborn child to a frozen embryo. The Texas Family Code does not define an unborn child nor does the Texas Family Code expand the rights of a child to a pre-embryo. Pre-embryos are not treated as children subject to a Suit Affecting the Parent Child Relationship, the definition of children in the family code, or the Texas Family Code section on the termination of rights. More importantly, no parent-child relationship has been created with the frozen embryos.

ISSUES PRESENTED

1. Whether the Court wrongfully categorized the frozen embryos as property during divorce proceedings?

2. Should the Court treat the frozen embryos under a property division or subject them to a SAPCR pleading?

Merits Brief of Respondent

TO THE JUSTICES OF THE SUPREME COURT OF TEXAS:

Respondent GABY ANTOUN respectfully submits this brief on the merits at the request of the Court prior to disposition of the pending Petition for Review.

STATEMENT OF FACTS

The parties married on or about August 4, 2014, and separated on or about July 20, 2021. [CR5,9]. The couple began IVF treatment in 2019. [2RR141:21]. Fifteen eggs were removed; fourteen were fertilized, [2RR:141:24, 142:1]. Three of those eggs were implanted successfully. [2RR 142:5-8]. Those implants resulted in one miscarriage and two live births, the children whose custody arrangement is subject to the MSA entered into between the parties and reflected in the Final Decree of Divorce. [2RR142: 2-8, CR47-52].

Out of the 14 fertilized embryos, seven of the embryos were sufficiently viable to be cryogenically preserved. [2RR142:13-15]. Three embryos are currently in storage. [2RR143:6-8].

The parties signed an agreement with Dallas Fertility Center, LLC entitled Consent Form Cryopreservation of Embryos on May 10, 2019. [4RR36, 39]. Those embryos are stored in Dallas, Texas with the clinic that did the fertility treatments. [2RR143]. The storage of the embryos is subject to a contract between the couple and the clinic. [2RR143]. The contract shows an agreement that in the event of a divorce that the embryos be awarded to the Husband. [2RR: 152-156].

Neither party listed the frozen embryos as children on their pleadings, but rather only listed the two children of the marriage and asking that the Court divide the estate in a manner that the Court deems just and right, as provided by the law. [CR8-29], [CR36-46].

On May 16, 2022, a Mediated Settlement Agreement was filed based on the parties' agreement (MSA) for custody, possession and access to the children in mediation. [CR47-52], [2RR12:13-24]. The MSA did not resolve the property and embryo issues. [2RR12:13-25, 13:1-11].

The parties commenced trial on June 29, 2022, and the court heard the property issues first and then heard the embryo issues separately. [2RR13:10-18]. Both parties testified to the division of personal property, retirement assets, and debts. [2RR23-139]. The court then heard testimony on the disposition of the embryos. [2RR139-175].

The testimony at trial showed the following:

Three embryos remain cryogenically preserved. [2RR143].

Those embryos are stored in Dallas, Texas with the clinic that did the fertility treatments. [2RR143].

The storage of the embryos is subject to the contract between the couple and the clinic. [2RR143].

The Contract shows an agreement that the embryos be awarded to the Husband. [2RR152-156].

Wife acknowledged that there was an agreement between herself, Husband and Dr. Gada. When asked if there was an agreement between herself and Dr. Gada, Wife replied in the affirmative. [2RR143:17-19].

The agreement was admitted into evidence. [2RR151:23-25].

The Wife testified that she signed the agreement. [2RR152:8-13].

The Wife was asked if she read the document and she said that, "I did read the document." [2RR156:22-23].

The Husband was asked if he made his Wife sign the document and he answered, "No." [2RR159, 13-14, 23-24].

When asked if Husband believed that they both understood the agreement, his answer was "100 percent". [2RR160:5-7].

The Husband was asked if the Wife ever told him that she didn't understand the documents, and he said "No". [2RR160:23-25].

On June 29, 2022, the Court ruled that all the remaining, viable, embryos to Husband per the parties' agreement. [CR60-197].

The final order of divorce was judicially pronounced and rendered in court at 367th Judicial District Court, Denton County, Texas, on June 29, 2022, and further noted on the court's docket sheet on the same date but signed on August 19, 2022. [CR160-197]. The order, in part, read:

> IT IS ORDERED AND DECREED that the remaining frozen embryos stored at Dallas Fertility Center are awarded to GABY ELIAS ANTOUN. GABY ELIAS ANTOUN shall be responsible for all charges due or to become due in relation to the frozen embryos stored at Dallas Fertility Center. CAROLINE MICHELLE ANTOUN is divested of all right, title, interest, and claim in and to the remaining frozen embryos stored at Dallas Fertility Center. [CR194-195].

On July 23, 2022, Wife filed a Motion for Reconsideration of Disposition of Embryos After of Change in Law. [CR 141-155].

On July 26, 2022, the United States Supreme Court issued its final judgment in *Dobbs v. Jackson Women's Health Organization* which held that the federal constitution does not provide a right to an abortion, and the authority to regulate an abortion must be returned to the people and their elected representatives. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022).

On August 1, 2022, the Wife's motion for reconsideration was denied and the Court rendered an Order on Petitioner's Motion for Reconsideration of Disposition of Embryos. [CR156].

On August 25, 2022, based upon the *Dobbs* decision, The Texas Human Life Protection Act took effect. H.B. No. 1280.

On August 26, 2022, Wife filed a motion for a new trial, a notice of

appeal, and a request for findings of fact and conclusions of law. [CR200-203, CR207-224, CR225-226]. The motion for new trial was overruled by operation of law.

On September 28, 2022, the Court signed Findings of Fact and Conclusions of Law. [CR265-269].

The Second Court of Appeals, Fort Worth, affirmed. The court held that (1) embryos are property and (2) because embryos are property there are no parental rights to be terminated.

ARGUMENT

ISSUE ONE: Texas law applied to abortion and did not apply to frozen embryos not in the body of a woman, and the law after *Dobbs* does not extend the definition of unborn child to a frozen embryo.

The issue that this section presents is should we treat embryos as people or property? Acknowledging the significance of Assisted Reproduction in shaping families and impacting children, it becomes a matter of societal importance. In 2020, over 73,000 babies were born in the U.S. through in vitro fertilization (IVF), constituting slightly over 2 percent of total births. Notably, around 85 percent of children born through IVF result from thawed embryos, and since 1987, over 1 million Americans have started life as embryos created outside their mothers' bodies. Approximately 1.4 million embryos are estimated to be frozen in U.S. fertility clinics Ronald Bailey, The *Supreme Court's Dobbs Decision Threatens Assisted*

Reproduction, Reason.com, June 27, 2022. *See* Appendix-18-The Supreme Court's Dobbs Decision Threatens Assisted Reproduction, Ronald Bailey. IVF has become a prevalent method for couples seeking to achieve pregnancy. As of 2021, 1 in 10 women aged 15 to 44 had utilized fertility services. In Texas, 2% of infants born in 2021, totaling 7,315 babies, were conceived with the aid of assisted reproductive technology. Wolf, M. (2024, February 28). It's too much': texas ivf patients scramble in wake of Alabama decision,. *Dallas Morning News*. See Appendix 6-'*It's too much': Texas IVF patients scramble in wake of Alabama decision*, Marin Wolf.

Despite the potential for changes in the law, the Wife presented no evidence during the trial, failing to call an expert on science, life, or the IVF process. The argument here is that the Wife seeks to expand the definition of a pre-embryo to that of a person. This contention is refuted by the fact that the Texas Health and Safety Code, specifically addressing the "Performance of Abortion," defines key terms, including "Fertilization," "Pregnant," and "Unborn Child."

The Act defines "Fertilization": as the point in time when a male human sperm penetrates the zona pellucida of a female human ovum and "Pregnant" means the female human reproductive condition of having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child development from fertilization until birth. Tex. Health & Safety Code §170A(2)(3).

"Unborn Child" means an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development. Tex. Health & Safety Code §170A(5). These definitions are applied to the 245.002 definition of abortion." Tex. Health & Safety Code Ann. Section 245.002.

The Texas Family Code defines a child as:

§101.003 defines a Child or Minor; Adult as:

(a) **"**Child" or "minor" means a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.
(b) In the context of child support, "child" includes a person over 18 years of age for whom a person may be obligated to pay child support.
(c) "Adult" means a person who is not a child. Tex. Family Code Section §101.003.

To comprehend the term "person," it's vital to consider attributes like reason, morality, consciousness, and self-consciousness. Additionally, being part of culturally established social relations, such as kinship, property ownership, or legal responsibility, contributes to the definition of personhood "Personhood – Anthropology"." *www.oxfordbibliographies.com – Oxford Bibliographies;* . De Craemer, Willy. "A Cross-Cultural Perspective on Personhood." The Milbank Memorial Fund Quarterly. 19 Health and Society, vol. 61, no. 1, 1983, pp. 19–34., https://www.jstor.org/stable/3349814; Christian Smith. 2003. Moral, Believing Animals: Human Personhood and Culture. Oxford University Press; Carrithers, Michael, Steven Collins, and Steven Lukes, eds. 1985. The category of the person:

Anthropology, philosophy, history. Cambridge, UK: Cambridge Univ. Press.

There is no definition of unborn child under the definition section of the Family Code nor does the Texas Family Code expand the rights of a child to a pre-embryo.

A. The Roman case allowed parties to voluntarily decide the disposition of frozen embryos.

In an unprecedented scenario, the Houston Court of Appeals in 2006 faced a case akin to the present one, *Roman v. Roman*. In this instance, a married couple had successfully mediated the division of marital assets, excluding three frozen embryos. The *Roman* case established the enforceability of a prior agreement between spouses regarding the fate of frozen embryos in the event of divorce. The court determined that such agreements, specifying the disposal of embryos post-cryopreservation, were legally valid. *Roman v. Roman*, 193 S.W.3d 40, (Tex. App-Houston[1st] 2006, pet. denied).

The *Roman* court defined embryo in the first footnote:

> Although "preembryo" is a medically accurate term for a zygote, or fertilized egg, that has not been implanted in a uterus, we will use the term embryo for linguistic convenience. *See* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction,* 59 S. Cal. L.Rev. 939, 952 n. 45 (1986). Frozen embryos is "the term of art denoting cryogenically-preserved preembyos." Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?,* 27 Conn. L.Rev. 1377 n. 4 (1995).

In the instant case, it is important to also note that there was no medical testimony, and no experts or evidence was presented regarding embryos or the

process of in vitro fertilization (“IVF’). However, we can look to the *Roman* case which explained the process: “The process of IVF “involves the aspiration of ova or oocytes from the follicles of a woman's ovaries and fertilization of these ova in a laboratory procedure using the husband's or donor's sperm. The resulting [embryos] are transferred to the uterus of the potential mother, whereupon a viable pregnancy may occur. Because the IVF procedure frequently produces more [embryos] than safely may be transferred at one time, the extra [embryos] may be frozen for future use through a process called cryopreservation.” *Id*. *In the Interest of O.G.M*., 988 S.W.2d 473, 474 (Tex.App.-Houston [1st Dist.] 1999, pet. dism'd).

Both the Roman case and the current case involved the signing of various documents, including an "Informed Consent for Cryopreservation of Embryos" ("embryo agreement"). *See* Appendix 29- Consent Form Cryopreservation of Embryos. This agreement authorized the frozen storage of embryos until conditions allowed for transfer to the woman’s uterus, with an agreement for both spouses to consent to the transfer. Notably, both parties also agreed to discard the embryos in the event of a divorce. *Roman v. Roman*, 193 S.W.3d 40, (Tex. App-Houston[1st] 2006, pet. denied).

The *Roman* case also examines case law from other states and the statutes in effect in Texas at the time and says, “We glean from these statutes that the public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in

the event of a contingency, such as divorce, death, or changed circumstances. We agree with the New York Court of Appeals that "[a]dvance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." *Kass,* 696 N.E.2d 174,180. These agreements should thus be "presumed valid and should be enforced as between the progenitors." *Davis,* 842 S.W.2d at 597; *Kass,* 696 N.E.2d 174, at 180–181. *Roman v. Roman,* 193 S.W.3d 40, (Tex. App-Houston[1st] 2006, pet. denied). We will discuss the validity of the embryo agreement in the third point of this issue which *Roman* also discusses. Importantly, *Roman* was the law in effect when this case went to trial and we will show in this brief why the change in the abortion law does not affect the *Roman* analysis to embryos in cold storage.

Unlike the case before this court, in the case of *Bilbao v. Goodwin* the Supreme Court of Connecticut explored the science:

> Although the parties did not introduce any scientific evidence at trial, like other courts, we take judicial notice of the following basic facts of in vitro fertilization: "Typically the [in vitro fertilization] procedure begins with hormonal stimulation of a woman's ovaries to produce multiple eggs. The eggs are then removed by laparoscopy or ultrasound-directed needle aspiration and placed in a glass dish, where sperm are introduced. Once a sperm cell fertilizes the egg, this fusion, or pre-zygote, divides until it reaches the four-to-eight cell stages, after which several pre-zygotes are transferred to the woman's uterus by a cervical catheter. If the procedure succeeds, an embryo will attach itself to the uterine wall, differentiate, and develop into a fetus. As an alternative to immediate implantation, prezygotes

> may be cryopreserved indefinitely in liquid nitrogen for later use. Pre-embryo is a medically accurate term for a zygote or fertilized egg that has not been implanted in a uterus. It refers to the approximately 14-day period of development from fertilization to the time when the embryo implants in the uterine wall and the primitive streak, the precursor to the nervous system, appears. An embryo properly develops only after implantation. The term frozen embryos is a term of art denoting cryogenically preserved preembryos." (Internal quotation marks omitted.) *McQueen* v. *Gadberry*, 507 S.W.3d 127, 134 n.4 (Mo. App. 2016).

What is important is the science discussed in the *Bilbao* case, as applied to this case, similarly we are talking about the pre-embryo fertilized egg and prior to implantation. Clearly, the *Dobbs* decision did not say that an embryo is a human person. The Trigger provision in the change in law with the Texas Health and Safety Code in 170A did not specifically say that the pre-embryo stage was an unborn child. Tex. Health & Safety Code 170A.001. While Chapter 170A of the Performance of Abortion section of the Texas Health and Safety Code does define an "unborn child" as an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development, this must be read in the context of the entire statute where "pregnant" means the female human reproduction condition of having a living unborn child *within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth*. Tex. Health & Safety Code 170A.001.

As a reminder, the *Roman* court stated "we are presented as narrowly as possible in anticipation that the issue will ultimately be resolved by the Texas Legislature. *Roman v. Roman*, 193 S.W.3d 40, 44 (Tex.App-Houston [1st Dist.]

2006, pet. denied). While the authors believe that the science is interesting and compelling, we do not believe the court needs to answer the question as the when life begins because the statute of the health and safety code is specific to abortions and not to frozen of embryos that have not been implanted within the female body.

Texas has no statute that directly addresses the legal status of frozen fertilized embryos preserved outside the body before implantation in a uterus. To establish that such embryos are "children," not property, and subject to the Family Code provisions regarding child custody and gestational agreements, Wife relies on Texas Health and Safety Code Section 170A.001(5), which became effective with the *Dobbs* decision. Section 170A.001(5) defines an "unborn child" as "an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development." According to Wife, since the embryos were fertilized and then cryogenically preserved outside her body, they fall within this definition and are "unborn children."[3] *See* Tex. Health & Safety Code Ann. § 170A.001(5).

The Court of Appeals stated that the argument above was "a classic example of taking a definition out of its legislatively created context and using it in a context that the legislature did not intend." Antoun v. Antoun, No. 02-22-00343-CV, 2023 WL 4501875, at *4 (Tex. App.—Fort Worth July 13, 2023, pet. filed)

The Court of Appeals further goes on to state that "a **living unborn child**, i.e. one living in the body of a pregnant female, cannot have its life terminated by an

abortion that is prohibited under Section 170A.002. *Id.*at 5. The Court of Appeals correctly rejected Petitioner's argument that cryogenically preserved fertilized embryos are "unborn children." *Id*. The Court of Appeals did not err in finding that the parties entered into an enforceable contract using the criteria described in *Roman*, stating that in the present case, the terms of the agreement clearly and unambiguously set out the intent of the parties regarding their mutual rights and responsibilities regarding the IVF process in general, and that the agreed upon disposition of the embryos in the event of divorce was for husband to have the right to dispose of the embryos. *Id.* at 6.

B. The Dobbs decision and Texas Trigger law enactment did not address embryos but only returned abortion law to the law in effect pre-Roe.

On August 26, 2022, Appellant/Wife filed for a motion for new trial, arguing that the law changed with the *Dobbs* decision and the Texas Trigger Law and that the Court was now required to treat embryos as people. [CR227-224]. As we will explain in this brief, the law didn't change as related to embryos and the ability to enter into Assisted Reproduction Agreements regarding embryos in cold storage has not changed.

On July 26, 2022, the United States Supreme Court issued its final judgment in *Dobbs v. Jackson Women's Health Organization.* The *Dobbs* Court stated that the Constitution makes no reference to abortion and no such right is implicitly protected by any constitutional provision, including substantive due process

principles under the Due Process Clause of the Fourteenth Amendment, which Clause has been held to guarantee some substantive rights that are not mentioned in the Constitution if they are deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty, a category in which a right to abortion, which involves the destruction of fetal life, does not fall, and thus, the authority to regulate abortion must be returned to the people and their elected representatives. *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

Wife states that the law changed post-*Dobbs*, however that is not the case. The *Dobbs* decision left it to the states to determine how they were going to establish relevant abortion statutes based on the people and the representatives of each state. *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2239 (2022). The *Dobbs* court explains, "The Court emphasizes that this decision concerns the constitutional right to abortion and no other right. *Id.* at 2275-2278. Moreover, the court specifically states when discussing the case history of 19th century abortion laws that "there is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point. One may disagree with this belief (and our decision is not based on any view about when a State should regard prenatal life as having rights or any cognizable interests)… *Id.* at 2256. The *Dobbs* decision didn't say that embryos are people. In 2021, The Texas Legislature passed a bill with a trigger provision. This bill, HB 1280, also known

as the Human Life Protection Act of 2021 ("The Act") contained in the Health and Safety Code Section 170A would be triggered if *Roe v. Wade* was overturned. Tex. Health & Safety Code Ann. Section 170A.

Section 170A contained language that would ban abortion 30 days after one of the following events occurred:

Section 3. Section 2 of this Act takes effect, to the extent permitted, on the 30th day after:

I. The issuance of a United States Supreme Court judgment in a decision overruling, wholly or partially, *Roe v. Wade*, 410 U.S. 113 (1973); as modified *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), thereby allowing the states of the United States to prohibit abortion. Tex. Health & Safety Code Ann. Section 170A.
II. The issuance of any other United States Supreme Court decision that recognizes, wholly or partly, the authority of the states to prohibit abortion; or
III. Adoption of an amendment to the United States constitution that, wholly or partly, restores to the states the authority to prohibit abortion.

See Appendix 23 - 87(R) HB 1280

The Act as it is titled deals with the "Performance of Abortion."

> The Act further defines "Fertilization" : as the point in time when a male human sperm penetrates the zona pellucida of a female human ovum and "Pregnant" means the female human reproductive condition of having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child development from fertilization until birth. Tex. Health & Safety Code Ann. Section 170A(2)(3).
>
> "Unborn Child" means an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development. Tex. Health & Safety Code Ann. Section 170A(5).
>
> These definitions are applied to the Texas Health and Safety Section 245.002 definition of abortion which means "the act of using or prescribing an

> instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause death of an unborn child of a woman known to be pregnant." Tex. Health & Safety Code Ann. § 245.002.

What is important to note is that the legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger. *See* Appendix 25- 1925 Abortion Legislation.

Wife states that when the applicable law changes during the pendency of an appeal, that the appellate court is required to apply the new law. *Blair v. Fletcher*, 849 S.W.2d 344, 345 (Tex. 1993). This case is clearly distinguishable from the *Blair* case which delt with a discovery dispute. In *Blair*, the court of appeals vacated the trial court's judgment without affirming, reversing, or modifying the judgment in the case. The *Blair* case holds that when the applicable law changes during the pendency of the appeal, the court of appeals must render its decision in light of the change of law. *Id.* One of those decision options is affirming the judgment of the trial court in the case.

First, the *Dobbs* decision didn't define embryos as people. Specifically, the Supreme Court stated that they were not ruling on that issue as it was up to the states. Second, the trigger law references abortion rights and pregnancy. This case does not deal with abortion or the termination of pregnancy. The Health and Safety Code does not reference the storage of embryos other than during pregnancy within a female's body. One of the most important points is that the law specifically states,

The Health and Safety Code 170A references termination of a pregnancy within the female's body. Tex. Health & Safety Code Ann. Section 170A. Third, as the legislature pointed out, the 170A provisions just restores abortion rights as they existed pre-*Roe* because Texas never repealed the 1925 abortion laws in the state pre-*Roe*. Another important point is that the previous law was enacted prior to IVF because IVF was created around 1978. Fourth, the decision in *Dobbs* and its after effects to the state of Texas do not change the law related to pre-embryos, their storage, or the courts public policy concerns of allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties. Fifth, as in *Roman* we answer the issue with which we are presented as narrowly as possible in the anticipation that the issue will ultimately be resolved by the Texas Legislature. The Texas Legislature has not passed legislation that 170A applies to frozen embryos in frozen storage outside the body. Sixth, noticeably absent from Wife's argument is that the trigger law or *Dobbs* provides any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce. Nor is there anything in the case law that is incompatible with the recognition of the parties' agreement as controlling. Therefore, there was no specific change in the law regarding the classification of embryos or pre-embryos as defined in *Roman*. There was no abuse of discretion by the trial court because there was no law that intervened and positively changed the

rule which governs. *United States v. Schooner Peggy*, 5 U.S. (iCranch) 103, 110 (1801).

We can further see that there was no change by reviewing The Texas Attorney General Ken Paxton's update on the *Dobbs* decision. *See* Appendix 28-Updated Advisory on Texas Law Upon Reversal of *Roe v. Wade.*

Throughout his Advisory, Mr. Paxton only mentions the effects that Texas' trigger law will have on abortions. In the advisory, he mentions that the term abortion would be defined as in the Texas Health and Safety Code Section 245.002(1) which provides: "Abortion is the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant." Tex. Health & Safety Code Ann. Section 245.002(1).

In the meanwhile, as explained by the Texas Attorney General, "the Texas Supreme Court ruled that the state's 1925 anti-abortion laws, which were contested in *Roe v. Wade*, can be reinstated because the state Legislature never overturned them. These laws, which were drafted prior to the first IVF baby being born in 1978, also put a focus on pregnant women and forbade actions that "destroyed an embryo in the woman's womb." *See* Appendix 17-*IVF treatment can continue under Texas' current apportion law, experts say*.

(Maria Mendez, *IVF treatment can continue under Texas' current apportion law, experts say*, The Texas Tribune, (July 13, 2022) https://www.texastribune.org/2022/07/13/texas-ivf-treatments/).

The American Society for Reproductive Medicine broke down "trigger laws" across the country, based on its lawyers' analysis, and says Texas' trigger law "does not appear to be applicable to IVF and reproductive medicine services prior to implantation of embryos."

(Maria Mendez, *IVF treatment can continue under Texas' current apportion law, experts say*, The Texas Tribune, (July 13, 2022) https://www.texastribune.org/2022/07/13/texas-ivf-treatments/).

As explained by Maria Mendez in her Texas Tribune article cited, "Two of Texas' most well-known anti-abortion groups — Texas Alliance for Life and Texas Right to Life — also say the state's laws and more recent definition of abortion should not affect or inhibit IVF treatment, even if they include the term embryo." *Id.*

"Abortion is, according to Texas law, causing the death of the child, who is a child of a woman known to be pregnant," John Seago, president of Texas Right to Life, said pointing to a statute the Legislature amended a few years ago outlining what counts as an abortion. The statute that Mr. Seago is referring to is Texas Health and Safety Section 245.002 (1) which defines what abortion means under the statute." *Id.*

"There's also no such thing as an abortion outside of a woman's womb, so when you look at what's happening in the laboratory with assisted reproductive technology, that is not destruction of an embryo," he added.

(Maria Mendez, *IVF treatment can continue under Texas' current apportion law, experts say*, The Texas Tribune, (July 13, 2022)

https://www.texastribune.org/2022/07/13/texas-ivf-treatments/)

In this case, the Court of Appeals stated "*Dobbs* did not determine rights of cryogenically stored embryos outside of the human body before uterine implantation. *Dobbs* is not law "applicable" to this case, and thus its pronouncement did not justify a new trial. Texas has no statute that directly addresses the legal status of frozen fertilized embryos preserved outside the body before implantation in a uterus." Antoun v. Antoun, 2023 WL 4501875, at *3-4 (Tex.App.-Fort Worth, 2023).

C. The Trial Court did not abuse it's discretion in honoring the parties' agreement as to the frozen embryos.

A. A division of property is reviewed for an abuse of discretion.

A trial court has wide discretion to divide the parties' marital estate. *Murff v. Murff*, 615 S.W.2d 696,698 (Tex. 1981); *Boyd v. Boyd*, 67 S.W.3d 398,406 (Tex. App. – Fort Worth 2002, no pet.). A trial court when dividing property, should consider the spouses' capacities and abilities, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property. *Murff*, 615 S.W.2d at 698. The reviewing court defers to the factfinder's resolution of conflicts in the evidence and its weighing of the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). Likewise, the Texas Family Code in the Uniform Parentage Act references that medical science has developed a wide range of assisted reproductive

technologies, often referred to ARTS, which enable childless couples to become parents. Tex. Fam. Code 160 Subchapter H. Commissioners' Prefatory Note to Subchapter H. Also, the commissioner further explains that, a very common ARTS procedure mixes sperm and eggs to for a pre-zygote that is then frozen for future use. *Id.* Even in the context of an ART proceeding, a trial court's decision in a paternity action or action establishing the parent-child relationship is reviewed for an abuse of discretion and will only be disturbed when it is clear that the court acted in an arbitrary or unreasonable manner, without reference to any guiding principles. *Stamper v. Knox*, 254 S.W.3d 537, 542 (Tex. App.–Houston [1st Dist.] 2008, no pet.) (citing *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)). In family-law cases, the traditional sufficiency standards of review overlap with the abuse-of-discretion standard of review; therefore, legal and factual insufficiency are not independent grounds of error but are relevant factors in our assessment of whether the trial court abused its discretion. *Neyland v. Raymond* , 324 S.W.3d 646, 649 (Tex. App.–Fort Worth 2010, no pet.). To determine whether there has been an abuse of discretion because the evidence is legally or factually insufficient to support the trial court's decision, we must determine (1) whether the trial court had sufficient evidence upon which to exercise its discretion and (2) whether the trial court erred in its application of that discretion. *Id*. The applicable sufficiency review comes into play with regard to the first question. Id. *In the Interest of P.S.*, 505 S.W. 3d 106, 109 (Tex. App.- Fort

Worth 2016, no pet.).

The Texas' trigger law became effective on August 25, 2022. The final order in this case was rendered on June 29, 2022, before the trigger law became effective. With the final order being signed by the judge on August 19, 2022. According to current Texas Law at the time that this case was decided in the trial court, frozen embryos are considered property and the enactment of Tex.Health & Safety Code 170A.001 does not afford pre-embryos which have not been placed within the female's body during the embryonic and fetal stages the rights, privileges, and protections of children as defined by the Texas Family Code whereby the court didn't abuse its discretion based upon the evidence presented.

D. The Alabama Supreme Court decision has impacted IVF treatment and the Legislature quickly took action to protect IVF service providers.

In recent weeks, the Alabama Supreme Court has ruled that frozen embryos are considered unborn children under Alabama's Wrongful Death of a Minor Act. The Alabama Supreme Court made its ruling after three Alabama couples sued a fertility clinic for wrongful death after a patient accessed the freezer their embryos were stored in and dropped them on the floor.

The Alabama ruling is applying specifically as to whether or not frozen embryos can be considered as children under the Wrongful Death of a Minor Act. Given the precedents in Alabama, the Alabama Supreme Court stated in the opinion:

The parties to these cases have raised many difficult questions,

> including ones about the ethical status of extrauterine children, the application of the 14th Amendment to the United States Constitution to such children, and the public-policy implications of treating extrauterine children as human beings. But the Court today need not address these questions because, as explained below, the relevant statutory text is clear: the Wrongful Death of a Minor Act applies on its face to all unborn children, without limitation.

LePage v. Center for Reproductive Medicine, P.C., 2024 WL 656591, at *2 (Ala., 2024).

The court's ruling, handed down by an 8-to-1 majority, applies only to three couples who were suing a fertility clinic over the accidental destruction of their embryos.

While the Alabama Supreme Court acknowledged concerns that allowing embryos to be considered children would make IVF services more difficult to provide in Alabama, it stated in its ruling that those issues were for the state Legislature to address.

Less than a week after the ruling, three of the largest fertility clinics in Alabama have announced that they've paused IVF services to avoid legal risk in the wake of the decision. To make matters worse for IVF patients, nationwide embryo shipping services have said they are pausing embryo transport to and from Alabama.

Several individuals have spoken out since the Alabama Court rendered its decision, but one of the most impactful is from Elizabeth Carr, the first baby to ever be born using in vitro fertilization. In a letter published by Ms. Carr, she stated

Last week's ruling was clearly written without a true understanding of

> the IVF procedure and a total disregard for the science of assisted reproductive technology. No one understands better than the infertility community that embryos are not children. **Success in IVF means bringing home a baby, not solely creating embryos.** The latter is simply one of many complicated steps one has to take in order to even have a chance of having a live birth. (emphasis added)

Carr, E. (2024, February 26). *I was the first baby born via IVF in the U.S. for the first time in my 42 years, "I feel like an endangered species."* Cognoscenti. https://www.wbur.org/cognoscenti/2024/02/26/alabama-supreme-court-ruling-first-ivf-baby-elizabeth-carr?emci=24691c1d-e8d4-ee11-85f9-002248223794&emdi=1234bbbb-67d5-ee11-85f9-002248223794&ceid=517634

The Alabama House of Representatives and State Senate both passed bills on February 29, 2024, giving in vitro fertilization (IVF) service providers civil and criminal immunity from prosecution or legal action related to the "goods and services" they provide, just weeks after the state's Supreme Court ruled that frozen embryos can be considered children under the law.

The bill passed the Alabama House of Representatives with 94 yeas, six nays and three abstentions. It will now head to the Alabama Senate. In the state Senate, a bill essentially identical to the one in the House passed unanimously with 34 yeas. The two chambers now just have to prepare the enrolled bill for Alabama Governor Kay Ivey, who has indicated she will sign the bill into law. Choi, J. (2024, February 29). *Alabama legislature passes protections for IVF providers*. The Hill. https://thehill.com/homenews/state-watch/4497878-alabama-house-passes-ivf-protections/

The Alabama Supreme Court case is very different from the case presented

here because the Alabama case only applied to the three couples that were in the suit. Also, the Alabama Supreme Court acknowledged in the opinion that "these types of policy-focused arguments belong before the Legislature, not this Court. Judges are required to conform our rulings "to the expressions of the legislature, to the letter of the statute," and to the Constitution, "without indulging a speculation, either upon the impolicy, or the hardship, of the law." *Priestman v. United States*, 4 U.S. 28, 30 n.1, 4 Dall. 28, 1 L.Ed. 727 (1800) in the reporter's synopsis (1800) (Chase, J., writing for the federal circuit court). *LePage v. Center for Reproductive Medicine, P.C.*, 2024 WL 656591, at *8 (Ala., 2024). It is not the role of this Court to craft a new limitation based on our own view of what is or is not wise public policy. *LePage v. Center for Reproductive Medicine, P.C.*, 2024 WL 656591, at *8 (Ala., 2024).

The Alabama Supreme court relied on the Wrongful Death of a Minor Act, also known as AL Code § 6-5-391 (2022).*See* Appendix 23 – Alabama Code §6-5-391(2022). The Court also relied on Article I, § 36.06(b), of the Constitution of 2022 "acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." That section, which is titled "Sanctity of Unborn Life," operates in this context as a constitutionally imposed canon of construction, directing courts to construe ambiguous statutes in a way that "protect[s] ... the rights of the unborn child" equally with the rights of born children, whenever such construction is "lawful and appropriate." *Id*. The Alabama Supreme court stated "[w]hen it comes

to the Wrongful Death of a Minor Act, that means coming down on the side of including, rather than excluding, children who have not yet been born. *LePage v. Center for Reproductive Medicine,* P.C., 2024 WL 656591, at *6 (Ala., 2024).

The Alabama Constitution plays a crucial role in shaping the interpretation of state laws by Alabama courts. *See* Appendix 24 - Alabama Constitution of 1901, Art. I, § 36.06 In contrast, the Texas Constitution lacks a comparable provision. Additionally, notable distinctions exist in the wrongful death statutes of the two states. While Alabama law permits a damages claim for the "death of a minor child," a recent ruling expanded the definition of "child" to include an unborn fetus without restrictions. Conversely, the Texas wrongful death statute, found in Chapter 71 of the Civil Practice and Remedies Code, establishes a claim for "actual damages arising from an injury that caused an individual's death." *See* Appendix 22 - Civil Practice and Remedies Code Chapter 71.

In 2003, the Texas Legislature modified the state law, explicitly defining "individual" to encompass "an unborn child at every stage of gestation from fertilization until birth." Simultaneously, the definition of "death" was expanded to incorporate "for an individual who is an unborn child, the failure to be born alive." Notably, at the time of these amendments, there was no consideration that they would impact frozen embryos. This oversight arose because the amendments explicitly exempted lawful medical activities from the statute's purview. Precisely, the changes preclude a wrongful death claim if the alleged death "is the intended

result of a lawful medical procedure," is a consequence of the "dispensation or administration" of a legal drug, or is linked to a lawful medical or health care practice or procedure by the physician or health care provider.

In 2003, in vitro fertilization (IVF) was recognized as a lawful medical procedure, and this status persists in 2024. Consequently, these amendments effectively exclude IVF from the scope of the wrongful death statute in Texas.

Sen. Bryan Hughes, R-Mineola, says the heartbeat bill he wrote that effectively banned abortion in the state specifically protects IVF here in Texas.

Sen. Bryan Hughes stated “The heartbeat bill specifically exempts in vitro fertilization. So, I’m not sure about Alabama law, and I haven’t read that case, but Texas law is clear. In vitro fertilization is not covered by the heartbeat law, by abortion statutes in Texas,” Hughes stressed on *Inside Texas Politics*. *See* Appendix 5 - State Senator says abortion law in Texas protects IVF.

ISSUE TWO: The Court of Appeals correctly overruled Petitioner’s argument because the Trial Court correctly used a property division standard rather than a SAPCR proceeding.

A. The Best Interest Standard has not been applied to frozen embryos.

Tex. Fam. Code §153.002 provides that “[t]he best interest of the child shall always be the primary consideration of the court in determining issues of conservatorship of and possession and access to the child.” Tex. Fam. Code §153.002. This is commonly referred to as the “best interest standard” and it has

guided Texas courts in their overall decisions affecting children in family law cases for years. In 1966 the Texas Supreme Court held that the desires, acts and claims of the respective parents are secondary considerations and material only as they bear upon the question of best interest. *Bukovich. v. Bukovick,* 399 S.W.2d 528, 529 (Tex. 1966). In making a best interest determination, courts have often balanced the rights of the parents against the rights of the child. Sallee S. Smyth, In *re C.J.C.: A "Fit Parent" Presumption Emerges*, 43rd Annual Marriage Dissolution Institute, 13, April 29-30, 2021.

This balancing act was front and center in the *In re C.J.C.* decision clearly holds that embedded within the best interest standard is the presumption that a fit parent acts in the best interest of their child. *In re C.J.C.*, 603 S.W.3d 818- 819 (Tex.2020). (Emphasis added).

However, it is important to note that the Texas Family Code Title 5 which covers the Parent-Child Relationship and the Suit Affecting the Parent Child Relationship under section §101.003 defines a Child or Minor; Adult as:

> (a); **"**Child" or "minor" means a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.
> (b);In the context of child support, "child" includes a person over 18 years of age for whom a person my be obligated to pay child support.
> (c)"Adult" means a person who is not a child. Tex. Family Code Section 101.003.

We agree that in a decree of divorce of the parties, the court shall order a division of the estate of the parties in a manner that the court deems just and right,

having due regard for the rights of each party and any children of the marriage." Tex. Fam. Code §7.001.

Wife argues that the embryos in this case are unborn children and should be afforded the best interest standard. Wife has cited no authority other than the Texas Health and Safety Code. Tex. Health & Safety Code 170A.001. Wife also argues that the protections of the federal and state constitution should apply to fertilized eggs, including embryos. If the court were to follow Wife's argument, a few questions are created. Are we going to have parents who are the custodian of embryos receive child support? How about visitation for the other parents-and when is their birth date under section 153 of the Family Code? Who claims the embryo for federal tax purposes such as the dependency exemption? Does ownership of the embryo allow the owner to claim state and federal benefits?

Wife then cites the case of *Blackman v. Langford*, which holds that "no cause of action may be maintained for the death of a fetus under the wrongful death statute until the right to bring such action is afforded by the legislature." *Blackman v. Langford*, 795 S.W.2d 742, 743 (Tex. 1990). The distinction in this case is that the *Blackman* case was discussing a fetus and not a frozen pre-embryo. *Id.* In fact, the *Sosebee* case can also be distinguished because that case deals with a negligence case because their child was stillborn and not a frozen pre-embryo. *Sosebee v. Hillcrest Baptist Med. Ctr.*, 8 S.W.3rd 427, 432 n2(Tex. App.-Waco 1999). However, *Sosebee* did conclude that protections of the federal and state constitutions

do not extend to an unborn child. *Id.* It should be noted that under the existing Health and Safety Code Section 170A trigger law provides for a felony of the second degree, except that the offense is a felony of the first degree if an unborn child dies as a result of the offense. Tex. Health & Safety Code Section 170A.004. The Act also provides for a civil penalty if a person violates Section 170A.002 is subject to a civil penalty of not less than $100,000 for each violation. Tex. Health & Safety Code Section 170A.005. Now, clearly this act was designed to prohibit Abortion not the storage of frozen embryos. Tex. Health & Safety Code Section 170A.002.

Remember approximately 85 percent of children born as a result of IVF procedures in this country are born from thawed embryos. (*See* Appendix 2-The Supreme Court's Dobbs Decision Threatens Assisted Reproduction, Ronald Bailey). If the embryo does not thaw or is damaged is the fertility clinic going to be sued? Is the employee of the fertility clinic guilty of murder or a felony? Under the logic of the Wife, all of these hypothetical questions are the result.

Since 1987, more than 1 million Americans started their lives as embryos created outside of their mother's bodies. By one estimate, as many as 1.4 million embryos remain frozen at U.S. fertility clinics. By the argument of Wife all of these frozen embryos would be entitled to visitation, government benefits, and the benefits of civil and criminal law. This logic would harm the ability of potential parents to start families, discourage U.S. fertility clinics to exist, and rewrite the Family Code.

B. The law doesn't treat frozen embryos as children subject to SAPCR.

A. The Pre-Embryos were properly before the Trial Court.

a. We don't serve children or embryos.

We agree that the petition begins the lawsuit. The Petitioner must name each child subject to the suit. See Tex. Fam. Code §102.008(a). In fact, Texas Family Code Section §102.008(b)(2) states: "the name and date of birth of the child, except if adoption of a child is requested, the name of the child may be omitted". Tex. Fam. Code Section §102.008(b)(2). Section §102.009 of the Texas Family Code does not require that the embryos be served. Tex. Fam. Code Section §102.009. The statute does not include embryos in the statute.

Texas has adopted a fair notice of pleadings rule which means that the pleadings must give the opposing party fair notice of the claims being asserted against them. Generally, a trial court may not grant relief to a party in the absence of pleadings to support that relief, but pleadings may be liberally construed to support the judgment. *Sivley v. Sivley*, 972 S.W.2d 850, 857 (Tex. App. – Tyler 1998, no pet.). The Second Amended Original Petition for Divorce from the Wife states that the only children from the marriage were the twins. [CR8-29]. The First Amended Original Counterpetition for Divorce from the Husband also references that the parties were the following parents of the two children born to the marriage. [CR36-46]. The Wife did not list the embryos as people in her pleadings or even

unborn children. [CR8-29] She listed no other children unborn or people in her pleadings. [CR8-29] The embryos were before the court as in the *Roman* case previously cited.

While the Wife references that the court, on its own motion, may require the parties to replead in order that any issue affecting the parent-child relationship may be determined in the suit. Tex. Fam. Code Section §102.008. Upon review of the record, the Wife didn't make a proper motion to amend her pleadings and no request can be found in the record. [2RR7:17-21].

b. The Family Code doesn't have a termination of embryo rights section.

We agree that the judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Tex. R.Civ. P. 301.

This is not a termination case under Texas Family Code 161. Tex. Fam. Code §161. This is not a suit by a governmental agency for termination. No party plead for termination of the other parent's parental rights, or ask that the rights to the two children before the court be terminated.

c. Agreements for Embryo storage are legal.

This case is not about slavery or the ownership of people. We don't need to revisit slavery and even the suggestion to some would be offensive and should be.

The law as set out in *Roman v. Roman* provided for the first time in Texas that "the public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in the event of a contingency, such as divorce, death, or change of circumstances." *Roman v. Roman*, 193 S.W.3d 40, 49-50 (Tex. App.-Houston [1st Dist.] 2006, pet. denied). We disagree with Wife's analysis and believe the *Roman* decision was not changed by the *Dobbs* decision or the Texas trigger law related to Abortion. This is not an Abortion case. We looked at *Roman* before but let's look at the case from a contract standpoint.

In *Roman*, on March 27, 2002, the parties signed a number of documents at the Center, including one entitled "Informed Consent for Cryopreservation of Embryos" ("embryo agreement"). In this document, the parties authorized the storage of the embryos in a frozen state until the Center determined that appropriate conditions existed for transfer of the embryos to the woman's uterus and both husband and wife agreed to the transfer. In addition, the parties chose to discard the embryos in case of divorce. The document also contained a provision that allowed the parties to withdraw their consent to the disposition of the embryos and to discontinue their participation in the program. *Roman v. Roman*, 193 S.W.3d 40, 42 (Tex. App.-Houston [1st Dist.] 2006, pet. denied).

On December 10, 2002, Randy Roman filed for divorce and Augusta Roman filed a counterclaim for divorce that included claims for fraud and intentional

infliction of emotional distress. The parties reached a final binding agreement during mediation as to the division of the marital property, except for the frozen embryos. Similar to the case before this court, at trial, Randy asked the trial court to uphold their written agreement, which specified that the embryos be discarded. Augusta wanted the opportunity to have the embryos implanted so that she could have a biological child. *Id.* at 43. The court had issued findings that, "the division of the community property agreed to by Petitioner and Respondent in their mediation agreement and the award to Respondent of the three frozen embryos as set forth in the Modified Final Decree of Divorce is just and right and a fair and equitable division of the community property." *Id.*

The *Roman* court further looked to the Texas Family Code, "State of Texas has laws regarding children of assisted reproduction and gestational agreements, both contained within the Uniform Parentage Act." *See* Tex. Fam. Code Ann. §160.701–.707 (Vernon 2002), §§ 160.751–.763 (Vernon Supp.2005). Assisted reproduction means a method of causing pregnancy other than sexual intercourse, including IVF and transfer of embryos. *Id.* § 160.102(2)(D) (Vernon 2002). The statute requires that both husband and wife consent to assisted reproduction. *Id.* §160.704(a). However, section §160.704(b) acknowledges that a child may be born without the husband's consent. *Id.* §160.704(b). Section §160.706 addresses paternity in the event of divorce as follows: "if a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the

resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child." *Id.* §160.706(a). This section also provides that consent of the former spouse may be withdrawn at any time before the placement of eggs, sperm, or embryos. *Id.* §160.706(b). Noticeably absent from these sections is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce. Nor is there anything in the case law that is incompatible with the recognition of the parties' agreement as controlling." *Roman v. Roman*, 193 S.W.3d 40, 48 (Tex. App.-Houston [1st Dist.] 2006, pet. denied). The *Dobbs* decision and the Texas Trigger Law are also not incompatible with the recognition of the parties' agreement as we have explained in this brief.

The *Roman* case discusses the embryo agreement similar to the embryo agreement in this case. The court says, "Absent ambiguity, we interpret a contract as a matter of law. *DeWitt County Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex.1999). "Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered." *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex.1996). "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous, and the court will construe the contract as a matter of law." *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex.1983). "An ambiguity exists only if the contract

language is susceptible to two or more reasonable interpretations." *Am. Mfrs. Mut. Ins. Co. v. Schaefer,* 124 S.W.3d 154, 157 (Tex.2003). The language in a contract is to be given its plain grammatical meaning unless doing so would defeat the parties' intent. *DeWitt County Elec. Coop.,* 1 S.W.3d at 101. We presume that the parties intended every clause to have an effect. *Heritage Res., Inc. v. NationsBank,* 939 S.W.2d 118, 121 (Tex.1996)." *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex.App. Houston[1st Dist.] 2006, pet. denied).

The *Roman* court looked at the elements of contract law, "the following elements are required for the formation of a valid and binding contract: 1) an offer, 2) acceptance in strict compliance with the terms of the offer, 3) a meeting of the minds, 4) each party's consent to the terms, and 5) execution and delivery of the contract with the intent that it be mutual and binding." *Wal–Mart Stores, Inc. v. Lopez,* 93 S.W.3d 548, 555–56 (Tex. App.-Houston [14th Dist.] 2002, no pet.). Consideration is also a fundamental element of every valid contract. *Turner-Bass Assocs. Of Tyler v. Williamson*, 932 S.W2d 219, 222(Tex.App.-Tyler 1996, writ denied).

In *Roman*, "Neither party disputes that he or she signed the agreement or initialed the bottom of each page of this agreement. They also do not dispute that each one of them specifically initialed section 8 (embryo disposition in the event of a death) and section 10 (embryo disposition in the event of divorce). They also do not dispute that their frozen embryos were still in the program or that, when they

filed for divorce, they had not withdrawn consent as to the disposition of the embryos and discontinued in the participation in the program." *Roman v. Roman*, 193 S.W.3d 40, 52 (Tex.App. Houston[1st Dist.] 2006, pet. denied).

In an unambiguous contract, a court will not imply language, add to language, or interpret it other than pursuant to its plain meaning. *See Schaefer,* 124 S.W.3d at 162; *Natural Gas Clearinghouse v. Midgard Energy Co.,* 113 S.W.3d 400, 407 (Tex.App.-Amarillo 2003, pet. denied).

The *Roman* embryo agreement provided: "Section 10 of the agreement specifically states, "If we are divorced or either of us files for divorce while *any of our frozen embryos are still in the program,* we hereby authorize and direct, jointly and individually, that one of the following actions be taken: The frozen embryo(s) shall be ... Discarded." (Emphasis added). Although the parties could have chosen to release the frozen embryos either to Randy or Augusta, they chose the option to discard the frozen embryos in the event of divorce. *Roman v. Roman*, 193 S.W.3d 40, 52 (Tex.App. Houston[1st Dist.] 2006, pet. denied).

In *Roman* the court found that, " The embryo agreement's language could not be clearer. Section 10 specifically addresses the disposition of the frozen embryos in the event of a divorce. It is undisputed that Augusta and Randy both signed the entire embryo agreement, and they both initialed section 10. The evidence shows that the parties considered this section and did not sign it without thought. " *Id.* "[P]arties strike the deal *they* choose to strike and, thus, voluntarily bind themselves

in the manner *they* choose." *Natural Gas*, 113 S.W.3d at 407. The court explained, although Augusta's choice may not have been fully considered, the evidence shows that she was aware of and understood the significance of her decision. The parties' embryo agreement clearly indicates their wishes in the event of divorce. We conclude that the parties' embryo agreement was not ambiguous so as to preclude a meeting of the minds." *Roman v. Roman*, 193 S.W.3d 40, 53 (Tex.App. Houston[1st Dist.] 2006, pet. denied).

The court explains that, " Texas statutory law and section 16 of the embryo agreement allow a party to withdraw consent to assisted reproduction procedures. *See* Tex. Fam. Code Ann. §160.706(b) (Vernon 2002) (stating that consent may be withdrawn at any time before the placement of eggs, sperm, or embryos). Neither Randy nor Augusta withdrew consent to the provision in the embryo agreement that the frozen embryos were to be discarded in the event of divorce. Nor did they withdraw consent to the provision within section 11 of the embryo agreement—that if the parties could not agree on the disposition of the embryos, the frozen embryos were to be discarded. Rather, their embryos were still in the program, and the embryo agreement was still in effect when the parties divorced." *Roman v. Roman*, 193 S.W.3d 40, 54 (Tex.App. Houston[1st Dist.] 2006, pet. denied).

Like the *Roman* case, in the instant case the parties had a consent form cryopreservation of embryos agreement. [4RR35]. Both the parties indicated that they understood that as a result of their participation with the Dallas Fertility Center

that more fertilized eggs may result than were needed. [4RR36]. They both acknowledged and requested that these embryos be (cryopreserved). [4RR36]. They both understood that the embryos were subject to our joint disposition as limited by the conditions stated in this form and that all decisions about their disposition, within the limits may be affected by applicable law or court decision. [4RR37]. We understand that if we fail to provide joint direction on the disposition of the frozen embryos, the embryos will be considered abandoned after five years of storage and disposed of as described in the agreement. [4RR37]. There was a divorce provision in the agreement that provided that, "we understand that in the event of divorce or the death of either spouse, the spouse given the dispositional authority of the frozen embryos by this agreement shall have the same dispositional rights that we have under this Agreement, including the right to withdraw from Dallas Fertility ARTS Program as stated below, and to dispose of the embryos. [4RR38]. The Agreement has a Disposition of Others section. We direct Dallas Fertility Center ARTS program and our physician (s) treating us regarding the disposition of our embryos if the following events occur:

> 1. In the event of deaths, we understand that frozen embryos will be considered abandoned, and direct Dallas Fertility Center ARTS Program to discard our embryos. In the event of death of only the husband or wife, we direct Dallas Fertility Center ARTS program to: (both Husband and Wife should initial one choice only. [4RR39]

Both parties initialed preserve the frozen embryos for disposition by the surviving spouse(subject to the five year storage period). [4RR39].

The Embryo agreement also had a second provision that read:

> 2. In the event of divorce, we direct Dallas Fertility Center ARTS Program to: (both Husband and Wife should initial one choice only)[4RR39]

Both parties initialed place the frozen embryos at the disposition of the husband. [4RR39]. Both parties signed the document and dated it May 10, 2019. [4RR39]. The physician signed the document and dated it May 10, 2019. [4RR39]. The physician's statement explains that I have explained to the above couple the nature and purpose of treatment, of the potential benefits and possible risks associated with participation in this treatment. I have answered any questions that have been raised. [4RR39].

The Wife in this case acknowledged that three embryos were in storage in Dallas. [2RR143: 6-10]. There was an embryo agreement between her and Dr. Gada. [2RR143:17-19]. The Wife states that "there were two parties to the contract my husband, myself, and the doctor". [2RR144: 1-7]. When asked about the contract compelling her husband to do anything the Wife said, "I don't think so." [2RR144: 18-20]. The Wife and the Husband had many conversations about what he would do with the embryos if he obtains custody. [2RR146: 21-24]. The agreement was admitted into evidence. [2RR151:23-25]. The Husband's attorney cross examined the Wife regarding the contract and she says "that is what I signed." [2RR152:8-13].

Wife was asked, it states upon divorce that the embryos go to your husband. Isn't that what it says and she answered "It looks so." [2RR152:14-17]. The Judge further asked "is that your signature?" and the Wife said "yes." [2RR153:12-18]. The Husband's attorney asked, "you weren't on drugs or alcohol at the time?" The Wife answered, "Absolutely not." [2RR156: 19-21]. The Wife was asked if she read the document and she said that, "I did read the document." [2RR156:22-23].

The Husband was asked if he remembered the contract and he answered "Yes". [2RR159:10-12]. The Husband was asked if he made his Wife sign the document and he answered "No". [2RR159, 13-14, 23-24]. He acknowledged that she signed the agreement. [2RR159:21-22]. When asked if Husband believed that they both understood the agreement his answer was, "100 percent." [2RR160:5-7]. The Husband was asked if the Wife ever told him that she didn't understand the documents and he said, " No." [2RR160:23-25].

As in the *Roman* case, neither party disputes that he or she signed the agreement or initialed the agreement. They also do not dispute that they initialed the Disposition of Others section in the agreement regarding what happens in event of death or divorce. They do not dispute that the frozen embryos were still in the program or that when they filed for divorce, they had not withdrawn consent to the disposition of the embryos and discontinued in the participation in the program. Also, the disposition section specifically and clearly defines what happens in the event of death or divorce. It is undisputed that both Husband and Wife signed the

embryo agreement. The Wife testified that she and her husband even discussed what he would do with the embryos if he received them. He further testified that there was no coercion used to make her sign the agreement. She testified that she signed the agreement. The doctor's signature indicates that he went over the agreement. There was even a witness to the agreement as reflected in the document.

As in *Roman,* "the parties stike the deal they choose to strike, voluntarily binding themselves in the manner they choose." *Natural Gas Clearinghouse v. Midgard Energy Co.*, 113 S.W. 3d 400, 407 (Tex.App.-Amarillo 2003, pet. denied). The parties agreement clearly indicates their wishes in the event of a divorce.

C. The Trial Court did not terminate the parental rights of the Wife in violation of the Family Code and without sufficient due process of the law.

This Case is not a termination case. No party plead for termination of parental rights. [CR8, 36]. Both parties' reference that there were two children born or adopted to this marriage. [CR8, 36]. The parties settled the child related issues in this case and left all property division matters and the embryo issues for trial. [CR47]. The Wife didn't plead that the embryos were children. [CR8]. Parental rights and duties were allocated between the Wife and Husband according to the Temporary Orders entered by the Court on February 25, 2022. [CR48].

A. There can be no termination if there is no parent-child relationship.

This case is about reviewing the contract that the parties signed for pre-

embryos that were not children and had not been born [4RR:35]. The Wife in this case acknowledged that three embryos were in frozen storage in Dallas. [2RR143: 6-10]. There was an embryo agreement between her and Dr. Gada. [2RR143:17-19]. The Wife states that there were two parties to the contract my husband, myself, and the doctor. [2RR144: 1-7]. When asked about the contract compelling her husband to do anything the wife said I don't think so. [2RR144: 18-20]. The Wife and the Husband had many conversations about what he would do with the embryos if he obtained custody. [2RR146: 21-24]. The agreement was admitted into evidence. [2RR151:23-25]. The Husband's attorney cross examined the Wife regarding the contract, and she says, "that is what I signed." [2RR152:8-13]. Wife was asked, it states upon divorce that the embryos go to your husband. Isn't that what it says, and she answered, "It looks so." [2RR152:14-17]. The Judge further said is that your signature and the Wife said, "yes." [2RR153:12-18]. The Husband's attorney asked, you weren't on drugs or alcohol at the time? The Wife answered, "absolutely not." [2RR156: 19-21]. The Wife was asked if she read the document and she said that, "I did read the document." [2RR156:22-23].

The Husband was asked if he remembered the contract and he answered, "Yes." [2RR159:10-12]. The Husband was asked if he made his Wife sign the document and he answered, "no." [2RR159, 13-14, 23-24]. He acknowledged that she signed the agreement. [2RR159:21-22]. When asked if Husband believed that they both understood the agreement his answer was 100 percent. [2RR160:5-7].

The husband was asked if the Wife ever told him that she didn't understand the documents and he said "No". [2RR160:23-25].

The Court's ruling, as reflected in the final order of the divorce decree, terminates all interests Petitioner had in the embryos per the parties' consent and embryo agreement [CR195]. The agreement doesn't create or terminate a parent child relationship as defined in the Texas Family Code. In fact, the consent agreement by a married woman to assisted reproduction must be in a record signed by the woman and her husband and kept by a licensed physician. Tex. Family Code §160.704(a). The court's ruling doesn't create or terminate a parent-child relationship.

The Parent-Child Relationship is defined in the Family Code as "the legal relationship between a child and the child's parents as provided by Chapter 160. The term includes the mother and child relationship and the father and child relationship. Tex. Fam. Code. §101.025.

The Texas Family Code Section §160.201 defines the establishment of a Parent-Child Relationship as:

(a) The mother-child relationship is established between a woman and a child by:
    (1) The women giving birth to the child;
    (2) An adjudication of the woman's maternity; or
    (3) The adoption of the child by the woman. (Tex. Fam. Code § 160.201).

Again, a "child" or "minor" means a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for

general purposes. Tex. Fam. Code §101.003(a).

The couple began IVF treatment in 2019. [2RR141:21]. Those implants resulted in one miscarriage and two live births; the children whose custody arrangement is subject to the MSA entered in this case. [2RR142-144]. Of the remaining three embryos, a contract exists between the couple and the fertility clinic. [2RR144:1-7].

A contract existed because the Wife and the Husband wanted to have a family and use the assisted reproduction process. The parties used the assisted reproduction process which resulted in three remaining pre-embryos that were not implanted. Wife was never pregnant with the three remaining pre-embryos. The contract existed because the consent was required under the Texas Family Code and to spell out their wishes should they ever get divorced. Tex. Fam. Code §160.704. They were pre-embryos in frozen storage and not children. She didn't have a female human reproductive condition of having a living unborn child within her body. Texas Health & Safety Code 170A(3). Even in a comment in the *Dobbs* decision the U.S. Supreme Court says, "our decision is not based on any view about when a State should regard prenatal life as having rights or legal cognizable interests." *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2256(2022). The Wife was not pregnant. She didn't adopt the embryos. There was no adjudication of her maternity. There is no parent-child relationship as defined in the Family Code. Tex. Fam. Code §160.201.

The *Roman* court further looked to the Texas Family Code, "State of Texas has laws regarding children of assisted reproduction and gestational agreements, both contained within the Uniform Parentage Act." *See* Tex. Fam. Code Ann. §160.701–.707 (Vernon 2002), §§ 160.751–.763 (Vernon Supp.2005). Assisted reproduction means a method of causing pregnancy other than sexual intercourse, including IVF and transfer of embryos. *Id.* § 160.102(2)(D) (Vernon 2002). The statute requires that both husband and wife consent to assisted reproduction. *Id.* §160.704(a). However, section §160.704(b) acknowledges that a child may be born without the husband's consent. *Id.* §160.704(b). Section §160.706 addresses paternity in the event of divorce as follows: "if a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child." *Id.* §160.706(a). This section also provides that consent of the former spouse may be withdrawn at any time before the placement of eggs, sperm, or embryos. *Id.* §160.706(b). Noticeably absent from these sections is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce. Nor is there anything in the case law that is incompatible with the recognition of the parties' agreement as controlling." *Roman v. Roman*, 193 S.W.3d 40, 48 (Tex. App.-Houston [1st Dist.] 2006, pet. denied). The *Dobbs* decision and the Texas Trigger Law are also not incompatible with the recognition

of the parties' agreement as we have explained in this brief. The Commissioner's Comment to Texas Family Code §160.706 states "This Act does not attempt to resolve issues as to control of frozen embryos following dissolution of marriage. Those matters are left to other state laws, usually in the context of settlement of divorce and regulation of health care facilities."

The pre-embryos currently held in cryogenic preservation are expressly not considered children. The commentary within the Family Code explicitly acknowledges the determination of paternity for pre-embryos utilized subsequent to a divorce involving biological parents. However, it is crucial to underscore that the succeeding comment within the same section expressly articulates that the provisions pertaining to post-divorce paternity concerning embryos do not extend to cases involving frozen embryos. Instead, resolution of such matters is appropriately deferred to the purview of state laws. The proposition of enacting legislation to ascertain the legal status of frozen embryos, including whether they possess individual rights, is a matter best left for the Legislature to deliberate and decide upon.

Section 161 of the Texas Family Code provides the procedures for termination of the parent-child relationship. These procedures are not applicable to this case. Petitioner has cited no Texas cases that acknowledged that a parent-child relationship exists with a pre-embryo or embryo that is in cold storage. The Court did not treat the contract as a relinquishment of the wife's parental rights. Enforcing

the embryo agreement functions to allow the parties to voluntarily decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties. *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex.App-Houston [1st Dist.] 2006, pet. denied). The court reviewed the parties' agreement and approved the deal that the parties voluntarily agreed, read, and signed.

B. You cannot relinquish parental rights if the child has not been born and no parent-child relationship created.

We agree that the "parental rights termination proceeding encumbers a value 'far more precious than any property right, " *In re E.R.* , 385 S.W.3d 552, 555 (Tex. 2012)(quoting *Santosky v. Kramer*, 455 U.S. 745, 747-48, 102 S. Ct. 1388, 71 L.Ed. 2d 599 (1982)), this right may be waived through statutes such as the Texas Family Code §161.103, which provides for affidavits of voluntary relinquishment of parental rights. See, e.g., *In re L.M.I.*, 119 S.W.3d 707, 721-22. (Tex. 2003)(Owen, J., concurring and dissenting). However, this is where our agreement ends with a basic review of Texas Family Code §161.103(a). The affidavit must be signed after the birth of the child, but not before 48 hours after the birth of the child. See Tex. Fam. Code §161.103(a). The author hates to point out the obvious but the embryos haven't been born yet. Let's then look as directed at Section §161.103(a) requirements, the affidavit must reference, the name, age, and birth date of the child. *See* Tex. Fam. Code §161.103(a)(2). Again, the argument fails in that the embryos

haven't been born. The relinquishment of parental rights is subject to strict requirements in the Texas Family Code but they are not applicable to embryos that are in frozen storage and haven't been born yet. In fairness, a suit for termination may be filed before the birth of a child. Tex. Fam. Code §161.102(a). If the suit is filed before the birth of the child, the petition should be styled, "In the Interest of an Unborn Child." After the birth, the clerk shall change the style of the case to conform to the requirements of Section §102.008. Tex. Fam. Code §161.102(b); A reading of §102.008 will highlight that the petition must contain the name and date of birth of the child. Tex. Fam. Code §102.008(b)(2).

The Court of Appeals reiterates that the basis for Petitioner's argument here is that the frozen embryos should be considered "unborn children". However, the Court of Appeals ruled against Petitioner in their opinion regarding the treatment of frozen embryos as people instead of property, as mentioned earlier in this response, and therefore, the Court of Appeals, overruled her argument that her parental rights were terminated. *Antoun v. Antoun*, No. 02-22-00343-CV, 2023 WL 4501875, at *7 (Tex. App.—Fort Worth July 13, 2023, pet. filed).

D. This is a matter for the legislature.

Throughout the cases cited in this brief, there is a resounding theme - this is up for the legislature to take action.

The *Dobbs* decision left it to the states to determine how they were going to

establish relevant abortion statutes based on the people and the representatives of each state. *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2239 (2022). The *Dobbs* court explains, "The Court emphasizes that this decision concerns the constitutional right to abortion and no other right. *Id.* at 2275-2278.

In *Roman*, The Court of Appeals mentioned that there was "noticeably absent from these sections is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce. Nor is there anything in the case law that is incompatible with the recognition of the parties' agreement as controlling." *Roman v. Roman*, 193 S.W.3d 40, 49 (Tex.App. Houston [1 Dist.],2006). The Court of Appeals also noted:

> We understand that legal principles and requirements regarding IVF and embryo freezing have not been firmly established. There is presently no state legislation dealing specifically with these issues. We have been advised that each embryo resulting from the fertilization of the wife's oocytes by the husband's sperm shall be the joint property of both partners based on currently accepted principles regarding legal ownership of human sperm and oocytes. We are aware that these regulations may change at any time.
>
> *Roman v. Roman*, 193 S.W.3d 40, 51 (Tex.App. Houston [1 Dist.],2006)

Prior to *Roman*, the legislature enacted laws dealing with assisted reproduction and gestational agreements, but it had not, and has not since, addressed the legal status of frozen embryos or the rights to ownership or possession of frozen embryos upon the divorce of the parties creating the frozen embryos. We are

persuaded that the legislature's failure to address the holding in *Roman* indicates its acquiescence in its holding. In matters of statutory construction, the legislature is free to rectify court interpretations or change its policy at any time, and the legislature's failure to act may constitute acquiescence in court interpretations. *See City of San Antonio v. Tenorio,* 543 S.W.3d 772, 779 (Tex. 2018). Though this situation is not precisely an issue of statutory construction, the *Roman* court put the legislature on notice of the significance of the issue and the need for legislative action in an area where the legislature had exercised its legislative prerogative. In the ensuing seventeen years, the legislature has done nothing to change the law as pronounced in *Roman. Antoun v. Antoun,* 2023 WL 4501875, at *6 (Tex.App.-Fort Worth, 2023).

The Appellant's request for the Court to take action appears to involve assuming a legislative role, a responsibility more appropriately within the purview of the actual legislature.

PRAYER

Appellee/Respondent prays that the Court DENY the Petition for Review and AFFIRM the Court of Appeals Opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word and contains 13,096 words, as determined by the computer's software's wordcount function.

By: /s/ Patrick A. Wright
Patrick A. Wright
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Response to Petition for Review has been served upon the below-named individuals on March 6, 2024, in accordance with the Texas Rules of Appellate Procedure via e-service.

By: /s/ Patrick A. Wright
Patrick A. Wright
Attorney for Respondent

Respondent's Appendix

1. IVF treatment can continue under Texas' current abortion law, expert say, Maria Mendez.

2. The Supreme Court's *Dobbs* Decision Threatens Assisted Reproduction, Ronald Bailey.

3. I was the first baby born via IVF in the U.S. For the first time in my 42 years, 'I feel like an endangered species', Elizabeth Carr

4. In Texas, IVF is safe for Now, David Coale

5. State Sentator says abortion law in Texas protects IVF, Michael McCardel

6. *It's too much': Texas IVF patients scramble in wake of Alabama decision,* Dallas Morning News, Marin Wolf

7. *Dobbs v. Jackson Women's Health Organization*

8. *LePage v. Center for Reproductive Medicine*

9. *Roman v. Roman*

10. Tex. Health & Safety Code Ann. Section 245.002

11. Tex. Health & Safety Code 170A.001

12. Tex. Health & Safety Code Ann. § 170A.001(5).

13. Tex. Health & Safety Code §170A(2)(3).

14. Tex. Health & Safety Code §170A(5).

15. Tex. Fam. Code §101.003(a).

16. Tex. Fam. Code. §101.025.

17. Tex. Fam. Code §102.008(b)(2).

18. Texas Family Code Section §160.201

19. Tex. Family Code §160.704(a).

20. Tex. Fam. Code §161.102(a).

21. Tex. Fam. Code §161.102(b)

22. Tex. Fam. Code §161.103(a)(2).

23. 87(R) HB 1280

24. Texas Civil Practice and Remedies Code Chapter 71

25. AL Code § 6-5-391 (2022).

26. Alabama Constitution of 1901, Art. I, § 36.06

27. 1925 Abortion Legislation

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29. Consent Form Cryopreservation of Embryos. [4RR36-39]

30. Opinion of Second Court of Appeals

31. Appealable Order of Divorce from the Trial Court

32. Court's Findings of Fact and Conclusions of Law

APPENDIX 1

MENU

TEXAS ABORTION RESTRICTIONS

IVF treatment can continue under Texas' current abortion law, experts say

> Doctors and legal experts say Texas' anti-abortion laws haven't yet affected fertility treatments, and it appears an unlikely target for anti-abortion groups in the state for now.

BY **MARÍA MÉNDEZ** JULY 13, 2022 UPDATED: JULY 15, 2022

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Doctor Katarzyna Koziol injects sperm directly into an egg during an in vitro fertilization (IVF) procedure called Intracytoplasmic Sperm Injection (ICSI) at Novum clinic in Warsaw on Oct. 26, 2010. REUTERS/Kacper Pempel

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Abortion bans across the country have thrown into question the fate of in vitro fertilization, an expensive medical process that helps people become pregnant.

But experts and anti-abortion groups say Texas' laws shouldn't apply to IVF treatment, and clinics across the state are proceeding with the procedures for now.

Similar to other "trigger laws" enacted to ban abortion after the U.S. Supreme Court's reversal of Roe v. Wade, a Texas law passed last year broadens the definition of an "unborn child" to begin at "fertilization" and include "embryonic" stages.

That type of language can raise questions about the "personhood" and rights of embryos in IVF and other fertility treatments, said Dr. Natalie Crawford, who is co-founder of Fora Fertility in Austin.

In IVF, Crawford said, doctors use hormone injections to save more of a woman's eggs during a menstrual cycle and take them out to fertilize them with sperm in a lab. The eggs are then allowed to grow into a blastocyst, or an implantation-stage embryo.

Crawford said this allows doctors to select the embryo they believe has the "highest chance of success" for a pregnancy to put back inside the woman's uterus and save the other embryos so patients can try again or grow their family in the future. Doctors can also use these embryos to test for genetic diseases.

Once a person or couple no longer need the embryos, they decide whether to discard them as medical waste, donate them for scientific research or to donate them to another couple, she said. It's this step in particular that is posing a question for IVF treatments in the face of abortion bans.

“The thing that we’re the most uncertain about is, ‘could it impact discarding embryos, like when somebody is done with their family and they have remaining embryos?’” Crawford said. “Or if they have genetically abnormal embryos, could it potentially make it harder to discard those?”

Some also worry about doctors’ ability to conduct genetic testing.

Right now, Crawford and other fertility doctors in Texas and other states are continuing IVF treatments because most laws against abortions focus on embryos during pregnancies, not outside of the womb.

“While they contain phrases like ‘every stage of human development,’ or ‘from the moment of conception,’ which makes us nervous, they are written in a statute that is clearly about terminating an established pregnancy,” said Sean Tipton, chief policy and advocacy officer for the American Society for Reproductive Medicine.

The American Society for Reproductive Medicine broke down “trigger laws” across the country, based on its lawyers’ analysis, and says Texas’ trigger law “does not appear to be applicable to IVF and reproductive medicine services prior to implantation of embryos.”

The ASRM found that similar laws in 11 other states most likely exempt IVF and assisted reproductive technology from abortion bans, but its lawyers warned Utah’s laws “could be interpreted to have an impact” on assisted reproductive technology under a provision against the “intentional killing or attempted killing of a live unborn child through a medical procedure.”

The statute mostly focuses on pregnancies, but the term “live unborn child” is left undefined and could allow people to “argue that discarding an embryo or donating an embryo for research use is an intentional or attempted killing of a live unborn child,” according to ASRM’s analysis.

In Arkansas, Alabama and Oklahoma, attorney generals' offices have clarified anti-abortion laws should not have implications for IVF, but Idaho's attorney general said it would be up to local prosecutors to decide how to enforce the state's trigger law, according to NBC News. Texas Attorney General Ken Paxton's office did not respond to a request for comment from The Texas Tribune.

Tipton said ASRM and its members also worry courts may interpret these laws differently and about possible changes as state Legislatures reconvene.

"We can't speak to what state legislators are maybe gonna do in the next six months or a year and a half," he said.

Texas' trigger law is expected to go into effect 30 days after the Supreme Court issues a formal judgment overturning Roe v. Wade, following its late June opinion against the landmark 1973 decision that had established constitutional protections for abortion.

State Rep. Giovanni Capriglione, a Republican from Southlake who first introduced the legislation, did not respond to a request for comment.

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In the meantime, the Texas Supreme Court has said the state's 1925 anti-abortion statutes, which were challenged in Roe v. Wade, can go back into effect because they were never repealed by the state Legislature. Those statutes were written before the first IVF baby was born in 1978, but they also focus on pregnant women and outlawing acts in which an embryo is "destroyed in the woman's womb."

Two of Texas' most well-known anti-abortion groups — Texas Alliance for Life and Texas Right to Life — also say the state's laws and more recent definition of abortion should not affect or inhibit IVF treatment, even if they include the term embryo.

"Abortion is, according to Texas law, causing the death of the child, who is a child of a woman known to be pregnant," John Seago, president of Texas Right to Life, said pointing to a statute the Legislature amended a few years ago outlining what counts as an abortion.

"There's also no such thing as an abortion outside of a woman's womb, so when you look at what's happening in the laboratory with assisted reproductive technology, that is not destruction of an embryo," he added.

This language likely leaves IVF treatment intact, legal scholars told the Tribune. A district attorney could decide to try to test the issue by bringing a case against a fertility doctor, said Josh Blackman, a constitutional law professor at South Texas College of Law Houston. But he added that challenging IVF doesn't appear to be an area "ripe" for action in the anti-abortion movement.

Seago said Texas Right to Life has concerns about the "destruction" of "excessive" embryos, particularly in medical research, but the issue is not one of its priorities for Texas' 2023 legislative session. Instead, its priorities include enforcing existing laws against abortion and providing more support for pregnant women.

Rebecca Parma, a senior legislative associate for Texas Right to Life, previously said the group does eventually want to expand protections for embryos in IVF, but she also said it would not be in the upcoming legislative session.

"Ultimately, we believe that all human life is valuable and deserves our legal protection from that beginning moment of fertilization, whether that occurs through normal means or through IVF. And so certainly we want those embryos who are created through the IVF process protected," she told Spectrum News1 in Austin. "But, I think it's going to be a process. I don't think it's something that's going to happen next legislative session because obviously, IVF is something that is part of our culture and something that I think is pretty near and dear to a lot of people who desire families and desire children."

Amy O'Donnell, a spokesperson for the Texas Alliance for Life, said the group had not finalized its legislative priorities yet, but said the group supported a law passed in 2017 requiring the Texas Department of Family and Protective Services to post information on its website about embryo donations to other people to promote the option.

A bill filed in 2019 aimed to ban state agencies from contracting with vendors affiliated with "destructive embryonic stem cell research," human cloning and abortions, but the legislation didn't gain traction.

In Louisiana, embryos are stored because the state outlaws the destruction of embryos unless they "fail to develop further" over a 36-hour period, Tipton said.

Crawford, the co-founder of Fora Fertility in Austin, said most people keep their embryos for several years, and in some cases up to 20 years, but they may decide to discard them after reaching their desired family size or after a divorce or death of a partner. And while donating embryos to other patients can be an option, some people may not be comfortable with that, she said.

"That is a personal decision for most of us," she said. "An embryo does not exist as a person without a uterus to be implanted in, and that is what biology tells us all the time because many embryos do not implant and do not go on to become people."

For now, Crawford said she is advising her patients to not rush to transfer their IVF treatment to other states without abortion bans because "transporting embryos is not without risk of itself." Instead, she says patients should "sit tight" and watchfully wait.

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APPENDIX 2

ABORTION

The Supreme Court's *Dobbs* Decision Threatens Assisted Reproduction

IVF at "signi cant risk"

RONALD BAILEY | 6.27.2022 3:25 PM

(Александр Марко | Dreamstime.com)

More than 73,000 babies were born in the U.S. by means of *in vitro* fertilization (IVF) techniques in 2020, slightly more than 2 percent of all births that year. About 85 percent of children born as a result of IVF procedures in this country are born from thawed embryos. Since 1987, more than 1 million Americans started their lives as embryos created outside of their mother's bodies. By one estimate, as many as 1.4 million embryos remain frozen at U.S. fertility clinics.

It is not clear what effect the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* will have on would-be parents seeking to use IVF as a way to have children. The majority opinion states that abortion destroys "potential life" and what the Mississippi statute at issue in the case calls an "unborn human being." It does not, however, mention IVF or other assisted reproduction techniques.

Infertility advocates and practitioners of fertility medicine are, nevertheless, concerned about the long-term implications of the *Dobbs* decision. In an article in *Contemporary OB/GYN*, Jared Robins and Sean Tipton, respectively the executive director and the chief policy and advocacy officer of the American Society for Reproductive Medicine, argue that the *Dobbs* decision puts fertility care at "signi cant risk." Under current practice, patients of IVF clinics generally choose to create numerous embryos for possible implantation. As fertility treatments proceed, embryos are often discarded when pre-implantation genetic diagnosis indicates signi cant inheritable maladies or after patients have completed their families.

As an example of post-*Dobbs* risks, Robins and Tipton point to Nebraska's Legislative Bill 933 which declares that an "unborn child means an individual living member of the species homo sapiens, throughout the embryonic and fetal stages of development from fertilization to full gestation and childbirth." They assert that "this bill clearly classifies an IVF-created embryo as an unborn child." Under the Nebraska bill, "causing or abetting the termination of the life of an unborn child" is a Class IIA felony, punishable by up 20 years in prison.

An op-ed in *The New England Journal of Medicine* also notes that users of IVF services who have completed their families generally choose to destroy their unused frozen embryos. "If these embryos are declared human lives by the stroke of a governor's pen, their destruction may be outlawed," observes the op-ed. "What will be the fate of abandoned embryos, of the people who 'abandon' them, and more broadly of IVF centers in these jurisdictions?"

Writing in the *Journal of the American Medical Association*, two legal scholars and a doctor observe that with respect to using IVF to treat infertility, "a future Supreme Court opinion might easily group embryo destruction as more like abortion because of its involvement with the destruction of 'potential life.'" They add that the Supreme Court might more easily decide to prohibit IVF because it would not involve "a countervailing claim to a woman's gestational bodily autonomy."

In their more sanguine analysis of how the *Dobbs* decision could affect IVF treatments over at *The Washington Post*, three political scientists note that since 2010, 45 of the 83 bills mentioning both abortion and IVF introduced or passed by state legislatures have explicitly exempted IVF and assisted reproductive technologies. The political reluctance to ban IVF may be based on the fact that most Americans are in favor of allowing people to use it. A 2013 poll found that only 12 percent of respondents thought IVF to be morally wrong. (Of course, the fact that a majority of Americans believe that decisions about terminating a pregnancy should be left to a woman and her doctor didn't prevent *Roe v. Wade* from being overturned.)

Given the number of embryos destroyed as a side effect of IVF treatments, Lehigh University bioethicist Dena Davis sought to analyze in her 2006 article, "The Puzzle of IVF," why there was so little anti-IVF activism on the part of the pro-life movement. She starkly concluded:

> The continued hostility toward abortion, even to the earliest form of possible abortion embodied in emergency contraception, coupled with the absence of attacks on IVF, can best be described as a relative indifference to the moral status of the embryo, but rather a great deal of hostility toward economic equality of women, sexual activity outside of marriage, and marriages that are not organized along traditional gender lines. When conservative activists see abortion, they see the destruction of embryos, yes, but they also see women who are insisting on their equality in the workplace and on marriages that are not organized around strong gender roles. When conservatives see IVF, they largely ignore the destruction of embryos, because they see heterosexual married couples going to great lengths to have children. Thus, it appears that the crucial variable in the equation is not the destruction of the embryo, but the behavior and roles and possibilities open to women. Anti-abortion activists claim to be motivated purely by concern for the unborn, but in fact they are motivated primarily by concerns for the shape of society and for the preservation of traditional gender roles.

Davis' conclusion was somewhat vindicated during the debate last month over Alabama's new anti-abortion law, the stated goal of which is to "protect the sanctity of unborn life." When bill sponsor state Sen. Clyde Chambliss (R) was asked how the law would affect IVF labs that discarded embryos, he responded, "The egg in the lab doesn't apply. It's not in a woman. She's not pregnant."

"We believe that without the protection of Roe v Wade, **state lawmakers now have an open door to introduce far-reaching legislation that will create barriers for people to access medical procedures like IVF** (emphasis theirs)," declared RESOLVE: The National Infertility Association in a statement. "Not only do people have the right to create embryos, but they are the only ones who have the right to determine what happens to their embryos." Post-*Dobbs*, this may not be the case for much longer in some states.

NEXT: **Supreme Court Says High School Coach's Postgame Prayers Are Prote**

RONALD BAILEY is science correspondent at *Reason*.

ABORTION ROE V. WADE IVF ASSISTED REPRODUCTION SUPREME COURT

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RECOMMENDED

GOP Senator Blocks IVF Protection Bill From Passing

South Dakota's Fetal Position

Global Gene-Edited Baby Ban Urged

Couple goes through IVF, breaks up. Who decides what to do with the fertilized ova? [UPDATE: Further details about outcome of the case added.]

Should the Government Ban Parents Using IVF from Picking Their Kid's Eye Color?

APPENDIX 3

COMMENTARY

I was the first baby born via IVF in the U.S. For the first time in my 42 years, 'I feel like an endangered species'

February 26, 2024 | By Elizabeth Carr

The author, the first baby born via in vitro fertilization in the U.S. as a newborn with her parents, Judith and Roger Carr. (Bettmann Archive/Getty Images)

For the first time in my 42 years of life, I feel like an endangered species.

Back in 1981, I was born the first in vitro fertilization (IVF) baby in the United States, thanks to the foresight of Drs. Howard and Georgeanna Jones at the Jones Institute in Norfolk, Virginia, who brought the then-groundbreaking procedure of IVF to this country.

I was born in Virginia because at that time, IVF was unavailable in my parents' home state of Massachusetts.

My parents experienced setback after setback, a story familiar to the millions experiencing infertility today. IVF was my parents' only hope of creating the family they so desperately wanted after experiencing three ectopic pregnancies. So they flew monthly to Virginia, spending thousands of dollars on travel. They even rented a home in Virignia for the last month of my mom's pregnancy before I was delivered by c-section. The treatments weren't covered by insurance, which added even more financial pressure and strain to the already emotionally taxing procedures.

The author on the cover of the November 1982 issue of Life magazine. (Courtesy Elizabeth Carr)

My birth, which made newspaper headlines and magazine covers around the globe, gave hope to millions of Americans who wanted to become mothers and fathers. It also marked the dawn of a new era of science-based medical fertility treatment known as assistive reproductive technology or ART. There's a reason Robert Edwards, the doctor who pioneered this method, first used in England three years before I was born, was later awarded the Nobel Prize for Medicine.

The reason my parents shared their names, faces and story with the media instead of remaining anonymous was so that people around the world could learn about IVF, a game-changing procedure. I share my story for the same reason.

Initially developed as a way to circumnavigate irreparable damage to a woman's fallopian tubes, today IVF is used as a first line therapy for all causes of infertility because its success rate is so high. IVF is the single most effective assistive reproductive technology.

My parents' greatest hope was that no one else would ever have to experience the heartache and strain they did in order to build a family. Forty-two years later, I still hold onto that hope.

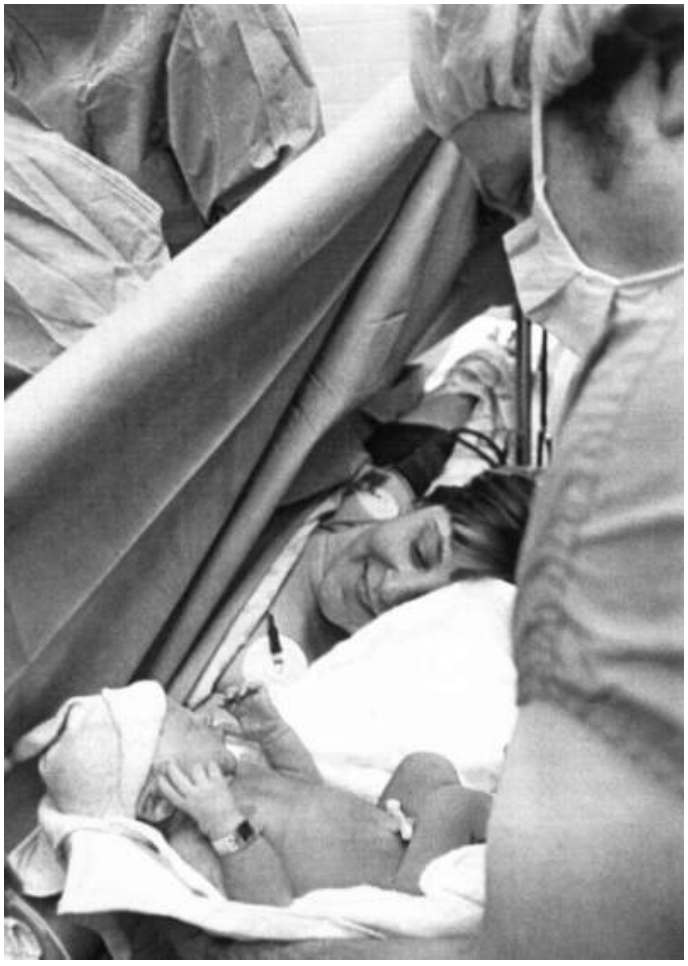
But that got much harder to do last week in the wake of an Alabama Supreme Court's ruling that frozen embryos can be considered "extrauterine children," which means clinics could be held liable for wrongful death claims in the case of lab accidents. The ruling also complicates the storage and disposal of embryos. As I write this, three clinics, including the one at the state's largest hospital — the University of Alabama at Birmingham — have paused IVF procedures (the CDC only lists seven assistive reproductive technology clinics in Alabama on its website.) And a major embryo shipping company has stopped transporting embryos to and from Alabama. More are sure to follow. This means residents of Alabama not only won't be able to access treatment at home, they won't be able to move their embryos to seek treatment elsewhere either.

No one understands better than the infertility community that embryos are not children. Success in IVF means bringing home a baby, not solely creating embryos.

Last week's ruling was clearly written without a true understanding of the IVF procedure and a total disregard for the science of assisted reproductive technology. No one understands better than the infertility community that embryos are not children. Success in IVF means bringing home a baby, not solely creating embryos. The latter is simply one of many complicated steps one has to take in order to even have a chance of having a live birth.

One in six people of reproductive age are impacted by infertility globally and in the U.S. about 2% of all births annually involve IVF — that's about 8 million born since I was. The procedure is used for a variety of reasons, including fertility loss after cancer treatment, a desire to delay having children, military deployments and the ability to screen for devastating genetic diseases.

IVF is a complicated multi-step process that includes hormone injections, egg retrieval and an embryo transfer. It is a delicate dance of financial resources, timing, science and scheduling. And now the Alabama Supreme Court has made it more challenging for Alabamians to have an IVF baby in 2024 than it was for my parents in 1981. Science should move us forward, not backward.



Judith Carr gets a first glimpse at her newborn baby girl, Elizabeth. (Bettmann Archive/Getty Images)

At its core, IVF is a miracle of modern medicine and a fulfillment of unwavering hope. The events we've seen unfold in recent days, however, have been motivated by fear — fear of prosecution of clinics and doctors, and fear of what might happen if embryos are transported across state lines. I will continue to hold onto the hope that lawmakers in Alabama will take action to protect IVF treatments. The fact that Gov. Kay Ivey, a Republican, supports such an

effort and has said that fostering "a culture of life" includes helping "couples hoping and praying to be parents who utilize IVF" echoes the optimism at the core of reproductive technologies.

As I navigate these uncertain times, I remain steadfast in my belief that the power of science, coupled with compassionate legislation, will pave the way for a future where the dreams of parenthood through IVF are safeguarded, cherished and celebrated.

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Related:

- The science of IVF: What to know about Alabama's 'extrauterine children' ruling
- **Here and Now:** How Alabama's frozen embryo ruling could impact IVF
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Elizabeth Carr Cognoscenti contributor
Elizabeth Carr is the first person born via in vitro fertilization in the United States. She is a patient advocate, fertility consultant and public speaker. More...

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In Texas, IVF is safe for now

State Constitution and laws don't support a decision like Alabama's

By DAVID COALE

The Supreme Court of Alabama recently held that its state's wrongful death statute applies to frozen embryos held in a cryogenic nursery at an IVF clinic. That alarming holding has caused providers to suspend in vitro fertilization treatments across Alabama, according to multiple news reports. It has also sparked a national dialogue about whether other states' courts may reach similar conclusions about wrongful death laws.

Any review of this issue in Texas requires accurate understanding of relevant Texas law; specifically, its Constitution, wrongful death statute and post-Roe abortion laws. Careful review of those authorities shows no good basis for a Texas court to write an opinion like the recent Alabama one.

of "death" to include, "for an individual who is an unborn child, the failure to be born alive."

But nobody in 2003 thought those changes affected frozen embryos. That's because those amendments also excluded lawful medical activity from the scope of the statute. Specifically, those amendments foreclose a wrongful death claim if an alleged death "is the intended result of a lawful medical procedure," is caused by the "dispensation or administration" of a legal drug, or "relates to a lawful medical or health care practice or procedure of the physician or the health care provider."

IVF was a lawful medical procedure in 2003. It continues to be one in 2024. Those amendments thus remove it from the scope of the wrongful death statute in Texas.

The overruling of Roe vs. Wade didn't change anything here. When the Texas "trigger law" became effective in 2022 after Roe was overruled, the Texas Health and Safety Code made it a felony to "knowingly perform, induce or attempt an abortion."

Start with the state Constitution. The Alabama Constitution contains a unique provision that "affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child." That provision is obviously important to how the Alabama courts interpret that state's laws. The Texas Constitution has no similar provision.

The two states' wrongful death statutes also differ substantially. The Alabama law allows a damages claim based on "the death of a minor child." The recent opinion held that "child" included an unborn fetus, without limitation.

The Texas wrongful death statute, codified in Chapter 71 of the Civil Practice and Remedies Code, creates a claim "for actual damages arising from an injury that causes an individual's death." Two parts of that statute superficially look like Alabama's.

In 2003, the Legislature amended the Texas law to define the term "individual" to include "an unborn child at every stage of gestation from fertilization until birth." It also amended the definition

The term "abortion" is plainly defined to exclude the handling of embryos during IVF. Specifically, "abortion" is defined as using or prescribing a "substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant." And "pregnant" means "the female human reproductive condition of having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth."

Of course, the Legislature may amend the statutes of Texas, if the House and Senate agree on specific language and the governor signs off. And the people of Texas may amend the state Constitution by majority vote.

But at the present time, no authority supports reading the Texas wrongful death statute in the way that the Alabama Supreme Court recently read that state's wrongful death statute. Discussion about the recent Alabama ruling should bear that reality in mind.

David Coale is a Dallas lawyer.

APPENDIX 5

INSIDE TEXAS POLITICS

State Senator says abortion law in Texas protects IVF

State Sen. Bryan Hughes also listened to arguments before U.S. Supreme Court related to Texas' controversial social media law.

Author: **Michael McCardel**
Published: **7:32 AM CST March 3, 2024**
Updated: **7:32 AM CST March 3, 2024**

TEXAS, USA — The lawmaker behind the Texas Heartbeat bill says he doesn't see Texas moving in Alabama's direction at all.

Alabama's Supreme Court recently issued a highly controversial ruling that embryos are children.

It immediately raised concerns about the future of in vitro fertilization (IVF) not only in Alabama, but the rest of the country were other state Supreme Courts to follow suit.

Alabama lawmakers immediately filed a bill that would protect IVF access.

And state Sen. Bryan Hughes, R-Mineola, says the bill he wrote that effectively banned abortion in the state specifically protects IVF here in Texas.

“The heartbeat bill specifically exempts in vitro fertilization. So, I’m not sure about Alabama law, and I haven’t read that case, but Texas law is clear. In vitro fertilization is not covered by the heartbeat law, by abortion statutes in Texas,” Hughes stressed on *Inside Texas Politics*.

The Republican is also behind the state’s law that limits how social media companies can curate certain content. The lawmaker was in the nation’s capital as the Texas Solicitor General argued before the U.S. Supreme Court that the law should stand.

It would prevent social media companies from banning or even restricting some users based on their “viewpoints.” Many conservatives feel their voices are being silenced on certain platforms.

Florida has a similar law on the books and was also arguing before the justices.

But critics say the laws would force the platforms to carry hate speech, objectionable content, or a post that might incite violence.

They also argue the First Amendment also means the government can’t *compel* certain speech, or in this case, what information to disseminate.

But Sen. Hughes and others argue that social media companies are the new public square.

“They’re trying to cloak themselves in the first amendment when, ironically, they are the ones who were squelching first amendment speech,” said Hughes. “Just like your cell phone provider can’t cut you off because of your politics, the power company can’t deny you service because of your religion. These guys are common carriers. They’re the only game in town. That’s the new public square.”

But will the justices buy that argument?

Even though many observers say they appeared skeptical, Hughes says he's optimistic after what he heard.

"Some of the Republican appointees seemed to like the bill, some didn't. Some of the Democrats were on both sides. I think we're going to win, at least initially, on the point they tried to block the whole law before there was even any kind of a trial. And that means they've got to show the law is unconstitutional in every possible application. They're going to lose that," Hughes argued.

We also asked the Mineola Republican if he was concerned about the election being accurate now that the state abandoned the national data-sharing program called ERIC, or the Electronic Registration Information Center.

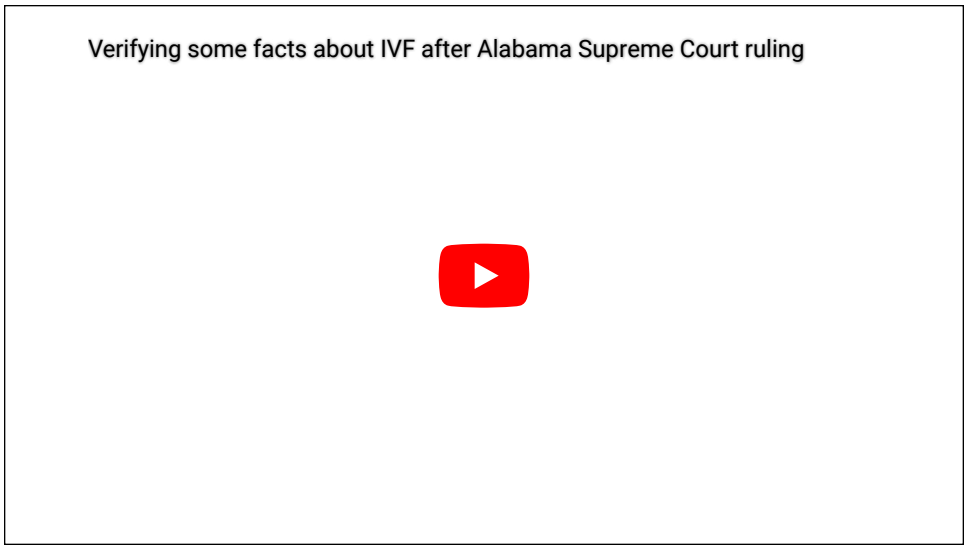
Among its many responsibilities, ERIC keeps voter rolls clean by providing officials with reports that identify inaccurate or out-of-date voter registration records, deceased voters, individuals who appear to be eligible to vote but who are not yet registered, and possible cases of illegal voting.

Texas is obligated, by law, to join a multi-state, information-sharing network for elections.

Hughes tells us Texas and some other states are working together to build their own system, and something is currently in the works.

But he didn't tell us which states are participating and if it will come anywhere close to the number of states using ERIC.

And there's no firm timeline for when it will be up and running, with Hughes only telling us he's optimistic a new system will be in place by the general election in November, but certainly by 2026.



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‘It’s too much’: Texas IVF patients scramble in wake of Alabama decision

The Alabama Supreme Court ruled that frozen embryos created during in-vitro fertilization are legally children.

Heather Burzlaff, who has gone through several rounds of IVF, poses for a photo, Tuesday, Feb. 27, 2024, in Dallas. After an Alabama Supreme Court decision equated embryos with children, Burzlaff, 38, of Flower Mound, tries to figure out what to do with her embryos before Texas makes a similar move.

(Chitose Suzuki / Staff Photographer)

By Marin Wolf
6:00 AM on Feb 28, 2024 CST

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Heather Burzlaff has four embryos in a freezer in Dallas and she doesn't know what to do with them.

After seven years of medications, egg retrievals and waiting, the embryos are all the 38-year-old Flower Mound resident has left from the grueling in-vitro fertilization process, which resulted in no children. The embryos have genetic abnormalities that make it virtually impossible for them to result in a viable pregnancy. It's a heartbreaking reality many IVF patients face in the pursuit of starting a family.

States away, the Alabama Supreme Court decided frozen embryos created

through IVF — each only a cluster of cells made from a fertilized egg stored outside the uterus — are legally children and people can be held liable for their destruction. Already, Alabama clinics have halted IVF treatments while they determine whether they're at legal risk.

Related: Frozen embryo ruling renews focus on IVF, fertility treatments

Texas has issued no such ruling. But IVF patients like Burzlaff are scrambling to make a plan for their embryos in case that changes. Does she move her embryos to another state? Does she budget to pay for their storage for the rest of her life? Does she implant them at a point in her menstrual cycle when she's least likely to get pregnant?

Burzlaff and her husband are in the middle of the adoption process through the foster care system. The Alabama decision, she said, adds another layer of complications to an already draining situation.

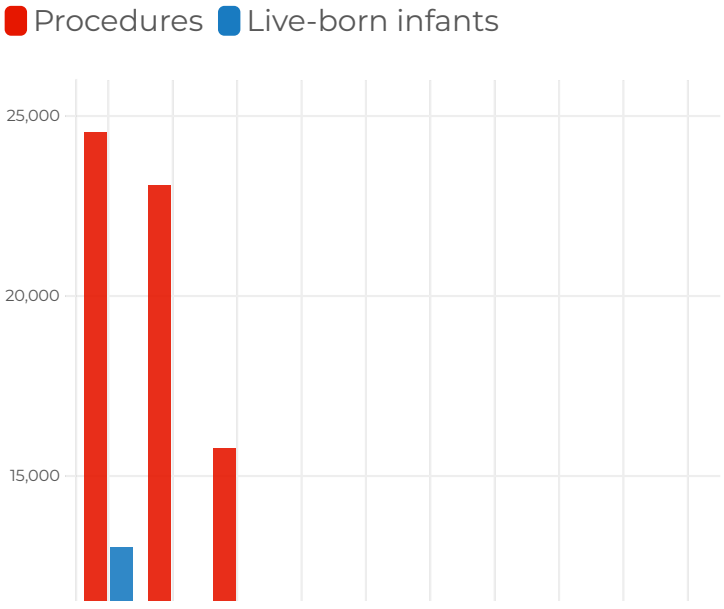
"The paperwork alone is overwhelming. Now you throw this into the mix and I just kind of want to shut down and stop," Burzlaff said. "I don't even want

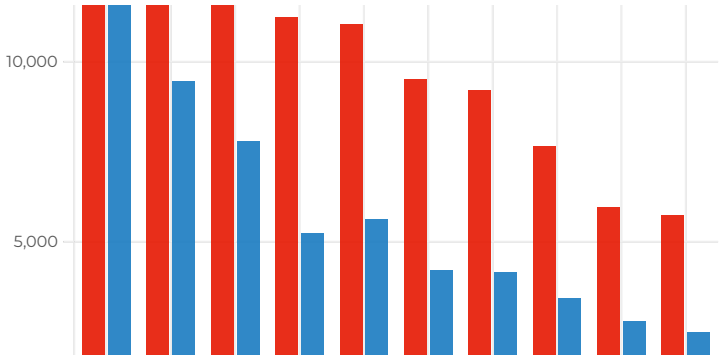
to build my family anymore. It's too much."

Texans raised concern over the future of IVF after the fall of Roe vs. Wade in 2022, but doctors and politicians alike assured them the procedure would not be a target of abortion restrictions. The move by Alabama's top court has undone any sense of security IVF patients had.

States with most assisted reproductive technology births

2021 data collected by the Centers for Disease Control and Prevention.





SOURCE: Centers for Disease Control and Prevention
GRAPHIC: Kyle Arnold/DMN

The Dallas Morning News

The decision came from a pair of wrongful death cases where couples' embryos were destroyed in an accident at a fertility clinic. Justices, citing anti-abortion language in the state's constitution, determined parents could sue over the death of a minor child "regardless of their location."

It's unclear the exact situations in which a fertility clinic or person could be found legally liable under the ruling. Out of caution, a spokesperson for the University of Alabama at Birmingham said the health system will continue offering egg retrievals but won't fertilize them, NBC News reported.

The Lone Star State has time and again secured its place at the center of the decades-long reproductive rights debate. Nearly a year before the U.S.

Supreme Court overturned the federal right to abortion, Texas instituted the Heartbeat Act, which bans abortion after roughly six weeks and allows private individuals to bring civil suits against anyone who performs or aids the procedure.

Whether Texas will follow Alabama's suit is yet to be seen. When asked during an interview on CNN whether IVF patients in the state should be worried, Gov. Greg Abbott said he supports IVF but that the question was complex.

Southern Methodist University professor and health law expert Seema Mohapatra said, at least in her reading of current Texas law, embryos have to be implanted in a person to be considered a child. That doesn't mean legislators won't try to change the definition of a child.

"Do I think there might be attempts? Yes. Do I think that they're going to be successful? I would be surprised," Mohapatra said. "But there's a lot of things that have happened in Texas that I would not have thought would have happened two years ago related to abortion restrictions."

IVF appears to have cross-aisle backing that other reproductive rights issues,

like abortion, lack. Republican candidates across the country, including former President Donald Trump, have vocalized their support of the medical procedure in the days following the Alabama decision.

Danielle Rugoff holds her eight month-old son Ezra Loren Singer in her house, Tuesday, Feb. 27, 2024, in Dallas, as her husband David Singer looks on. Rugoff, who had her son through IVF, is concerned the Alabama Supreme Court decision could spill into Texas and threaten the future of IVF in the state. (Chitose Suzuki / Staff Photographer)

IVF is an increasingly common tool for couples looking to conceive. One in 10 women between the ages of 15 and 44 had received some sort of fertility service as of 2021, while 2% of infants in Texas, or 7,315 babies, were born in 2021 with the help of assisted reproductive technology.

Using IVF is also seen as more morally acceptable than other reproductive health procedures and research, according to a 2013 study by Pew Research Center. About 49% of U.S. adults said having an abortion was morally wrong, while only 12% said the same about using IVF.

Danielle Rugoff, 40, who gave birth to her son in June after two years of IVF treatment, said the Alabama ruling is an example of an extreme policy that doesn't represent the wants of the American public. The Dallas native ran a campaign for a Republican candidate and has voted Republican, Democrat and Independent in her lifetime. There are people across the political spectrum, she said, who don't want to limit a family's ability to have children.

“The unfortunate thing about the ruling is that it not only instilled a lot of fear across the board, but also, in particular, fear for families like mine, where the future of their families hangs in the balance,” Rugoff said.

In response, Rugoff moved up her appointment to discuss when she can implant one of her two remaining embryos.

Texans hoping to start families with medical assistance are left with uncertainty, waiting to see what, if anything, the state does about the definition of human life.

Patients immediately began calling the Fertility Specialists of Texas, a

Dallas-Fort Worth clinic, asking what the Alabama ruling means for their family decisions. Dr. Jerald Goldstein, founder and medical director of the practice, said he and other fertility specialists are in the practice of creating families, and threats to that are concerning.

Goldstein, who is Rugoff's doctor, has not yet advised patients to move their embryos out-of-state or change their plans because of what's happened a few states over.

"It's frustrating. Patients are really under a lot of stress just because of the fact that they're having to go through this process, and this has to be an additional consideration," Goldstein said. "Hopefully, there will be things on the state level or national level that would make it where the process of IVF is protected."

One of Goldstein's patients is caught in the whirlwind process of determining what her next step should be in the process of getting pregnant. Meredith, who requested not to use her last name because she has not publicly shared she's undergoing IVF, has four embryos, only one of which is considered genetically normal.

Already, Meredith, 37, has spent between $20,000 and $30,000 on egg retrievals and a December embryo implantation that was ultimately unsuccessful. She doesn't know what she'll do with the embryos that aren't viable, which she said cost her about $1,000 a year to store.

"You can donate them to science, but, again, I don't know if there's certain things that they want or don't want, if they would accept that donation. And then there's a discard," Meredith said. "I'm not sure what the discarding looks like. Of course, I'm attached to these embryos, but not to the point where I feel like they are a living being yet."

Burzlaff said she, too, is emotionally attached to her remaining embryos, even though they're nonviable.

"They're all that's left, because I don't have any more rounds covered by insurance and I can't afford out-of-pocket," she said.

Burzlaff doesn't feel ready to make a decision about what to do with her embryos, but she said the risk of Texas entering a similar situation as Alabama has forced her hand. She's looking at storage facilities in California, where she has an aunt she could lean on should she decide to make the

transfer.

“Once I started this process, I didn’t expect to go to round two. I didn’t expect to go to round three, round four, round five,” Burzlaff said. “I definitely didn’t expect to be sitting there essentially empty-handed and trying to navigate laws and all of this while building my family.”

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KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Planned Parenthood South Atlantic v. State, S.C., January 5, 2023

142 S.Ct. 2228
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.

No. 19-1392
|
Argued December 1, 2021
|
Decided June 24, 2022

Synopsis
Background: Sole facility providing abortion services in Mississippi, as well as one of its abortion providers, brought action against state officials responsible for overseeing health care and medical licensing, challenging constitutionality of Mississippi's Gestational Age Act which prohibited abortions after 15 weeks' gestation except in medical emergency or in case of severe fetal abnormality. The United States District Court for the Southern District of Mississippi, Carlton Reeves, J., 349 F.Supp.3d 536, granted facility's motion to limit discovery to the issue of viability, granted plaintiffs' summary judgment motion, and permanently enjoined the Act in all applications. Defendants appealed. The United States Court of Appeals for the Fifth Circuit, Higginbotham, Senior Circuit Judge, 945 F.3d 265, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:

federal constitution does not provide a right to abortion, and authority to regulate abortion must be returned to the people and their elected representatives, overruling *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, and abrogating *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596, *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 136 S.Ct. 2292, 195 L.Ed.2d 665, *June Medical Services L.L.C. v. Russo*, 140 S.Ct. 2103, 207 L.Ed.2d 566, and other cases, and

on rational-basis review for constitutional violation, legitimate interests supported Mississippi's Gestational Age Act.

Reversed and remanded.

Justice Thomas filed a concurring opinion.

Justice Kavanaugh filed a concurring opinion.

Chief Justice Roberts filed an opinion concurring in the judgment.

Justices Breyer, Sotomayor, and Kagan filed a dissenting opinion.

West Codenotes

Negative Treatment Reconsidered
Miss. Code Ann. § 41-41-191

***2234** *Syllabus*[*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Mississippi's Gestational Age Act provides that "[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform ... or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." Miss. Code Ann. § 41–41–191. Respondents—Jackson Women's Health Organization, an abortion clinic, and one of its doctors—challenged the Act in Federal District Court, alleging that it violated this Court's precedents establishing a constitutional right to abortion, in particular *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that Mississippi's 15-week restriction on abortion violates this Court's cases forbidding States to ban abortion pre-viability. The Fifth Circuit affirmed. Before this Court, petitioners defend the Act on the grounds that *Roe* and *Casey* were wrongly decided and that the Act is constitutional because it satisfies rational-basis review.

Held: The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives. Pp. 2244 – 2285.

(a) The critical question is whether the Constitution, properly understood, confers a right to obtain an abortion. *Casey*'s controlling opinion skipped over that question and reaffirmed *Roe* solely on the basis of *stare decisis*. A proper application of *stare decisis*, however, requires an assessment of the strength of the grounds on which *Roe* was based. The Court therefore turns to the question that the *Casey* plurality did not consider. Pp. 2244 – 2258.

(1) First, the Court reviews the standard that the Court's cases have used to determine whether the Fourteenth Amendment's reference to "liberty" protects ***2235** a particular right. The Constitution makes no express reference to a right to obtain an abortion, but several constitutional provisions have been offered as potential homes for an implicit constitutional right. *Roe* held that the abortion right is part of a right to privacy that springs from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. See 410 U.S. at 152–153, 93 S.Ct. 705. The *Casey* Court grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. Others have suggested that support can be found in the Fourteenth Amendment's Equal Protection Clause, but that theory is squarely foreclosed by the Court's precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications. See *Geduldig v. Aiello*, 417 U.S. 484, 496, n. 20, 94 S.Ct. 2485, 41 L.Ed.2d 256; *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–274, 113 S.Ct. 753, 122 L.Ed.2d 34. Rather, regulations and prohibitions of abortion are governed by the same standard of review as other health and safety measures. Pp. 2244 – 2246.

(2) Next, the Court examines whether the right to obtain an abortion is rooted in the Nation's history and tradition and whether it is an essential component of "ordered liberty." The Court finds that the right to abortion is not deeply rooted in the Nation's history and tradition. The underlying theory on which *Casey* rested—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial. The Court's decisions have held that the Due Process Clause protects two categories of substantive rights—those rights guaranteed by the first eight Amendments to the Constitution and those rights deemed fundamental that are not mentioned anywhere in the Constitution. In deciding whether a right falls into either of these categories, the question is whether the right is "deeply rooted in [our] history and tradition" and

whether it is essential to this Nation's "scheme of ordered liberty." *Timbs v.Indiana*, 586 U.S. ——, ——, 139 S.Ct. 682, 686, 203 L.Ed.2d 11 (internal quotation marks omitted). The term "liberty" alone provides little guidance. Thus, historical inquiries are essential whenever the Court is asked to recognize a new component of the "liberty" interest protected by the Due Process Clause. In interpreting what is meant by "liberty," the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court's own ardent views about the liberty that Americans should enjoy. For this reason, the Court has been "reluctant" to recognize rights that are not mentioned in the Constitution. *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261.

Guided by the history and tradition that map the essential components of the Nation's concept of ordered liberty, the Court finds the Fourteenth Amendment clearly does not protect the right to an abortion. Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe*, no federal or state court had recognized such a right. Nor had any scholarly treatise. Indeed, abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s ***2236** expanded criminal liability for abortions. By the time the Fourteenth Amendment was adopted, three-quarters of the States had made abortion a crime at any stage of pregnancy. This consensus endured until the day *Roe* was decided. *Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis.

Respondents' argument that this history does not matter flies in the face of the standard the Court has applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment. The Solicitor General repeats *Roe*'s claim that it is "doubtful ... abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus," 410 U.S. at 136, 93 S.Ct. 705, but the great common-law authorities—Bracton, Coke, Hale, and Blackstone—all wrote that a post-quickening abortion was a crime. Moreover, many authorities asserted that even a pre-quickening abortion was "unlawful" and that, as a result, an abortionist was guilty of murder if the woman died from the attempt. The Solicitor General suggests that history supports an abortion right because of the common law's failure to criminalize abortion before quickening, but the insistence on quickening was not universal, see *Mills v. Commonwealth*, 13 Pa. 631, 633; *State v. Slagle*, 83 N.C. 630, 632, and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so.

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, 410 U.S. at 154, 93 S.Ct. 705, and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy," 505 U.S. at 851, 112 S.Ct. 2791. Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." *Roe*, 410 U.S. at 150, 93 S.Ct. 705; *Casey*, 505 U.S. at 852, 112 S.Ct. 2791. But the people of the various States may evaluate those interests differently. The Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated. Pp. 2245 – 2257.

(3) Finally, the Court considers whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents. The Court concludes the right to obtain an abortion cannot be justified as a component of such a right. Attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. *Casey*, 505 U.S. at 851, 112 S.Ct. 2791. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion is different because it destroys what *Roe* termed "potential life" and what the law challenged in this case calls an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. Accordingly, those cases do not support the right to obtain an abortion, and the Court's conclusion that the Constitution does not confer ***2237** such a right does not undermine them in any way. Pp. 2256 – 2258.

(b) The doctrine of *stare decisis* does not counsel continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role and protects the interests of those who have taken action in reliance on a past decision. It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455, 135 S.Ct. 2401, 192 L.Ed.2d 463. It "contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720. And it restrains judicial hubris by respecting the judgment of those who grappled with important questions in the past. But *stare decisis* is not an inexorable command, *Pearson v. Callahan*, 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565, and "is at its weakest when [the Court] interpret[s] the Constitution," *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391. Some of the Court's most important constitutional decisions have overruled prior precedents. See, *e.g.*,*Brown v. Board of Education*, 347 U.S. 483, 491, 74 S.Ct. 686, 98 L.Ed. 873 (overruling the infamous decision in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, and its progeny).

The Court's cases have identified factors that should be considered in deciding when a precedent should be overruled. *Janus v.State, County, and Municipal Employees*, 585 U.S. ——, —— – ——, 138 S.Ct. 2448, —— – ——, 201 L.Ed.2d 924. Five factors discussed below weigh strongly in favor of overruling *Roe* and *Casey*. Pp. 2261 – 2278.

(1) *The nature of the Court's error*. Like the infamous decision in *Plessy v. Ferguson*, *Roe* was also egregiously wrong and on a collision course with the Constitution from the day it was decided. *Casey* perpetuated its errors, calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side —those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who disagreed with *Roe*. Pp. 2264 – 2266.

(2) *The quality of the reasoning*. Without any grounding in the constitutional text, history, or precedent, *Roe* imposed on the entire country a detailed set of rules for pregnancy divided into trimesters much like those that one might expect to find in a statute or regulation. See 410 U.S. at 163–164, 93 S.Ct. 705. *Roe*'s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Then, after surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee, and did not explain why the sources on which it relied shed light on the meaning of the Constitution. As to precedent, citing a broad array of cases, the Court found support for a constitutional "right of personal privacy." *Id.,* at 152, 93 S.Ct. 705. But *Roe* conflated the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See *Whalen v. Roe*, 429 U.S. 589, 599–600, 97 S.Ct. 869, 51 L.Ed.2d 64. None of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed "potential life." When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were "consistent with," among other things, "the relative ***2238** weights of the respective interests involved" and "the demands of the profound problems of the present day." *Roe*, 410 U.S. at 165, 93 S.Ct. 705. These are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body. An even more glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions. See *id*., at 163, 93 S.Ct. 705. The arbitrary viability line, which *Casey* termed *Roe*'s central rule, has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. The most obvious problem with any such argument is that viability has changed over time and is heavily dependent on factors—such as medical advances and the availability of quality medical care—that have nothing to do with the characteristics of a fetus.

When *Casey* revisited *Roe* almost 20 years later, it reaffirmed *Roe*'s central holding, but pointedly refrained from endorsing most of its reasoning. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause. 505 U.S. at 846, 112 S.Ct. 2791. The controlling opinion criticized and rejected *Roe*'s trimester scheme, 505 U.S. at 872, 112 S.Ct. 2791, and substituted a new and obscure "undue burden" test. *Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies

in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new test with no firm grounding in constitutional text, history, or precedent. Pp. 2265 – 2272.

(3) *Workability*. Deciding whether a precedent should be overruled depends in part on whether the rule it imposes is workable —that is, whether it can be understood and applied in a consistent and predictable manner. *Casey*'s "undue burden" test has scored poorly on the workability scale. The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. And the difficulty of applying *Casey*'s new rules surfaced in that very case. Compare 505 U.S. at 881–887, 112 S.Ct. 2791, with *id.,* at 920–922, 112 S.Ct. 2791 (Stevens, J., concurring in part and dissenting in part). The experience of the Courts of Appeals provides further evidence that *Casey*'s "line between" permissible and unconstitutional restrictions "has proved to be impossible to draw with precision." *Janus*, 585 U.S., at ——, 138 S.Ct., at 2481. *Casey* has generated a long list of Circuit conflicts. Continued adherence to *Casey*'s unworkable "undue burden" test would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U.S. at 827, 111 S.Ct. 2597. Pp. 2275.

(4) *Effect on other areas of law*. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. See *Ramos v.Louisiana*, 590 U.S. ——, ——, 140 S.Ct., at —— (KAVANAUGH, J., concurring in part). Pp. 2275 – 2276.

(5) *Reliance interests.* Overruling *Roe* and *Casey* will not upend concrete reliance interests like those that develop in "cases involving property and contract rights." *Payne*, 501 U.S. at 828, 111 S.Ct. 2597. In *Casey*, the controlling opinion conceded ***2239** that traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." 505 U.S. at 856, 112 S.Ct. 2791. Instead, the opinion perceived a more intangible form of reliance, namely, that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society ... in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.* The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women as well as the status of the fetus. The *Casey* plurality's speculative attempt to weigh the relative importance of the interests of the fetus and the mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson v. Skrupa*, 372 U.S. 726, 729–730, 83 S.Ct. 1028, 10 L.Ed.2d 93.

The Solicitor General suggests that overruling *Roe* and *Casey* would threaten the protection of other rights under the Due Process Clause. The Court emphasizes that this decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion. Pp. 2275 – 2278.

(c) *Casey* identified another concern, namely, the danger that the public will perceive a decision overruling a controversial "watershed" decision, such as *Roe*, as influenced by political considerations or public opinion. 505 U.S. at 866–867, 112 S.Ct. 2791. But the Court cannot allow its decisions to be affected by such extraneous concerns. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* would still be the law. The Court's job is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly. Pp. 2277 – 2279.

(d) Under the Court's precedents, rational-basis review is the appropriate standard to apply when state abortion regulations undergo constitutional challenge. Given that procuring an abortion is not a fundamental constitutional right, it follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson*, 372 U.S. at 729–730, 83 S.Ct. 1028. That applies even when the laws at issue concern matters of great social significance and moral substance. A law

regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257. It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Id.,* at 320, 113 S.Ct. 2637.

Mississippi's Gestational Age Act is supported by the Mississippi Legislature's specific findings, which include the State's asserted interest in "protecting the life of the unborn." § 2(b)(i). These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail. Pp. 2283 – 2284.

(e) Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. The Court overrules those decisions and returns that authority to the people and their elected representatives. Pp. 2284 – 2285.

945 F.3d 265, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which THOMAS, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., and KAVANAUGH, J., filed concurring opinions. ROBERTS, C. J., filed an opinion concurring in the judgment. BREYER, SOTOMAYOR, and KAGAN, JJ., filed a dissenting opinion.

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Opinion

Justice ALITO delivered the opinion of the Court.

***2240** Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.*, its discussion of abortion in antiquity) to the plainly incorrect (*e.g.*, its assertion that abortion was probably

never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

***2241** Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve "viability," *i.e.*, the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting "potential life,"[1] it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*'s reasoning. One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and brutal: *Roe* was "not constitutional law" at all and gave "almost no sense of an obligation to try to be."[2]

1 *Roe v. Wade*, 410 U.S. 113, 163, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

2 J. Ely, The Wages of Crying Wolf: A Comment on *Roe v.Wade*, 82 Yale L. J. 920, 926, 947 (1973) (Ely) (emphasis deleted).

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State.[3] As Justice Byron White aptly put it in his dissent, the decision represented the "exercise of raw judicial power," 410 U.S. 179, 222, 93 S.Ct. 762, 35 L.Ed.2d 147 (1973), and it sparked a national controversy that has embittered our political culture for a half century.[4]

3 L. Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 2 (1973) (Tribe).

4 See R. Ginsburg, Speaking in a Judicial Voice, 67 N. Y. U. L. Rev. 1185, 1208 (1992) ("*Roe* ... halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue").

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court revisited *Roe*, but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way.[5] Four others wanted to overrule the decision in its entirety.[6] And the three remaining Justices, who jointly signed the controlling opinion, took a third position.[7] Their opinion did not endorse *Roe*'s reasoning, and it even hinted that one or more of its authors might have "reservations" about whether the Constitution protects a right to abortion.[8] But the opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before "viability"—even if that holding was wrong.[9] Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

5 See 505 U.S. at 911, 112 S.Ct. 2791 (Stevens, J., concurring in part and dissenting in part); *id.*, at 922, 112 S.Ct. 2791 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

6 See *id*., at 944, 112 S.Ct. 2791 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id.*, at 979, 112 S.Ct. 2791 (Scalia, J., concurring in judgment in part and dissenting in part).

7 See *id*., at 843, 112 S.Ct. 2791 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

8 *Id*., at 853, 112 S.Ct. 2791.

9 *Id*., at 860, 112 S.Ct. 2791.

***2242** Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were overruled *in toto*, and *Roe* itself was overruled in part.[10] *Casey* threw out *Roe*'s trimester scheme and substituted a new rule of

uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion.[11] The decision provided no clear guidance about the difference between a "due" and an "undue" burden. But the three Justices who authored the controlling opinion "call[ed] the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.[12]

10 *Id.*, at 861, 870, 873, 112 S.Ct. 2791 (overruling *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986)).

11 505 U.S. at 874, 112 S.Ct. 2791.

12 *Id.*, at 867, 112 S.Ct. 2791.

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. In defending this law, the State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. On the other side, respondents and the Solicitor General ask us to reaffirm *Roe* and *Casey*, and they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after 15 weeks of pregnancy, they argue, "would be no different than overruling *Casey* and *Roe* entirely." Brief for Respondents 43. They contend that "no half-measures" are available and that we must either reaffirm or overrule *Roe* and *Casey*. Brief for Respondents 50.

We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v.* Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal quotation marks omitted).

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion ***2243** a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."[13]

13 Miss. Code Ann. § 41–41–191(4)(b) (2018).

Stare decisis, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey*, 505 U.S. at 979, 112 S.Ct. 2791 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.

I

The law at issue in this case, Mississippi's Gestational Age Act, see Miss. Code Ann. § 41–41–191 (2018), contains this central provision: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform ... or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." § 4(b).[14]

14 The Act defines "gestational age" to be "the age of an unborn human being as calculated from the first day of the last menstrual period of the pregnant woman." § 3(f).

To support this Act, the legislature made a series of factual findings. It began by noting that, at the time of enactment, only six countries besides the United States "permit[ted] nontherapeutic or elective abortion-on-demand after the twentieth week of gestation."[15] § 2(a). The legislature then found that at 5 or 6 weeks' gestational age an "unborn human being's heart begins beating"; at 8 weeks the "unborn human being begins to move about in the womb"; at 9 weeks "all basic physiological functions are present"; at 10 weeks "vital organs begin to function," and "[h]air, fingernails, and toenails ... begin ***2244** to form"; at 11 weeks "an unborn human being's diaphragm is developing," and he or she may "move about freely in the womb"; and at 12 weeks the "unborn human being" has "taken on 'the human form' in all relevant respects." § 2(b)(i) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 160, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007)). It found that most abortions after 15 weeks employ "dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child," and it concluded that the "intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." § 2(b)(i)(8).

15 Those other six countries were Canada, China, the Netherlands, North Korea, Singapore, and Vietnam. See A. Baglini, Charlotte Lozier Institute, Gestational Limits on Abortion in the United States Compared to International Norms 6–7 (2014); M. Lee, Is the United States One of Seven Countries That "Allow Elective Abortions After 20 Weeks of Pregnancy?" Wash. Post (Oct. 8, 2017), www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-preganacy (stating that the claim made by the Mississippi Legislature and the Charlotte Lozier Institute was "backed by data"). A more recent compilation from the Center for Reproductive Rights indicates that Iceland and Guinea-Bissau are now also similarly permissive. See The World's Abortion Laws, Center for Reproductive Rights (Feb. 23, 2021), https://reproductiverights.org/ maps/worlds-abortion-laws/.

Respondents are an abortion clinic, Jackson Women's Health Organization, and one of its doctors. On the day the Gestational Age Act was enacted, respondents filed suit in Federal District Court against various Mississippi officials, alleging that the Act violated this Court's precedents establishing a constitutional right to abortion. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions" and that 15 weeks' gestational age is "prior to viability." *Jackson Women's Health Org. v. Currier*, 349 F.Supp.3d 536, 539–540 (S.D. Miss. 2019) (internal quotation marks omitted). The Fifth Circuit affirmed. 945 F.3d 265 (2019).

We granted certiorari, 593 U.S. ——, 141 S.Ct. 2619, 209 L.Ed.2d 748 (2021), to resolve the question whether "all pre-viability prohibitions on elective abortions are unconstitutional," Pet. for Cert. i. Petitioners' primary defense of the Mississippi Gestational Age Act is that *Roe* and *Casey* were wrongly decided and that "the Act is constitutional because it satisfies rational-basis review." Brief for Petitioners 49. Respondents answer that allowing Mississippi to ban pre-viability abortions "would

be no different than overruling *Casey* and *Roe* entirely." Brief for Respondents 43. They tell us that "no half-measures" are available: We must either reaffirm or overrule *Roe* and *Casey*. Brief for Respondents 50.

II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe*'s "central holding" based solely on the doctrine of *stare decisis*, but as we will explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was based. See *infra,* at 2265 – 2272.

We therefore turn to the question that the *Casey* plurality did not consider, and we address that question in three steps. First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

A

1

Constitutional analysis must begin with "the language of the instrument," ***2245** *Gibbons v. Ogden*, 9 Wheat. 1, 186–189, 6 L.Ed. 23 (1824), which offers a "fixed standard" for ascertaining what our founding document means, 1 J. Story, Commentaries on the Constitution of the United States § 399, p. 383 (1833). The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

Roe, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. See 410 U.S. at 152–153, 93 S.Ct. 705. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.*, at 152, 93 S.Ct. 705.

The Court's discussion left open at least three ways in which some combination of these provisions could protect the abortion right. One possibility was that the right was "founded ... in the Ninth Amendment's reservation of rights to the people." *Id.,* at 153, 93 S.Ct. 705. Another was that the right was rooted in the First, Fourth, or Fifth Amendment, or in some combination of those provisions, and that this right had been "incorporated" into the Due Process Clause of the Fourteenth Amendment just as many other Bill of Rights provisions had by then been incorporated. *Ibid*; see also *McDonald v. Chicago*, 561 U.S. 742, 763–766, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (majority opinion) (discussing incorporation). And a third path was that the First, Fourth, and Fifth Amendments played no role and that the right was simply a component of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. *Roe*, 410 U.S. at 153, 93 S.Ct. 705. *Roe* expressed the "feel[ing]" that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance.[16] The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.

16 The Court's words were as follows: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation

> of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153, 93 S.Ct. 705.

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. See Brief for United States as *Amicus Curiae* 24 (Brief for United States); see also Brief for Equal Protection Constitutional Law Scholars as *Amici Curiae*. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications.[17] The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional ***2246** scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello*, 417 U.S. 484, 496, n. 20, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974). And as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–274, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (internal quotation marks omitted). Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.[18]

17 See, *e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, ——, 137 S.Ct. 1678, 1689, 198 L.Ed.2d 150 (2017).

18 We discuss this standard in Part VI of this opinion.

With this new theory addressed, we turn to *Casey*'s bold assertion that the abortion right is an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. 505 U.S. at 846, 112 S.Ct. 2791; Brief for Respondents 17; Brief for United States 21–22.

2

The underlying theory on which this argument rests—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 247–251, 8 L.Ed. 672 (1833) (opinion for the Court by Marshall, C. J.), but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. See *McDonald*, 561 U.S. at 763–767, and nn. 12–13, 130 S.Ct. 3020. The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." *Timbsv.Indiana*, 586 U.S. ——, ——, 139 S.Ct. 682, 686, 203 L.Ed.2d 11 (2019) (internal quotation marks omitted); *McDonald*, 561 U.S. at 764, 767, 130 S.Ct. 3020 (internal quotation marks omitted); *Glucksberg*, 521 U.S., at 721, 117 S.Ct. 2258 (internal quotation marks omitted).[19] And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue.

19 See also, *e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 148, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (asking whether "a right is among those 'fundamental principles of liberty and justice which lie at the base of our civil and political institutions' "); *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (requiring "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' " (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934))).

Justice Ginsburg's opinion for the Court in *Timbs* is a recent example. In concluding that the Eighth Amendment's protection against excessive fines is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and

tradition," 586 U.S., at ——, 139 S.Ct., at 689 (internal quotation marks omitted), her opinion traced the right back to Magna Carta, Blackstone's Commentaries, and 35 of the 37 state constitutions in effect at the ***2247** ratification of the Fourteenth Amendment. 586 U.S., at —— – ——, 139 S.Ct., at 687-690.

A similar inquiry was undertaken in *McDonald*, which held that the Fourteenth Amendment protects the right to keep and bear arms. The lead opinion surveyed the origins of the Second Amendment, the debates in Congress about the adoption of the Fourteenth Amendment, the state constitutions in effect when that Amendment was ratified (at least 22 of the 37 States protected the right to keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence. 561 U.S. at 767–777, 130 S.Ct. 3020. Only then did the opinion conclude that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id*., at 778, 130 S.Ct. 3020; see also *id.*, at 822–850, 130 S.Ct. 3020 (THOMAS, J., concurring in part and concurring in judgment) (surveying history and reaching the same result under the Fourteenth Amendment's Privileges or Immunities Clause).

Timbs and *McDonald* concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution. Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of "Anglo-American common law tradition," 521 U.S., at 711, 117 S.Ct. 2258, and made clear that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition," *id*., at 720–721, 117 S.Ct. 2258.

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. "Liberty" is a capacious term. As Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing."[20] In a well-known essay, Isaiah Berlin reported that "[h]istorians of ideas" had cataloged more than 200 different senses in which the term had been used.[21]

20 Address at Sanitary Fair at Baltimore, Md. (Apr. 18, 1864), reprinted in 7 The Collected Works of Abraham Lincoln 301 (R. Basler ed. 1953).

21 Four Essays on Liberty 121 (1969).

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been "reluctant" to recognize rights that are not mentioned in the Constitution. *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). "Substantive due process has at times been a treacherous field for this Court," *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion), and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–226, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). As the Court cautioned in *Glucksberg*, "[w]e must ... exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences ***2248** of the Members of this Court." 521 U.S., at 720, 117 S.Ct. 2258 (internal quotation marks and citation omitted).

On occasion, when the Court has ignored the "[a]ppropriate limits" imposed by " 'respect for the teachings of history,' " *Moore,* 431 U.S. at 503, 97 S.Ct. 1932 (plurality opinion), it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.[22]

22 That is true regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause. Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights. See, *e.g.,McDonald v. Chicago*, 561 U.S. 742, 813–850, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment); *Duncan*, 391 U.S. at 165–166, 88 S.Ct. 1444 (Black, J., concurring); A. Amar, Bill of Rights: Creation and Reconstruction 163–180 (1998) (Amar); J. Ely, Democracy and Distrust 22–30 (1980); 2 W. Crosskey, Politics and the Constitution in the History of the United States 1089–1095 (1953). But even on that view, such a right would need to be rooted in the Nation's history and tradition. See *Corfield v. Coryell*, 6 F.Cas. 546, 551–552 (No. 3,230) (C.C.E.D. Pa. 1823) (describing unenumerated rights under the Privileges and Immunities Clause, Art. IV, § 2, as those "fundamental" rights "which have, at all times, been enjoyed by the citizens of the several states"); Amar 176 (relying on *Corfield* to interpret the Privileges or Immunities Clause); cf. *McDonald*, 561 U.S. at 819–820, 832, 854, 130 S.Ct. 3020 (opinion of THOMAS, J.) (reserving the question whether the Privileges or Immunities Clause protects "any rights besides those enumerated in the Constitution").

B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.[23]

23 See R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. Rev. 730 (1968) (Lucas); see also D. Garrow, Liberty and Sexuality 334–335 (1994) (Garrow) (stating that Lucas was "undeniably the first person to fully articulate on paper" the argument that "a woman's right to choose abortion was a fundamental individual freedom protected by the U.S. Constitution's guarantee of personal liberty").

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, ***2249** and the remaining States would soon follow.

Roe either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight.

2

a

We begin with the common law, under which abortion was a crime at least after "quickening"—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.[24]

24 The exact meaning of "quickening" is subject to some debate. Compare Brief for Scholars of Jurisprudence as *Amici Curiae* 12–14, and n. 32 (emphasis deleted) (" 'a quick child' " meant simply a "live" child, and under the era's outdated knowledge of embryology, a fetus was thought to become "quick" at around the sixth week of pregnancy), with Brief for American Historical Association et al. as *Amici Curiae* 6, n. 2 ("quick" and "quickening" consistently meant "the woman's perception of fetal movement"). We need not wade

into this debate. First, it suffices for present purposes to show that abortion was criminal by *at least* the 16th or 18th week of pregnancy. Second, as we will show, during the relevant period—*i.e.,* the period surrounding the enactment of the Fourteenth Amendment—the quickening distinction was abandoned as States criminalized abortion at all stages of pregnancy. See *infra*, at 2251 – 2254.

The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)," *Kahler v. Kansas*, 589 U.S. ——, ——, 140 S.Ct. 1021, 1027, 206 L.Ed.2d 312 (2020), *all* describe abortion after quickening as criminal. Henry de Bracton's 13th-century treatise explained that if a person has "struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide." 2 De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879); see also 1 Fleta, c. 23, reprinted in 72 Selden Soc. 60–61 (H. Richardson & G. Sayles eds. 1955) (13th-century treatise).[25]

25 Even before Bracton's time, English law imposed punishment for the killing of a fetus. See Leges Henrici Primi 222–223 (L. Downer ed. 1972) (imposing penalty for any abortion and treating a woman who aborted a "quick" child "as if she were a murderess").

Sir Edward Coke's 17th-century treatise likewise asserted that abortion of a quick child was "murder" if the "childe be born alive" and a "great misprision" if the "childe dieth in her body." 3 Institutes of the Laws of England 50–51 (1644). ("Misprision" referred to "some heynous offence under the degree of felony." *Id*., at 139, 127 S.Ct. 1610.) Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a "great crime" and a "great misprision." Pleas of the Crown 53 (P. Glazebrook ed. 1972); 1 History of the Pleas of the Crown 433 (1736) (Hale). And writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a "quick" child was "by the ancient law homicide or manslaughter" (citing Bracton), and at least a very "heinous misdemeanor" (citing Coke). 1 Commentaries on the Laws of England 129–130 (7th ed. 1775) (Blackstone).

English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime. See generally J. Dellapenna, Dispelling the Myths of Abortion History 126, and n. 16, 134–142, 188–194, and nn. 84–86 (2006) (Dellapenna); J. Keown, Abortion, Doctors and the Law 3–12 (1988) (Keown). In 1732, for example, Eleanor Beare was convicted of "destroying the Foetus in the Womb" of another woman and "thereby causing her ***2250** to miscarry."[26] For that crime and another "misdemeanor," Beare was sentenced to two days in the pillory and three years' imprisonment.[27]

26 2 Gentleman's Magazine 931 (Aug. 1732).

27 *Id*., at 932.

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*. Cf. *Glucksberg*, 521 U.S., at 713, 117 S.Ct. 2258 (removal of "common law's harsh sanctions did not represent an acceptance of suicide"). Quite to the contrary, in the 1732 case mentioned above, the judge said of the charge of abortion (with no mention of quickening) that he had "never met with a case so barbarous and unnatural."[28] Similarly, an indictment from 1602, which did not distinguish between a pre-quickening and post-quickening abortion, described abortion as "pernicious" and "against the peace of our Lady the Queen, her crown and dignity." Keown 7 (discussing *R. v.Webb*, Calendar of Assize Records, Surrey Indictments 512 (1980)).

28 *Ibid.*

That the common law did not condone even prequickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale and Blackstone explained a way in which a pre-quickening abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman "with child*"* a "potion" to cause an abortion, and the woman died, it was "murder" because the potion was given "*unlawfully* to destroy her child within her." 1 Hale 429–430 (emphasis added). As Blackstone explained, to be "murder" a killing had to be done with "malice aforethought, ... either express or implied." 4 Blackstone 198 (emphasis deleted). In the case of an abortionist, Blackstone wrote, "the law will imply [malice]" for the same reason that it would imply malice if a person who intended to kill one person accidentally killed a different person:

> "[I]f one shoots at A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. *So also*, if one gives *a woman with child* a medicine to procure abortion, and it operates so violently as to kill the woman, *this is murder* in the person who gave it." *Id.*, at 200–201 (emphasis added; footnote omitted).[29]

29 Other treatises restated the same rule. See 1 W. Russell & C. Greaves, Crimes and Misdemeanors 540 (5th ed. 1845) ("So where a person gave medicine to a woman to procure an abortion, and where a person put skewers into the woman for the same purpose, by which in both cases the women were killed, these acts were clearly held to be murder" (footnotes omitted)); 1 E. East, Pleas of the Crown 230 (1803) (similar).

Notably, Blackstone, like Hale, did not state that this proto-felony-murder rule required that the woman be "with quick child"—only that she be "with child." *Id*., at 201. And it is revealing that Hale and Blackstone treated abortionists differently from *other* physicians or surgeons who caused the death of a patient "without any intent of doing [the patient] any bodily hurt." Hale 429; see 4 Blackstone 197. These other physicians—even if "unlicensed"—would not be "guilty of murder or manslaughter." Hale 429. But a physician performing an abortion would, precisely because his aim was an "unlawful" one.

***2251** In sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.

b

In this country, the historical record is similar. The "most important early American edition of Blackstone's Commentaries," *District of Columbia v. Heller*, 554 U.S. 570, 594, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), reported Blackstone's statement that abortion of a quick child was at least "a heinous misdemeanor," 2 St. George Tucker, Blackstone's Commentaries 129–130 (1803), and that edition also included Blackstone's discussion of the proto-felony-murder rule, 5 *id*., at 200–201. Manuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rule on abortion, and some manuals repeated Hale's and Blackstone's statements that anyone who prescribed medication "unlawfully to destroy the child" would be guilty of murder if the woman died. See, *e.g.*, J. Parker, Conductor Generalis 220 (1788); 2 R. Burn, Justice of the Peace, and Parish Officer 221–222 (7th ed. 1762) (English manual stating the same).[30]

30 For manuals restating one or both rules, see J. Davis, Criminal Law 96, 102–103, 339 (1838); Conductor Generalis 194–195 (1801) (printed in Philadelphia); Conductor Generalis 194–195 (1794) (printed in Albany); Conductor Generalis 220 (1788) (printed in New York); Conductor Generalis 198 (1749) (printed in New York); G. Webb, Office and Authority of a Justice of Peace 232 (1736) (printed in Williamsburg); Conductor Generalis 161 (1722) (printed in Philadelphia); see also J. Conley, Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America, 6 J. Legal Hist. 257, 265, 267 (1985) (noting that these manuals were the justices' "primary source of legal reference" and of "practical value for a wider audience than the justices").
For cases stating the proto-felony-murder rule, see, *e.g.*, *Commonwealth v. Parker*, 50 Mass. 263, 265 (1845); *People v. Sessions*, 58 Mich. 594, 595–596, 26 N.W. 291, 292–293 (1886); *State v. Moore*, 25 Iowa 128, 131–132 (1868); *Smith v. State*, 33 Me. 48, 54–55 (1851).

The few cases available from the early colonial period corroborate that abortion was a crime. See generally Dellapenna 215–228 (collecting cases). In Maryland in 1652, for example, an indictment charged that a man "Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb." *Proprietaryv.Mitchell*, 10 Md. Archives 80, 183 (1652) (W. Browne ed. 1891). And by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime. See, *e.g.*, *Smith v. Gaffard*, 31 Ala. 45, 51 (1857); *Smith v. State*, 33 Me. 48, 55 (1851); *State v. Cooper*, 22 N.J.L. 52, 52–55 (1849); *Commonwealth v. Parker*, 50 Mass. 263, 264–268 (1845).

c

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages,[31] and thus, as one court put it in 1872: "[U]ntil the period of quickening ***2252** there is no *evidence* of life; and whatever may be said of the feotus, the law has fixed upon this period of gestation as the time when the child is endowed with life" because "foetal movements are the first clearly marked and well defined *evidencesof life*." *Evans v. People*, 49 N.Y. 86, 90 (emphasis added); *Cooper*, 22 N.J.L. at 56 ("In contemplation of law life commences at the moment of quickening, at that moment when the embryo gives *the first physical proof of life*, no matter when it first received it" (emphasis added)).

31 See E. Rigby, A System of Midwifery 73 (1841) ("Under all circumstances, the diagnosis of pregnancy must ever be difficult and obscure during the early months"); see also *id.,* at 74–80 (discussing rudimentary techniques for detecting early pregnancy); A. Taylor, A Manual of Medical Jurisprudence 418–421 (6th Am. ed. 1866) (same).

The Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus "as having a 'separate and independent existence.' " Brief for United States 26 (quoting *Parker*, 50 Mass. at 266). But the case on which the Solicitor General relies for this proposition also suggested that the criminal law's quickening rule was out of step with the treatment of prenatal life in other areas of law, noting that "to many purposes, in reference to civil rights, an infant *in ventre sa mere* is regarded as a person in being." *Ibid*. (citing 1 Blackstone 129); see also *Evans,* 49 N.Y. at 89; *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850); *Morrow v. Scott*, 7 Ga. 535, 537 (1849); *Hall v. Hancock*, 32 Mass. 255, 258 (1834); *Thellussonv.Woodford*, 4 Ves. 227, 321–322, 31 Eng. Rep. 117, 163 (1789).

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as "neither in accordance with the result of medical experience, nor with the principles of the common law." F. Wharton, Criminal Law § 1220, p. 606 (rev. 4th ed. 1857) (footnotes omitted); see also J. Beck, Researches in Medicine and Medical Jurisprudence 26–28 (2d ed. 1835) (describing the quickening distinction as "absurd" and "injurious").[32] In 1803, the British Parliament made abortion a crime at all stages of pregnancy and authorized the imposition of severe punishment. See Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803). One scholar has suggested that Parliament's decision "may partly have been attributable to the medical man's concern that fetal life should be protected by the law at all stages of gestation." Keown 22.

32 See *Mitchell v. Commonwealth*, 78 Ky. 204, 209–210 (1879) (acknowledging the common-law rule but arguing that "the law should punish abortions and miscarriages, willfully produced, at any time during the period of gestation"); *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850) (the quickening rule "never ought to have been the law anywhere"); J. Bishop, Commentaries on the Law of Statutory Crimes § 744, p. 471 (1873) ("If we look at the reason of the law, we shall prefer" a rule that "discard[s] this doctrine of the necessity of a quickening"); I. Dana, Report of the Committee on the Production of Abortion, in 5 Transactions of the Maine Medical Association 37–39 (1866); Report on Criminal Abortion, in 12 Transactions of the American Medical Association 75–77 (1859); W. Guy, Principles of Medical Forensics 133–134 (1845); J. Chitty, Practical Treatise on Medical Jurisprudence 438 (2d Am. ed. 1836); 1 T. Beck & J. Beck, Elements of Medical Jurisprudence 293 (5th ed. 1823); 2 T. Percival, The Works, Literary, Moral and Medical 430 (1807); see also Keown 38–39 (collecting English authorities).

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. See Appendix A, *infra* (listing state statutory provisions in chronological order).[33] By 1868, the year when the ***2253** Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.[34] See *ibid.* Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910. See *ibid.*

33 See generally Dellapenna 315–319 (cataloging the development of the law in the States); E. Quay, Justifiable Abortion—Medical and Legal Foundations, 49 Geo. L. J. 395, 435–437, 447–520 (1961) (Quay) (same); J. Witherspoon, Reexamining *Roe*: Nineteenth-Century Abortion Statutes and The Fourteenth Amendment, 17 St. Mary's L. J. 29, 34–36 (1985) (Witherspoon) (same).

34 Some scholars assert that only 27 States prohibited abortion at all stages. See, *e.g.*, Dellapenna 315; Witherspoon 34–35, and n. 15. Those scholars appear to have overlooked Rhode Island, which criminalized abortion at all stages in 1861. See Acts and Resolves R. I. 1861, ch. 371, § 1, p. 133 (criminalizing the attempt to "procure the miscarriage" of "any pregnant woman" or "any woman supposed by such person to be pregnant," without mention of quickening). The *amicus* brief for the American Historical Association asserts that only 26 States prohibited abortion at all stages, but that brief incorrectly excludes West Virginia and Nebraska from its count. Compare Brief for American Historical Association 27–28 (citing Quay), with Appendix A, *infra*.

The trend in the Territories that would become the last 13 States was similar: All of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). See Appendix B, *infra*; see also *Casey*, 505 U.S. at 952, 112 S.Ct. 2791 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); Dellapenna 317–319. By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother."410 U.S. at 139, 93 S.Ct. 705.[35]

35 The statutes of three States (Massachusetts, New Jersey, and Pennsylvania) prohibited abortions performed "unlawfully" or "without lawful justification." *Roe*, 410 U.S. at 139, 93 S.Ct. 705 (internal quotation marks omitted). In Massachusetts, case law held that abortion was allowed when, according to the judgment of physicians in the relevant community, the procedure was necessary to preserve the woman's life or her physical or emotional health. *Commonwealth v. Wheeler*, 315 Mass. 394, 395, 53 N.E.2d 4, 5 (1944). In the other two States, however, there is no clear support in case law for the proposition that abortion was lawful where the mother's life was not at risk. See *State v. Brandenburg*, 137 N.J.L. 124, 58 A.2d 709 (1948); *Commonwealth v. Trombetta*, 131 Pa.Super. 487, 200 A. 107 (1938).
Statutes in the two remaining jurisdictions (the District of Columbia and Alabama) permitted "abortion to preserve the mother's health." *Roe*, 410 U.S. at 139, 93 S.Ct. 705. Case law in those jurisdictions does not clarify the breadth of these exceptions.

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. See *id.*, at 118, and n. 2, 93 S.Ct. 705 (listing States). And though *Roe* discerned a "trend toward liberalization" in about "one-third of the States," those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. *Id.*, at 140, 93 S.Ct. 705, and n. 37; Tribe 2. In short, the "Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 793, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (White, J., dissenting).

d

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment ***2254** persisted from the earliest days of the common law until 1973. The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: "Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice]." 521 U.S., at 719, 117 S.Ct. 2258.

3

Respondents and their *amici* have no persuasive answer to this historical evidence.

Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy. See Brief for Petitioners 12–13; see also Brief for American Historical Association et al. as *Amici*

Curiae 27–28, and nn. 14–15 (conceding that 26 out of 37 States prohibited abortion before quickening); Tr. of Oral Arg. 74–75 (respondents' counsel conceding the same). Instead, respondents are forced to argue that it "does [not] matter that some States prohibited abortion at the time *Roe* was decided or when the Fourteenth Amendment was adopted." Brief for Respondents 21. But that argument flies in the face of the standard we have applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment.

Not only are respondents and their *amici* unable to show that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise. The earliest sources called to our attention are a few district court and state court decisions decided shortly before *Roe* and a small number of law review articles from the same time period.[36]

36 See 410 U.S. at 154–155, 93 S.Ct. 705 (collecting cases decided between 1970 and 1973); C. Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About To Arise From the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty? 17 N. Y. L. Forum 335, 337–339 (1971) (Means II); C. Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality, 14 N. Y. L. Forum 411 (1968) (Means I); Lucas 730.

A few of respondents' *amici* muster historical arguments, but they are very weak. The Solicitor General repeats *Roe*'s claim that it is " 'doubtful' ... 'abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.' " Brief for United States 26 (quoting *Roe*, 410 U.S. at 136, 93 S.Ct. 705). But as we have seen, great common-law authorities like Bracton, Coke, Hale, and Blackstone all wrote that a post-quickening abortion was a crime—and a serious one at that. Moreover, Hale and Blackstone (and many other authorities following them) asserted that even a pre-quickening abortion was "unlawful" and that, as a result, an abortionist was guilty of murder if the woman died from the attempt.

Instead of following these authorities, *Roe* relied largely on two articles by a pro-abortion advocate who claimed that Coke had intentionally misstated the common law because of his strong anti-abortion views.[37] These articles have been discredited,[38] and it has come to light that even ***2255** members of Jane Roe's legal team did not regard them as serious scholarship. An internal memorandum characterized this author's work as donning "the guise of impartial scholarship while advancing the proper ideological goals."[39] Continued reliance on such scholarship is unsupportable.

37 See 410 U.S. at 136, n. 26, 93 S.Ct. 705 (citing Means II); 410 U.S. at 132–133, n. 21, 93 S.Ct. 705 (citing Means I).

38 For critiques of Means's work, see, *e.g.*, Dellapenna 143–152, 325–331; Keown 3–12; J. Finnis, "Shameless Acts" in Colorado: Abuse of Scholarship in Constitutional Cases, 7 Academic Questions 10, 11–12 (1994); R. Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 Cal. L. Rev. 1250, 1267–1282 (1975); R. Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Ford. L. Rev. 807, 814–829 (1973).

39 Garrow 500–501, and n. 41 (internal quotation marks omitted).

The Solicitor General next suggests that history supports an abortion right because the common law's failure to criminalize abortion before quickening means that "at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages."[40] Brief for United States 26–27; see also Brief for Respondents 21. But the insistence on quickening was not universal, see *Mills*, 13 Pa. at 633; *State v. Slagle*, 83 N.C. 630, 632 (1880), and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right. That is not surprising since common-law authorities had repeatedly condemned abortion and described it as an "unlawful" act without regard to whether it occurred before or after quickening. See *supra*, at 2248 – 2252.

40 In any event, *Roe*, *Casey*, and other related abortion decisions imposed substantial restrictions on a State's capacity to regulate abortions performed after quickening. See, *e.g.*, *June Medical Services L. L. C.v.Russo*, 591 U.S. ——, 140 S.Ct. 2103, 207 L.Ed.2d 566 (2020) (holding a law requiring doctors performing abortions to secure admitting privileges to be unconstitutional); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016) (similar); *Casey*, 505 U.S. at 846, 112 S.Ct. 2791 (declaring that prohibitions on "abortion before viability" are unconstitutional); *id.*, at 887–898, 112 S.Ct. 2791 (holding that a spousal notification provision was unconstitutional). In addition, *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), has been interpreted by some to protect a broad right to obtain an abortion at any stage of pregnancy provided that a physician is willing to certify that it is needed due to a woman's "emotional" needs or "familial" concerns. *Id.*, at 192, 93 S.Ct. 739. See, *e.g.*, *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 209 (C.A.6 1997), cert. denied, 523 U.S. 1036, 118 S.Ct. 1347, 140 L.Ed.2d 496 (1998); but see *id.*, at 1039 (THOMAS, J., dissenting from denial of certiorari).

Another *amicus* brief relied upon by respondents (see Brief for Respondents 21) tries to dismiss the significance of the state criminal statutes that were in effect when the Fourteenth Amendment was adopted by suggesting that they were enacted for illegitimate reasons. According to this account, which is based almost entirely on statements made by one prominent proponent of the statutes, important motives for the laws were the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to "shir[k their] maternal duties." Brief for American Historical Association et al. as *Amici Curiae* 20.

Resort to this argument is a testament to the lack of any real historical support for the right that *Roe* and *Casey* recognized. This Court has long disfavored arguments based on alleged legislative motives. See, *e.g.*, ***2256** *Erie v. Pap's A. M.*, 529 U.S. 277, 292, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 652, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *Arizona v. California*, 283 U.S. 423, 455, 51 S.Ct. 522, 75 L.Ed. 1154 (1931) (collecting cases). The Court has recognized that inquiries into legislative motives "are a hazardous matter." *O'Brien*, 391 U.S. at 383, 88 S.Ct. 1673. Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we have been reluctant to attribute those motives to the legislative body as a whole. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.,* at 384, 88 S.Ct. 1673.

Here, the argument about legislative motive is not even based on statements by legislators, but on statements made by a few supporters of the new 19th-century abortion laws, and it is quite a leap to attribute these motives to all the legislators whose votes were responsible for the enactment of those laws. Recall that at the time of the adoption of the Fourteenth Amendment, over three-quarters of the States had adopted statutes criminalizing abortion (usually at all stages of pregnancy), and that from the early 20th century until the day *Roe* was handed down, every single State had such a law on its books. Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?

There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point. See, *e.g.*, *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934); *State v. Ausplund*, 86 Or. 121, 131–132, 167 P. 1019, 1022–1023 (1917); *Trent v. State*, 15 Ala.App. 485, 488, 73 So. 834, 836 (1916); *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913); *State v. Tippie*, 89 Ohio St. 35, 39–40, 105 N.E. 75, 77 (1913); *State v. Gedicke*, 43 N.J.L. 86, 90 (1881); *Dougherty v. People*, 1 Colo. 514, 522–523 (1873); *State v. Moore*, 25 Iowa 128, 131–132 (1868); *Smith,* 33 Me. at 57; see also *Memphis Center for Reproductive Health v. Slatery*, 14 F.4th 409, 446, and n. 11 (C.A.6 2021) (Thapar, J., concurring in judgment in part and dissenting in part) (citing cases).

One may disagree with this belief (and our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests), but even *Roe* and *Casey* did not question the good faith of abortion opponents. See, *e.g.*,*Casey*, 505 U.S. at 850, 112 S.Ct. 2791 ("Men and women of good conscience can disagree ... about the profound moral and spiritual implications of terminating a pregnancy even in its earliest stage"). And we see no reason to discount the significance of the state laws in question based on these *amici*'s suggestions about legislative motive.[41]

41 Other *amicus* briefs present arguments about the motives of proponents of liberal access to abortion. They note that some such supporters have been motivated by a desire to suppress the size of the African-American population. See Brief for African-American Organization et al. as *Amici Curiae* 14–21; see also *Boxv. Planned Parenthood of Ind. and Ky., Inc.*, 587 U.S. ——, —— – ——, 139 S.Ct. 1780, 1782-1784, 204 L.Ed.2d 78 (2019) (THOMAS, J., concurring). And it is beyond dispute that *Roe* has had that demographic effect. A highly disproportionate percentage of aborted fetuses are Black. See, *e.g.*, Dept. of Health and Human Servs., Centers for Disease Control and Prevention (CDC), K. Kortsmit et al., Abortion Surveillance—United States, 2019, 70 Morbidity and Mortality Report, Surveillance Summaries, p. 20 (Nov. 26, 2021) (Table 6). For our part, we do not question the motives of either those who have supported or those who have opposed laws restricting abortions.

***2257** C

1

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, 410 U.S. at 154, 93 S.Ct. 705, and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy," 505 U.S. at 851, 112 S.Ct. 2791. *Casey* elaborated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Ibid*.

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free *tothink* and *to say* what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free *to act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty."

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." *Roe*, 410 U.S. at 150, 93 S.Ct. 705 (emphasis deleted); *Casey*, 505 U.S. at 852, 112 S.Ct. 2791. But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." Miss. Code Ann. § 41–41–191(4)(b). Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); the right to marry while in prison, *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); the right to obtain contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), *Carey v. Population Services Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); the right to reside with relatives, *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); the right to make decisions about the education of one's children, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); the right not to be sterilized without consent, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), ***2258** *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) (right to marry a person of the same sex). See Brief for Respondents 18; Brief for United States 23–24.

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. *Casey*, 505 U.S. at 851, 112 S.Ct. 2791. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. See *Compassion in Dying v. Washington*, 85 F.3d 1440, 1444 (CA9 1996) (O'Scannlain, J., dissenting from denial of rehearing en banc). None of these rights has any claim to being deeply rooted in history. *Id*., at 1440, 1445.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." See *Roe*, 410 U.S. at 159, 93 S.Ct. 705 (abortion is "inherently different"); *Casey*, 505 U.S. at 852, 112 S.Ct. 2791 (abortion is "a unique act"). None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

2

In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey*'s claim (which we accept for the sake of argument) that "the specific practices of States at the time of the adoption of the Fourteenth Amendment" do not "mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." 505 U.S. at 848, 112 S.Ct. 2791. Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

Defenders of *Roe* and *Casey* do not claim that any new scientific learning calls for a different answer to the underlying moral question, but they do contend that changes in society require the recognition of a constitutional right to obtain an abortion. Without the availability of abortion, they maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy;[42] that leave for pregnancy and childbirth are ***2259** now guaranteed by law in many cases;[43] that the costs of medical care associated with pregnancy are covered by insurance or government assistance;[44] that States have increasingly adopted "safe haven" laws, which generally allow women to drop off babies anonymously;[45] and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.[46] They also claim that many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.

42 See, *e.g.*, Pregnancy Discrimination Act, 92 Stat. 2076, 42 U.S. C. § 2000e(k) (federal law prohibiting pregnancy discrimination in employment); Dept. of Labor, Women's Bureau, Employment Protections for Workers Who Are Pregnant or Nursing, https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections (showing that 46 States and the District of Columbia have employment protections against pregnancy discrimination).

43 See, *e.g.*, Family and Medical Leave Act of 1993, 107 Stat. 9, 29 U.S. C. § 2612 (federal law guaranteeing employment leave for pregnancy and birth); Bureau of Labor Statistics, Access to Paid and Unpaid Family Leave in 2018, https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm (showing that 89 percent of civilian workers had access to unpaid family leave in 2018).

44 The Affordable Care Act (ACA) requires non-grandfathered health plans in the individual and small group markets to cover certain essential health benefits, which include maternity and newborn care. See 124 Stat. 163, 42 U.S. C. § 18022(b)(1)(D). The ACA

also prohibits annual limits, see § 300gg–11, and limits annual cost-sharing obligations on such benefits, § 18022(c). State Medicaid plans must provide coverage for pregnancy-related services—including, but not limited to, prenatal care, delivery, and postpartum care—as well as services for other conditions that might complicate the pregnancy. 42 CFR §§ 440.210(a)(2)(i)–(ii) (2020). State Medicaid plans are also prohibited from imposing deductions, cost-sharing, or similar charges for pregnancy-related services for pregnant women. 42 U.S. C. §§ 1396*o*(a)(2)(B), (b)(2)(B).

45 Since *Casey*, all 50 States and the District of Columbia have enacted such laws. Dept. of Health and Human Servs., Children's Bureau, Infant Safe Haven Laws 1–2 (2016), https://www.childwelfare.gov/pubPDFs/ safehaven.pdf (noting that safe haven laws began in Texas in 1999).

46 See, *e.g.*, CDC, Adoption Experiences of Women and Men and Demand for Children To Adopt by Women 18–44 Years of Age in the United States 16 (Aug. 2008) ("[N]early 1 million women were seeking to adopt children in 2002 (*i.e.*, they were in demand for a child), whereas the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent"); CDC, National Center for Health Statistics, Adoption and Nonbiological Parenting, https://www.cdc.gov/nchs/nsfg/key_statistics/a-keystat.htm# adoption (showing that approximately 3.1 million women between the ages of 18–49 had ever "[t]aken steps to adopt a child" based on data collected from 2015–2019).

Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.

D

1

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a " 'deeply rooted' " one, " 'in this Nation's history and tradition.' " *Glucksberg*, 521 U.S., at 721, 117 S.Ct. 2258; see *post*, at 2323 – 2324 (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ.). The dissent does not identify *any* pre-*Roe* authority that supports such a right—no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise. Compare *post*, at 2324, n. 2, with *supra,* at 2248 – 2249, and n. 23. Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a ***2260** trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion "however and whenever performed" except if necessary to save "the life of the mother," *Roe*, 410 U.S. at 139, 93 S.Ct. 705; and that when *Roe* was decided in 1973 similar statutes were still in effect in 30 States. Compare *post*, at 2324, nn. 2–3, with *supra,* at 2252 – 2254, and nn. 33–34.[47]

47 By way of contrast, at the time *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), was decided, the Connecticut statute at issue was an extreme outlier. See Brief for Planned Parenthood Federation of America, Inc. as *Amicus Curiae* in *Griswold v.Connecticut*, O. T. 1964, No. 496, p. 27.

The dissent's failure to engage with this long tradition is devastating to its position. We have held that the "established method of substantive-due-process analysis" requires that an unenumerated right be " 'deeply rooted in this Nation's history and tradition' " before it can be recognized as a component of the "liberty" protected in the Due Process Clause. *Glucksberg*, 521 U.S., at 721, 117 S.Ct. 2258; cf. *Timbs*, 586 U.S., at ——, 139 S.Ct., at 689-90. But despite the dissent's professed fidelity to *stare decisis*, it fails to seriously engage with that important precedent—which it cannot possibly satisfy.

The dissent attempts to obscure this failure by misrepresenting our application of *Glucksberg*. The dissent suggests that we have focused only on "the legal status of abortion in the 19th century," *post,* at 2331, but our review of this Nation's tradition extends well past that period. As explained, for more than a century after 1868—including "another half-century" after women gained the constitutional right to vote in 1920, see *post*, at 2324 – 2325; Amdt. 19—it was firmly established that laws prohibiting

abortion like the Texas law at issue in *Roe* were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule *Roe* and *Casey.* The dissent cannot establish that a right to abortion has *ever* been part of this Nation's tradition.

2

Because the dissent cannot argue that the abortion right is rooted in this Nation's history and tradition, it contends that the "constitutional tradition" is "not captured whole at a single moment," and that its "meaning gains content from the long sweep of our history and from successive judicial precedents." *Post*, at 2326 (internal quotation marks omitted). This vague formulation imposes no clear restraints on what Justice White called the "exercise of raw judicial power," *Roe*, 410 U.S. at 222, 93 S.Ct. 762 (dissenting opinion), and while the dissent claims that its standard "does not mean anything goes," *post*, at 2326, any real restraints are hard to discern.

The largely limitless reach of the dissenters' standard is illustrated by the way they apply it here. First, if the "long sweep of history" imposes any restraint on the recognition of unenumerated rights, then *Roe* was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down. Second, it is impossible to defend *Roe* based on prior precedent because all of the precedents *Roe* cited, including *Griswold* and *Eisenstadt*, were critically different for a reason that we have explained: None of those cases involved the destruction of what *Roe* called "potential life." See *supra*, at 2257 – 2258.

***2261** So without support in history or relevant precedent, *Roe*'s reasoning cannot be defended even under the dissent's proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in *Roe* and later decisions that accepted *Roe*'s interpretation. Under the doctrine of *stare decisis*, those precedents are entitled to careful and respectful consideration, and we engage in that analysis below. But as the Court has reiterated time and time again, adherence to precedent is not " 'an inexorable command.' " *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015). There are occasions when past decisions should be overruled, and as we will explain, this is one of them.

3

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. This is evident in the analogy that the dissent draws between the abortion right and the rights recognized in *Griswold* (contraception), *Eisenstadt* (same), *Lawrence* (sexual conduct with member of the same sex), and *Obergefell* (same-sex marriage). Perhaps this is designed to stoke unfounded fear that our decision will imperil those other rights, but the dissent's analogy is objectionable for a more important reason: what it reveals about the dissent's views on the protection of what *Roe* called "potential life." The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance.

That view is evident throughout the dissent. The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life. The dissent repeatedly praises the "balance," *post*, at 2317 – 2318, 2319 – 2320, 2320 – 2321, 2322, 2323, that the viability line strikes between a woman's liberty interest and the State's interest in prenatal life. But for reasons we discuss later, see *infra,* at 2268 – 2271, 2271 – 2272, 135 S.Ct. 2401, and given in the opinion of THE CHIEF JUSTICE, *post,* at 2310 – 2313 (opinion concurring in judgment), the viability line makes no sense. It was not adequately justified in *Roe*, and the dissent does not even try to defend it today. Nor does it identify any other point in a pregnancy after which a State is permitted to prohibit the destruction of a fetus.

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that " 'theory of life.' " *Post*, at 2320 – 2321.

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of ***2262** those who have taken action in reliance on a past decision. See *Casey*, 505 U.S. at 856, 112 S.Ct. 2791 (joint opinion); see also *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble*, 576 U.S. at 455, 135 S.Ct. 2401. It fosters "evenhanded" decisionmaking by requiring that like cases be decided in a like manner. *Payne*, 501 U.S. at 827, 111 S.Ct. 2597. It "contributes to the actual and perceived integrity of the judicial process." *Ibid*. And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges." N. Gorsuch, A Republic, If You Can Keep It 217 (2019).

We have long recognized, however, that *stare decisis* is "not an inexorable command," *Pearson v. Callahan*, 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (internal quotation marks omitted), and it "is at its weakest when we interpret the Constitution," *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). It has been said that it is sometimes more important that an issue " 'be settled than that it be settled right.' " *Kimble*, 576 U.S. at 455, 135 S.Ct. 2401 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting)). But when it comes to the interpretation of the Constitution—the "great charter of our liberties," which was meant "to endure through a long lapse of ages," *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326, 14 U.S. 304, 4 L.Ed. 97 (1816) (opinion for the Court by Story, J.)—we place a high value on having the matter "settled right." In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. See Art. V; *Kimble*, 576 U.S. at 456, 135 S.Ct. 2401. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Court repudiated the "separate but equal" doctrine, which had allowed States to maintain racially segregated schools and other facilities. *Id*., at 488, 74 S.Ct. 686 (internal quotation marks omitted). In so doing, the Court overruled the infamous decision in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule. See *Brown*, 347 U.S. at 491, 74 S.Ct. 686.

In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), the Court overruled *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), which had held that a law setting minimum wages for women violated the "liberty" protected by the Fifth Amendment's Due Process Clause. *Id.*, at 545, 16 S.Ct. 1138. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. See *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (holding invalid a law setting maximum working hours); ***2263** *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915) (holding invalid a law banning contracts forbidding employees to join a union); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813 (1924) (holding invalid laws fixing the weight of loaves of bread).

Finally, in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), after the lapse of only three years, the Court overruled *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because nothing had changed during the intervening period other than the Court's belated recognition that its earlier decision had been seriously wrong.

On many other occasions, this Court has overruled important constitutional decisions. (We include a partial list in the footnote that follows.[48]) Without these decisions, ***2264** American constitutional law as we know it would be unrecognizable, and this would be a different country.

48 See, *e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) (right to same-sex marriage), overruling *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (right to engage in campaign-related speech), overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), and partially overruling *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003); *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (Sixth Amendment right to counsel), overruling *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (Sixth Amendment right to confront witnesses), overruling *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (right to engage in consensual, same-sex intimacy in one's home), overruling *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (Sixth Amendment right to a jury trial in capital prosecutions), overruling *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (evaluating whether government aid violates the Establishment Clause), overruling *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (lack of congressional power under the Indian Commerce Clause to abrogate States' Eleventh Amendment immunity), overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989); *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (the Eighth Amendment does not erect a *per se* bar to the admission of victim impact evidence during the penalty phase of a capital trial), overruling *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989); *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race), overruling *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 530, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (rejecting the principle that the Commerce Clause does not empower Congress to enforce requirements, such as minimum wage laws, against the States " 'in areas of traditional governmental functions' "), overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976); *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (the Fourth Amendment requires a totality of the circumstances approach for determining whether an informant's tip establishes probable cause), overruling *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (the Double Jeopardy Clause does not apply to Government appeals from orders granting defense motions to terminate a trial before verdict), overruling *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (gender-based classifications are subject to intermediate scrutiny under the Equal Protection Clause), overruling *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948); *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) (jury system which operates to exclude women from jury service violates the defendant's Sixth and Fourteenth Amendment right to an impartial jury), overruling *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*) (the mere advocacy of violence is protected under the First Amendment unless it is directed to incite or produce imminent lawless action), overruling *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927); *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Fourth Amendment "protects people, not places," and extends to what a person "seeks to preserve as private"), overruling *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), and *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (procedural safeguards to protect the Fifth Amendment privilege against self-incrimination), overruling *Crooker v. California*, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958), and *Cicenia v. La Gay*, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958); *Malloy v. Hogan*,

> 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (the Fifth Amendment privilege against self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States), overruling *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908), and *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947); *Wesberry v. Sanders*, 376 U.S. 1, 7–8, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) (congressional districts should be apportioned so that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's"), overruling in effect *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel for indigent defendant in a criminal prosecution in state court under the Sixth and Fourteenth Amendments), overruling *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (federal courts have jurisdiction to consider constitutional challenges to state redistricting plans), effectively overruling in part *Colegrove*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (the exclusionary rule regarding the inadmissibility of evidence obtained in violation of the Fourth Amendment applies to the States), overruling *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (racial restrictions on the right to vote in primary elections violates the Equal Protection Clause of the Fourteenth Amendment), overruling *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935); *United States v. Darby*, 312 U.S. 100, 312 U.S. 657, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (congressional power to regulate employment conditions under the Commerce Clause), overruling *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (Congress does not have the power to declare substantive rules of common law; a federal court sitting in diversity jurisdiction must apply the substantive state law), overruling *Swift v. Tyson*, 16 Pet. 1, 41 U.S. 1, 10 L.Ed. 865 (1842).

No Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision, but overruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision. *Janus v.State, County, and Municipal Employees*, 585 U.S. ——, —— – ——, 138 S.Ct. 2448, 2478-2479, 201 L.Ed.2d 924 (2018); *Ramosv.Louisiana*, 590 U.S. ——, —— – ——, 140 S.Ct. 1390, 1414-1416, 206 L.Ed.2d 583 (2020) (KAVANAUGH, J., concurring in part).

***2265** In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

A

The nature of the Court's error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others.

The infamous decision in *Plessy v. Ferguson*, was one such decision. It betrayed our commitment to "equality before the law." 163 U.S. at 562, 16 S.Ct. 1138 (Harlan, J., dissenting). It was "egregiously wrong" on the day it was decided, see *Ramos,* 590 U.S., at ——, 140 S.Ct., at 1414 (opinion of KAVANAUGH, J.), and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity, see Tr. of Oral Arg. 92–93.

Roe was also egregiously wrong and deeply damaging. For reasons already explained, *Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

Roe was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but "raw judicial power," *Roe*, 410 U.S. at 222, 93 S.Ct. 762 (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by

closing it to the large number of Americans who dissented in any respect from *Roe*. "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since." *Casey*, 505 U.S. at 995–996, 112 S.Ct. 2791 (opinion of Scalia, J.). Together, *Roe* and *Casey* represent an error that cannot be allowed to stand.

As the Court's landmark decision in *West Coast Hotel* illustrates, the Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process. As Justice White later explained, "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken." *Thornburgh*, 476 U.S. at 787, 106 S.Ct. 2169 (dissenting opinion).

B

The quality of the reasoning. Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. See *Janus*, 585 U.S., at ——, 138 S.Ct., at 2480-2481; *Ramos*, 590 U.S., at —— – ——, 140 S.Ct., at 1414-1415 (opinion ***2266** of KAVANAUGH, J.). In Part II, *supra*, we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds.

Roe found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental difference between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to "viability") was never raised by any party and has never been plausibly explained. *Roe*'s reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion.

The *Casey* plurality, while reaffirming *Roe*'s central holding, pointedly refrained from endorsing most of its reasoning. It revised the textual basis for the abortion right, silently abandoned *Roe*'s erroneous historical narrative, and jettisoned the trimester framework. But it replaced that scheme with an arbitrary "undue burden" test and relied on an exceptional version of *stare decisis* that, as explained below, this Court had never before applied and has never invoked since.

1

a

The weaknesses in *Roe*'s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation. See 410 U.S. at 163–164, 93 S.Ct. 705. Dividing pregnancy into three trimesters, the Court imposed special rules for each. During the first trimester, the Court announced, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id*., at 164, 93 S.Ct. 705. After that point, a State's interest in regulating abortion for the sake of a woman's health became compelling, and accordingly, a State could "regulate the abortion procedure in ways that are reasonably related to maternal health." *Ibid*. Finally, in "the stage subsequent to viability," which in 1973 roughly coincided with the beginning of the third trimester, the State's interest in "the potentiality of human life" became compelling, and therefore

a State could "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.,* at 164–165, 93 S.Ct. 705.

This elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that "viability" should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed. See Brief for Appellant and Brief for Appellee in *Roev.Wade*, O. T. 1972, No. 70–18; see also C. Forsythe, Abuse of Discretion: The Inside Story of *Roev.Wade,* 127, 141 (2012).

b

Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources ***2267** on which constitutional decisions are usually based. We have already discussed *Roe*'s treatment of constitutional text, and the opinion failed to show that history, precedent, or any other cited source supported its scheme.

Roe featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included. For example, multiple paragraphs were devoted to an account of the views and practices of ancient civilizations where infanticide was widely accepted. See 410 U.S. at 130–132, 93 S.Ct. 705 (discussing ancient Greek and Roman practices).[49] When it came to the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted—the Court said almost nothing. It allowed that States had tightened their abortion laws "in the middle and late 19th century," *id*., at 139, 93 S.Ct. 705, but it implied that these laws might have been enacted not to protect fetal life but to further "a Victorian social concern" about "illicit sexual conduct," *id*., at 148, 93 S.Ct. 705.

49 See, *e.g.*, C. Patterson, "Not Worth the Rearing": The Causes of Infant Exposure in Ancient Greece, 115 Transactions Am. Philosophical Assn. 103, 111–123 (1985); A. Cameron, The Exposure of Children and Greek Ethics, 46 Classical Rev. 105–108 (1932); H. Bennett, The Exposure of Infants in Ancient Rome, 18 Classical J. 341–351 (1923); W. Harris, Child-Exposure in the Roman Empire, 84 J. Roman Studies 1 (1994).

Roe's failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Relying on two discredited articles by an abortion advocate, the Court erroneously suggested —contrary to Bracton, Coke, Hale, Blackstone, and a wealth of other authority—that the common law had probably never really treated post-quickening abortion as a crime. See *id*., at 136, 93 S.Ct. 705 ("[I]t now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus"). This erroneous understanding appears to have played an important part in the Court's thinking because the opinion cited "the lenity of the common law" as one of the four factors that informed its decision. *Id*., at 165, 93 S.Ct. 705.

After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. This included a lengthy account of the "position of the American Medical Association" and "[t]he position of the American Public Health Association," as well as the vote by the American Bar Association's House of Delegates in February 1972 on proposed abortion legislation. *Id*., at 141, 144, 146, 93 S.Ct. 705 (emphasis deleted). Also noted were a British judicial decision handed down in 1939 and a new British abortion law enacted in 1967. *Id*., at 137–138, 93 S.Ct. 705. The Court did not explain why these sources shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country.

Finally, after all this, the Court turned to precedent. Citing a broad array of cases, the Court found support for a constitutional "right of personal privacy," *id.,* at 152, 93 S.Ct. 705, but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See *Whalen v. Roe*, 429 U.S. 589, 599–600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). Only the cases involving this

second sense of the term could have any possible relevance to the abortion issue, ***2268** and some of the cases in that category involved personal decisions that were obviously very, very far afield. See *Pierce*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (right to send children to religious school); *Meyer*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (right to have children receive German language instruction).

What remained was a handful of cases having something to do with marriage, *Loving*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (right to marry a person of a different race), or procreation, *Skinner*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (right not to be sterilized); *Griswold*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (right of married persons to obtain contraceptives); *Eisenstadt*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (same, for unmarried persons). But none of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed "potential life."

When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were "consistent with" the following: (1) "the relative weights of the respective interests involved," (2) "the lessons and examples of medical and legal history," (3) "the lenity of the common law," and (4) "the demands of the profound problems of the present day." *Roe*, 410 U.S., at 165, 93 S.Ct. 705. Put aside the second and third factors, which were based on the Court's flawed account of history, and what remains are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.

c

What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman's health? The Court's only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. *Id.*, at 163, 93 S.Ct. 705. But the Court did not explain why mortality rates were the only factor that a State could legitimately consider. Many health and safety regulations aim to avoid adverse health consequences short of death. And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures "in areas fraught with medical and scientific uncertainties." *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974).

An even more glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions. Here is the Court's entire explanation:

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb."410 U.S. at 163, 93 S.Ct. 705.

As Professor Laurence Tribe has written, "[c]learly, this mistakes 'a definition for a syllogism.' " Tribe 4 (quoting Ely 924). The definition of a "viable" fetus is one that is capable of surviving outside the womb, but why is this the point at which the State's interest becomes compelling? If, as *Roe* held, a State's interest in protecting prenatal life is compelling "after viability," 410 U.S. at 163, 93 S.Ct. 705, why isn't that interest "equally compelling before viability"? *Webster v. Reproductive Health Services*, 492 U.S. 490, 519, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (plurality opinion) (quoting ***2269** *Thornburgh*, 476 U.S. at 795, 106 S.Ct. 2169 (White, J., dissenting)). *Roe* did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a "person." Among the characteristics that have been offered as essential attributes of "personhood" are sentience, self-awareness, the ability to reason, or some combination thereof.[50] By this logic, it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical

conditions, merit protection as "persons." But even if one takes the view that "personhood" begins when a certain attribute or combination of attributes is acquired, it is very hard to see why viability should mark the point where "personhood" begins.

50 See, *e.g.*, P. Singer, Rethinking Life & Death 218 (1994) (defining a person as "a being with awareness of her or his own existence over time, and the capacity to have wants and plans for the future"); B. Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 9–13 (1992) (arguing that "the possession of interests is both necessary and sufficient for moral status" and that the "capacity for conscious awareness is a necessary condition for the possession of interests" (emphasis deleted)); M. Warren, On the Moral and Legal Status of Abortion, 57 The Monist 1, 5 (1973) (arguing that, to qualify as a person, a being must have at least one of five traits that are "central to the concept of personhood": (1) "consciousness (of objects and events external and/or internal to the being), and in particular the capacity to feel pain"; (2) "reasoning (the developed capacity to solve new and relatively complex problems)"; (3) "self-motivated activity (activity which is relatively independent of either genetic or direct external control)"; (4) "the capacity to communicate, by whatever means, messages of an indefinite variety of types"; and (5) "the presence of self-concepts, and self-awareness, either individual or racial, or both" (emphasis deleted)); M. Tooley, Abortion & Infanticide, 2 Philosophy & Pub. Affairs 37, 49 (Autumn 1972) (arguing that "having a right to life presupposes that one is capable of desiring to continue existing as a subject of experiences and other mental states").

The most obvious problem with any such argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus. One is the state of neonatal care at a particular point in time. Due to the development of new equipment and improved practices, the viability line has changed over the years. In the 19th century, a fetus may not have been viable until the 32d or 33d week of pregnancy or even later.[51] When *Roe* was decided, viability was gauged at roughly 28 weeks. See 410 U.S. at 160, 93 S.Ct. 705. Today, respondents draw the line at 23 or 24 weeks. Brief for Respondents 8. So, according to *Roe*'s logic, States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did ***2270** not have an interest in protecting an identical fetus. How can that be?

51 See W. Lusk, Science and the Art of Midwifery 74–75 (1882) (explaining that "[w]ith care, the life of a child born within [the eighth month of pregnancy] may be preserved"); *id.*, at 326, 130 S.Ct. 876 ("Where the choice lies with the physician, the provocation of labor is usually deferred until the thirty-third or thirty-fourth week"); J. Beck, Researches in Medicine and Medical Jurisprudence 68 (2d ed. 1835) ("Although children born before the completion of the seventh month have occasionally survived, and been reared, yet in a medico-legal point of view, no child ought to be considered as capable of sustaining an independent existence until the seventh month has been fully completed"); see also J. Baker, The Incubator and the Medical Discovery of the Premature Infant, J. Perinatology 322 (2000) (explaining that, in the 19th century, infants born at seven to eight months' gestation were unlikely to survive beyond "the first days of life").

Viability also depends on the "quality of the available medical facilities." *Colautti v. Franklin*, 439 U.S. 379, 396, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979). Thus, a 24-week-old fetus may be viable if a woman gives birth in a city with hospitals that provide advanced care for very premature babies, but if the woman travels to a remote area far from any such hospital, the fetus may no longer be viable. On what ground could the constitutional status of a fetus depend on the pregnant woman's location? And if viability is meant to mark a line having universal moral significance, can it be that a fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?

In addition, as the Court once explained, viability is not really a hard-and-fast line. *Ibid*. A physician determining a particular fetus's odds of surviving outside the womb must consider "a number of variables," including "gestational age," "fetal weight," a woman's "general health and nutrition," the "quality of the available medical facilities," and other factors. *Id.*, at 395–396, 99 S.Ct. 675. It is thus "only with difficulty" that a physician can estimate the "probability" of a particular fetus's survival. *Id.*, at 396, 99 S.Ct. 675. And even if each fetus's probability of survival could be ascertained with certainty, settling on a "probabilit[y] of survival" that should count as "viability" is another matter. *Ibid.* Is a fetus viable with a 10 percent chance of survival? 25 percent? 50 percent? Can such a judgment be made by a State? And can a State specify a gestational age limit that applies in all cases? Or must these difficult questions be left entirely to the individual "attending physician on the particular facts of the case before him"? *Id.*, at 388, 99 S.Ct. 675.

The viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line.[52] The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.

52 According to the Center for Reproductive Rights, only the United States and the Netherlands use viability as a gestational limit on the availability of abortion on-request. See Center for Reproductive Rights, The World's Abortion Laws (Feb. 23, 2021), https://reproductiverights.org/maps/worlds-abortion-laws.

d

All in all, *Roe*'s reasoning was exceedingly weak, and academic commentators, including those who agreed with the decision as a matter of policy, were unsparing in their criticism. John Hart Ely famously wrote that *Roe* was "not constitutional law and g[ave] almost no sense of an obligation to try to be." Ely 947 (emphasis deleted). Archibald Cox, who served as Solicitor General under President Kennedy, commented that *Roe* "read[s] like a set of hospital rules and regulations" that "[n]either historian, layman, nor lawyer will be persuaded ... are part of ... the Constitution." The Role of the Supreme Court in American Government 113–114 (1976). Laurence Tribe wrote that "even if there is a need to divide pregnancy into several segments with lines that clearly identify the limits of governmental power, 'interest-balancing' of the form the Court pursues fails to justify any of the lines actually drawn." Tribe 4–5. Mark Tushnet termed *Roe* a "totally unreasoned judicial opinion." Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988). See also P. Bobbitt, Constitutional Fate 157 (1982); ***2271** A. Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 110 (2000).

Despite *Roe*'s weaknesses, its reach was steadily extended in the years that followed. The Court struck down laws requiring that second-trimester abortions be performed only in hospitals, *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 433–439, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983); that minors obtain parental consent, *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); that women give written consent after being informed of the status of the developing prenatal life and the risks of abortion, *Akron*, 462 U.S. at 442–445, 103 S.Ct. 2481; that women wait 24 hours for an abortion, *id.*, at 449–451, 103 S.Ct. 2481; that a physician determine viability in a particular manner, *Colautti*, 439 U.S. at 390–397, 99 S.Ct. 675; that a physician performing a post-viability abortion use the technique most likely to preserve the life of the fetus, *id.,* at 397–401, 99 S.Ct. 675; and that fetal remains be treated in a humane and sanitary manner, *Akron*, 462 U.S. at 451–452, 103 S.Ct. 2481.

Justice White complained that the Court was engaging in "unrestrained imposition of its own extraconstitutional value preferences."*Thornburgh*, 476 U.S. at 794, 106 S.Ct. 2169 (dissenting opinion). And the United States as *amicus curiae* asked the Court to overrule *Roe* five times in the decade before *Casey*, see 505 U.S. at 844, 112 S.Ct. 2791 (joint opinion), and then asked the Court to overrule it once more in *Casey* itself.

2

When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause. 505 U.S. at 846, 112 S.Ct. 2791. The Court did not reaffirm *Roe*'s erroneous account of abortion history. In fact, none of the Justices in the majority said anything about the history of the abortion right. And as for precedent, the Court relied on essentially the same body of cases that *Roe* had cited. Thus, with respect to the standard grounds for constitutional decisionmaking—text, history, and precedent—*Casey* did not attempt to bolster *Roe*'s reasoning.

The Court also made no real effort to remedy one of the greatest weaknesses in *Roe*'s analysis: its much-criticized discussion of viability. The Court retained what it called *Roe*'s "central holding"—that a State may not regulate pre-viability abortions for

the purpose of protecting fetal life—but it provided no principled defense of the viability line. 505 U.S. at 860, 870–871, 112 S.Ct. 2791. Instead, it merely rephrased what *Roe* had said, stating that viability marked the point at which "the independent existence of a second life can in reason and fairness be the object of state protection that now overrides the rights of the woman." 505 U.S. at 870, 112 S.Ct. 2791. Why "reason and fairness" demanded that the line be drawn at viability the Court did not explain. And the Justices who authored the controlling opinion conspicuously failed to say that they agreed with the viability rule; instead, they candidly acknowledged "the reservations [some] of us may have in reaffirming [that] holding of *Roe*." *Id*., at 853, 112 S.Ct. 2791.

The controlling opinion criticized and rejected *Roe*'s trimester scheme, 505 U.S. at 872, 112 S.Ct. 2791, and substituted a new "undue burden" test, but the basis for this test was obscure. And as we will explain, the test is full of ambiguities and is difficult to apply.

***2272** *Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.

As discussed below, *Casey* also deployed a novel version of the doctrine of *stare decisis*. See *infra*, at 2276–. This new doctrine did not account for the profound wrongness of the decision in *Roe*, and placed great weight on an intangible form of reliance with little if any basis in prior case law. *Stare decisis* does not command the preservation of such a decision.

C

Workability. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Montejo v. Louisiana*, 556 U.S. 778, 792, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283–284, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988). *Casey*'s "undue burden" test has scored poorly on the workability scale.

1

Problems begin with the very concept of an "undue burden." As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is "due" or "undue" is "inherently standardless." 505 U.S. at 992, 112 S.Ct. 2791; see also *June Medical Services L. L. C. v. Russo*, 591 U.S. ——, ——, 140 S.Ct. 2103, 2180, 207 L.Ed.2d 566 (2020) (GORSUCH, J., dissenting) ("[W]hether a burden is deemed undue depends heavily on which factors the judge considers and how much weight he accords each of them" (internal quotation marks and alterations omitted)).

The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. The first rule is that "a provision of law is invalid, if its purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878, 112 S.Ct. 2791 (emphasis added); see also *id*., at 877, 112 S.Ct. 2791. But whether a particular obstacle qualifies as "substantial" is often open to reasonable debate. In the sense relevant here, "substantial" means "of ample or considerable amount, quantity, or size." Random House Webster's Unabridged Dictionary 1897 (2d ed. 2001). Huge burdens are plainly "substantial," and trivial ones are not, but in between these extremes, there is a wide gray area.

This ambiguity is a problem, and the second rule, which applies at all stages of a pregnancy, muddies things further. It states that measures designed "to ensure that the woman's choice is informed" are constitutional so long as they do not impose "an undue

burden on the right." *Casey*, 505 U.S. at 878, 112 S.Ct. 2791. To the extent that this rule applies to pre-viability abortions, it overlaps with the first rule and appears to impose a different standard. Consider a law that imposes an insubstantial obstacle but serves little purpose. As applied to a pre-viability abortion, would such a regulation be constitutional on the ground that it does not impose a "*substantial* obstacle"? Or would it be unconstitutional ***2273** on the ground that it creates an "*undue* burden" because the burden it imposes, though slight, outweighs its negligible benefits? *Casey* does not say, and this ambiguity would lead to confusion down the line. Compare *June Medical*, 591 U.S., at ——— – ———, 140 S.Ct., at 2112 (plurality opinion), with *id.,* at ——— – ———, 140 S.Ct., at 2135-2136 (ROBERTS, C. J., concurring).

The third rule complicates the picture even more. Under that rule, *"[u]nnecessary health* regulations that have the purpose or effect of presenting a *substantial obstacle* to a woman seeking an abortion impose an *undue burden* on the right." *Casey*, 505 U.S. at 878, 112 S.Ct. 2791 (emphasis added). This rule contains no fewer than three vague terms. It includes the two already discussed—"undue burden" and "substantial obstacle"—even though they are inconsistent. And it adds a third ambiguous term when it refers to "*unnecessary* health regulations." The term "necessary" has a range of meanings—from "essential" to merely "useful." See Black's Law Dictionary 928 (5th ed. 1979); American Heritage Dictionary of the English Language 877 (1971). *Casey* did not explain the sense in which the term is used in this rule.

In addition to these problems, one more applies to all three rules. They all call on courts to examine a law's effect on women, but a regulation may have a very different impact on different women for a variety of reasons, including their places of residence, financial resources, family situations, work and personal obligations, knowledge about fetal development and abortion, psychological and emotional disposition and condition, and the firmness of their desire to obtain abortions. In order to determine whether a regulation presents a substantial obstacle to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is "substantial."

Casey provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a substantial obstacle "in a large fraction of cases in which [it] is relevant," 505 U.S. at 895, 112 S.Ct. 2791, but there is obviously no clear line between a fraction that is "large" and one that is not. Nor is it clear what the Court meant by "cases in which" a regulation is "relevant." These ambiguities have caused confusion and disagreement. Compare *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 627–628, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016), with *id.,* at 666–667, and n. 11, 136 S.Ct. 2292 (ALITO, J., dissenting).

2

The difficulty of applying *Casey*'s new rules surfaced in that very case. The controlling opinion found that Pennsylvania's 24-hour waiting period requirement and its informed-consent provision did not impose "undue burden[s]," *Casey*, 505 U.S. at 881–887, 112 S.Ct. 2791, but Justice Stevens, applying the same test, reached the opposite result, *id.,* at 920–922, 112 S.Ct. 2791 (opinion concurring in part and dissenting in part). That did not bode well, and then-Chief Justice Rehnquist aptly observed that "the undue burden standard presents nothing more workable than the trimester framework." *Id.*, at 964–966, 112 S.Ct. 2791 (dissenting opinion).

The ambiguity of the "undue burden" test also produced disagreement in later cases. In *Whole Woman's Health*, the Court adopted the cost-benefit interpretation of the test, stating that "[t]he rule announced in *Casey* ... requires that courts consider the burdens a law imposes on abortion access *together with the benefits those laws confer*." ***2274** 579 U.S. at 607, 136 S.Ct. 2292 (emphasis added). But five years later, a majority of the Justices rejected that interpretation. See *June Medical*, 591 U.S. ———, 140 S.Ct. 2103, 207 L.Ed.2d 566. Four Justices reaffirmed *Whole Woman's Health*'s instruction to "weigh" a law's "benefits" against "the burdens it imposes on abortion access." 591 U.S., at ———, 140 S.Ct., at 2135 (plurality opinion) (internal quotation marks omitted). But THE CHIEF JUSTICE—who cast the deciding vote—argued that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." *Id.,* at ———, 140 S.Ct., at 2136 (opinion concurring in judgment). And the four Justices in dissent rejected the plurality's interpretation of *Casey*. See 591 U.S., at ———, 140 S.Ct., at 2154-2155 (opinion of ALITO, J., joined in relevant part by THOMAS, GORSUCH, and KAVANAUGH, JJ.);

id., at —— – ——, 140 S.Ct., at 2178-2180 (opinion of GORSUCH, J.); *id.*, at —— – ——, 140 S.Ct., at 2182 (opinion of KAVANAUGH, J.) ("[F]ive Members of the Court reject the *Whole Woman's Health* cost-benefit standard").

This Court's experience applying *Casey* has confirmed Chief Justice Rehnquist's prescient diagnosis that the undue-burden standard was "not built to last." *Casey*, 505 U.S. at 965, 112 S.Ct. 2791 (opinion concurring in judgment in part and dissenting in part).

3

The experience of the Courts of Appeals provides further evidence that *Casey*'s "line between" permissible and unconstitutional restrictions "has proved to be impossible to draw with precision." *Janus*, 585 U.S., at ——, 138 S.Ct., at 2481.

Casey has generated a long list of Circuit conflicts. Most recently, the Courts of Appeals have disagreed about whether the balancing test from *Whole Woman's Health* correctly states the undue-burden framework.[53] They have disagreed on the legality of parental notification rules.[54] They have disagreed about bans on certain dilation and evacuation procedures.[55] They have disagreed about when an increase in the time needed to reach a clinic constitutes an undue burden.[56] And they have disagreed on whether a State may regulate abortions performed because of the fetus's race, sex, or disability.[57]

53 Compare *Whole Woman's Health v. Paxton*, 10 F.4th 430, 440 (C.A.5 2021), *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418, 437 (C.A.6 2020), and *Hopkins v. Jegley*, 968 F.3d 912, 915 (C.A.8 2020) (*per curiam*), with *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 751–752 (C.A.7 2021).

54 Compare *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 367 (C.A.4 1998), with *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 985–990 (C.A.7 2019), cert. granted, judgment vacated, 591 U.S. ——, 141 S.Ct. 187, 207 L.Ed.2d 1112 (2020), and *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (C.A.8 1995).

55 Compare *Whole Woman's Health v. Paxton*, 10 F.4th at 435–436, with *West Ala. Women's Center v. Williamson*, 900 F.3d 1310, 1319, 1327 (C.A.11 2018), and *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 960 F.3d 785, 806–808 (C.A.6 2020).

56 Compare *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 541 (C.A.9 2004), with *Women's Medical Professional Corp.* v. *Baird*, 438 F.3d 595, 605 (C.A.6 2006), and *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 171–172 (C.A.4 2000).

57 Compare *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 520–535 (C.A.6 2021), with *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 688–690 (C.A.8 2021).

The Courts of Appeals have experienced particular difficulty in applying the large-fraction-of-relevant-cases test. They have criticized the assignment while reaching ***2275** unpredictable results.[58] And they have candidly outlined *Casey*'s many other problems.[59]

58 See, *e.g.*,*Bristol Regional Women's Center, P.C. v. Slatery*, 7 F.4th 478, 485 (C.A.6 2021); *Reproductive Health Servs. v. Strange*, 3 F.4th 1240, 1269 (C.A.11 2021) (*per curiam*); *June Medical Servs., L.L.C. v. Gee*, 905 F.3d 787, 814 (C.A.5 2018), rev'd, 591 U.S. ——, 140 S.Ct. 2103, 207 L.Ed.2d 566 (2020); *Preterm-Cleveland*, 994 F.3d at 534; *Planned Parenthood of Ark. & Eastern Okla. v. Jegley*, 864 F.3d 953, 958–960 (C.A.8 2017); *McCormack v. Hertzog*, 788 F.3d 1017, 1029–1030 (C.A.9 2015); compare *A Womans Choice–East Side Womens Clinic v. Newman*, 305 F.3d 684, 699 (C.A.7 2002) (Coffey, J., concurring), with *id.*, at 708 (Wood, J., dissenting).

59 See, *e.g.*,*Memphis Center for Reproductive Health v. Slatery*, 14 F.4th 409, 451 (CA6 2021) (Thapar, J., concurring in judgment in part and dissenting in part); *Preterm-Cleveland*, 994 F.3d at 524; *Planned Parenthood of Ind. & Ky., Inc. v. Commissioner of Ind. State Dept. of Health*, 888 F.3d 300, 313 (C.A.7 2018) (Manion, J., concurring in judgment in part and dissenting in part); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F.3d 997, 999 (C.A.7 2019) (Easterbrook, J., concurring in denial of reh'g en banc) ("How

> much burden is 'undue' is a matter of judgment, which depends on what the burden would be ... and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators)"); *National Abortion Federation v. Gonzales*, 437 F.3d 278, 290–296 (C.A.2 2006) (Walker, C. J., concurring); *Planned Parenthood of Rocky Mountains Servs. Corp. v. Owens*, 287 F.3d 910, 931 (C.A.10 2002) (Baldock, J., dissenting).

Casey's "undue burden" test has proved to be unworkable. "[P]lucked from nowhere," 505 U.S. at 965, 112 S.Ct. 2791 (opinion of Rehnquist, C. J.), it "seems calculated to perpetuate give-it-a-try litigation" before judges assigned an unwieldy and inappropriate task. *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 551, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). Continued adherence to that standard would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U.S. at 827, 111 S.Ct. 2597.

D

Effect on other areas of law. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. See *Ramos*, 590 U.S., at ——, 140 S.Ct., at 1397-98 (opinion of KAVANAUGH, J.); *Janus*, 585 U.S., at ——, 138 S.Ct., at 2478.

Members of this Court have repeatedly lamented that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh*, 476 U.S. at 814, 106 S.Ct. 2169 (O'Connor, J., dissenting); see *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 785, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (Scalia, J., concurring in judgment in part and dissenting in part); *Whole Woman's Health*, 579 U.S. at 631–633, 136 S.Ct. 2292 (THOMAS, J., dissenting); *id.,* at 645–666, 678–684, 136 S.Ct. 2292 (ALITO, J., dissenting); *June Medical*, 591 U.S., at —— – ——, 140 S.Ct., at 2171-2179 (GORSUCH, J., dissenting).

The Court's abortion cases have diluted the strict standard for facial constitutional challenges.[60] They have ignored the Court's third-party standing doctrine.[61] ***2276** They have disregarded standard *res judicata* principles.[62] They have flouted the ordinary rules on the severability of unconstitutional provisions,[63] as well as the rule that statutes should be read where possible to avoid unconstitutionality.[64] And they have distorted First Amendment doctrines.[65]

60 Compare *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), with *Casey*, 505 U.S. at 895, 112 S.Ct. 2791; see also *supra,* at 2271 – 2274.

61 Compare *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), and *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 15, 17–18, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004), with *June Medical*, 591 U.S., at ——, 140 S.Ct., at 2167-2168 (ALITO, J., dissenting), *id.*, at —— – ——, 140 S.Ct., at 2173-2174 (GORSUCH, J., dissenting) (collecting cases), and *Whole Woman's Health*, 579 U.S. at 632, n. 1, 136 S.Ct. 2292 (THOMAS, J., dissenting).

62 Compare *id.*, at 598–606, 136 S.Ct. 2292 (majority opinion), with *id.,* at 645–666, 136 S.Ct. 2292 (ALITO, J., dissenting).

63 Compare *id.*, at 623–626, 136 S.Ct. 2292 (majority opinion), with *id.*, at 644–645, 136 S.Ct. 2292 (ALITO, J., dissenting).

64 See *Stenberg v. Carhart*, 530 U.S. 914, 977–978, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (Kennedy, J., dissenting); *id.,* at 996–997, 120 S.Ct. 2597 (THOMAS, J., dissenting).

65 See *Hill v. Colorado*, 530 U.S. 703, 741–742, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (Scalia, J., dissenting); *id.*, at 765, 120 S.Ct. 2480 (Kennedy, J., dissenting).

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine "has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure." *Id.*, at ——,

140 S.Ct., at 2152 (THOMAS, J., dissenting) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)).

E

Reliance interests. We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests. See *Ramos*, 590 U.S., at ——, 140 S.Ct., at 1418-1419 (opinion of KAVANAUGH, J.); *Janus*, 585 U.S., at ——–——, 138 S.Ct., at 2478-2479.

1

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." *Casey*, 505 U.S. at 856, 112 S.Ct. 2791 (joint opinion); see also *Payne*, 501 U.S. at 828, 111 S.Ct. 2597. In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." 505 U.S. at 856, 112 S.Ct. 2791. For these reasons, we agree with the *Casey* plurality that conventional, concrete reliance interests are not present here.

2

Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society ... in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.* But this Court is ill-equipped to assess "generalized assertions about the national psyche." *Id.*, at 957, 112 S.Ct. 2791 (opinion of Rehnquist, C. J.). *Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in "cases involving property and contract rights." *Payne*, 501 U.S. at 828, 111 S.Ct. 2597.

***2277** When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. Compare Brief for Petitioners 34–36; Brief for Women Scholars et al. as *Amici Curiae* 13–20, 29–41, with Brief for Respondents 36–41; Brief for National Women's Law Center et al. as *Amici Curiae* 15–32. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson v. Skrupa*, 372 U.S. 726, 729–730, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963).

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.[66] In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi,[67] constituted 55.5 percent of the voters who cast ballots.[68]

66 See Dept. of Commerce, U.S. Census Bureau (Census Bureau), An Analysis of the 2018 Congressional Election 6 (Dec. 2021) (Fig. 5) (showing that women made up over 50 percent of the voting population in every congressional election between 1978 and 2018).

67 Census Bureau, QuickFacts, Mississippi (July 1, 2021), https://www. census.gov/quickfacts/MS.

68 Census Bureau, Voting and Registration in the Election of November 2020, Table 4b: Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html.

3

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." Brief for United States 26 (citing *Obergefell*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609; *Lawrence*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508; *Griswold*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510). That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, "[a]bortion is a unique act" because it terminates "life or potential life." 505 U.S. at 852, 112 S.Ct. 2791; see also *Roe*, 410 U.S. at 159, 93 S.Ct. 705 (abortion is "inherently different from marital intimacy," "marriage," or "procreation"). And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast ***2278** doubt on precedents that do not concern abortion.

IV

Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey*, we must address one final argument that featured prominently in the *Casey* plurality opinion.

The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures." 505 U.S. at 865, 112 S.Ct. 2791. There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial "watershed" decision, such as *Roe*. 505 U.S. at 866–867, 112 S.Ct. 2791. A decision overruling *Roe* would be perceived as having been made "under fire" and as a "surrender to political pressure," 505 U.S. at 867, 112 S.Ct. 2791, and therefore the preservation of public approval of the Court weighs heavily in favor of retaining *Roe*, see 505 U.S. at 869, 112 S.Ct. 2791.

This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work. Cf. *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Brown*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. That is true both when we initially decide a constitutional issue *and* when we consider whether to overrule a prior decision. As Chief Justice Rehnquist explained, "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task." *Casey*, 505 U.S. at 963, 112 S.Ct. 2791 (opinion concurring in judgment in part and dissenting in part). In suggesting otherwise, the *Casey* plurality went beyond this Court's role in our constitutional system.

The *Casey* plurality "call[ed] the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. *Id.*, at 867, 112 S.Ct. 2791. That unprecedented claim exceeded the power vested in us by the Constitution. As Alexander Hamilton famously put it, the Constitution gives the judiciary "neither Force nor Will." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. *Ibid.* The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochner* ***2279** would still be the law. That is not how *stare decisis* operates.

The *Casey* plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* "inflamed" a national issue that has remained bitterly divisive for the past half century. *Casey*, 505 U.S. at 995, 112 S.Ct. 2791 (opinion of Scalia, J.); see also R. Ginsburg, Speaking in a Judicial Voice, 67 N. Y. U. L. Rev. 1185, 1208 (1992) (*Roe* may have "halted a political process," "prolonged divisiveness," and "deferred stable settlement of the issue"). And for the past 30 years, *Casey* has done the same.

Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule *Roe* and *Casey* and to return the issue of abortion to the people and their elected representatives. This Court's inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on. Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise "raw judicial power." *Roe*, 410 U.S. at 222, 93 S.Ct. 762 (White, J., dissenting).

We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.

V

A

1

The dissent argues that we have "abandon[ed]" *stare decisis*, *post,* at 2333 – 2334, but we have done no such thing, and it is the dissent's understanding of *stare decisis* that breaks with tradition. The dissent's foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can "poin[t] to major legal or factual changes undermining [the] decision's original basis." *Post*, at 2337. To support this contention, the dissent claims that *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and other landmark cases overruling prior precedents "responded to changed law and to changed facts and attitudes that had taken hold throughout society." *Post,* at 2341. The unmistakable implication of this argument is that only the passage of time and new developments justified those decisions. Recognition that the cases they overruled were egregiously wrong on the day they were handed down was not enough.

The Court has never adopted this strange new version of *stare decisis*—and with good reason. Does the dissent really maintain that overruling *Plessy* was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects? *Post,* at 2341 – 2342.

***2280** Here is another example. On the dissent's view, it must have been wrong for *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, to overrule *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375, a bare three years after it was handed down. In both cases, children who were Jehovah's Witnesses refused on religious grounds to salute the flag or recite the pledge of allegiance. The *Barnette* Court did not claim that its reexamination of the issue was prompted by any intervening legal or factual developments, so if the Court had followed the dissent's new version of *stare decisis,* it would have been compelled to adhere to *Gobitis* and countenance continued First Amendment violations for some unspecified period.

Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket. And indeed, the dissent eventually admits that a decision *could* "be overruled just because it is terribly wrong," though the dissent does not explain when that would be so. *Post*, at 2342.

2

Even if the dissent were correct in arguing that an egregiously wrong decision should (almost) never be overruled unless its mistake is later highlighted by "major legal or factual changes," reexamination of *Roe* and *Casey* would be amply justified. We have already mentioned a number of post-*Casey* developments, see *supra*, at 2258 – 2259, 2273 – 2276, but the most profound change may be the failure of the *Casey* plurality's call for "the contending sides" in the controversy about abortion "to end their national division," 505 U.S. at 867, 112 S.Ct. 2791. That has not happened, and there is no reason to think that another decision sticking with *Roe* would achieve what *Casey* could not.

The dissent, however, is undeterred. It contends that the "very controversy surrounding *Roe* and *Casey*" is an important *stare decisis* consideration that requires upholding those precedents. See *post,* at 2347. The dissent characterizes *Casey* as a "precedent about precedent" that is permanently shielded from further evaluation under traditional *stare decisis* principles. See *post,* at 2348 – 2349. But as we have explained, *Casey* broke new ground when it treated the national controversy provoked by *Roe* as a ground for refusing to reconsider that decision, and no subsequent case has relied on that factor. Our decision today simply applies longstanding *stare decisis* factors instead of applying a version of the doctrine that seems to apply only in abortion cases.

3

Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. *Post*, at 2318 – 2319, 2332, n. 8. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Supra*, at 2277 – 2278. We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life." *Roe*, 410 U.S. at 150, 93 S.Ct. 705 (emphasis deleted); *Casey*, 505 U.S. at 852, 112 S.Ct. 2791. Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by "appeals to a broader right to autonomy." *Supra*, at 2258. It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, ***2281** there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.

B

1

We now turn to the concurrence in the judgment, which reproves us for deciding whether *Roe* and *Casey* should be retained or overruled. That opinion (which for convenience we will call simply "the concurrence") recommends a "more measured course," which it defends based on what it claims is "a straightforward *stare decisis* analysis." *Post*, at 2310 (opinion of ROBERTS, C. J.). The concurrence would "leave for another day whether to reject any right to an abortion at all," *post*, at 2314, and would hold only that if the Constitution protects any such right, the right ends once women have had "a reasonable opportunity" to obtain an abortion, *post*, at 2310. The concurrence does not specify what period of time is sufficient to provide such an opportunity, but it would hold that 15 weeks, the period allowed under Mississippi's law, is enough—at least "absent rare circumstances." *Post*, at 2310 – 2311, 2315 – 2316.

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. As we have recounted, both parties and the Solicitor General have urged us either to reaffirm or overrule *Roe* and *Casey*. See *supra*, at 2242 – 2243. And when the specific approach advanced by the concurrence was broached at oral argument, both respondents and the Solicitor General emphatically rejected it. Respondents' counsel termed it "completely unworkable" and "less principled and less workable than viability." Tr. of Oral Arg. 54. The Solicitor General argued that abandoning the viability line would leave courts and others with "no continued guidance." *Id*., at 101. What is more, the concurrence has not identified any of the more than 130 *amicus* briefs filed in this case that advocated its approach. The concurrence would do exactly what it criticizes *Roe* for doing: pulling "out of thin air" a test that "[n]o party or *amicus* asked the Court to adopt." *Post*, at 2311.

2

The concurrence's most fundamental defect is its failure to offer any principled basis for its approach. The concurrence would "discar[d]" "the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as 'viable' outside the womb." *Post*, at 2311. But this rule was a critical component of the holdings in *Roe* and *Casey*, and *stare decisis* is "a doctrine of preservation, not transformation," *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 384, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (ROBERTS, C. J., concurring). Therefore, a new rule that discards the viability rule cannot be defended on *stare decisis* grounds.

The concurrence concedes that its approach would "not be available" if "the rationale of *Roe* and *Casey* were inextricably entangled with and dependent upon the viability standard." *Post*, at 2314. But the concurrence asserts that the viability line is separable from the constitutional right they recognized, and can therefore be "discarded" without disturbing any past precedent. *Post*, at 2313 – 2314. That is simply incorrect.

Roe's trimester rule was expressly tied to viability, see 410 U.S. at 163–164, 93 S.Ct. 705, and viability played a critical role in later abortion decisions. For example, ***2282** in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788, the Court reiterated *Roe*'s rule that a "State may regulate an abortion to protect the life of the fetus and even may proscribe abortion" at "the stage *subsequent to viability*." 428 U.S. at 61, 96 S.Ct. 2831 (emphasis added). The Court then rejected a challenge to Missouri's definition of viability, holding that the State's definition was consistent with *Roe*'s. 428 U.S. at 63–64, 96 S.Ct. 2831. If viability was not an essential part of the rule adopted in *Roe*, the Court would have had no need to make that comparison.

The holding in *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596, is even more instructive. In that case, the Court noted that prior cases had "stressed viability" and reiterated that "[v]iability is the critical point" under *Roe*.439 U.S. at 388–

389, 99 S.Ct. 675. It then struck down Pennsylvania's definition of viability, *id.*, at 389–394, 99 S.Ct. 675, and it is hard to see how the Court could have done that if *Roe*'s discussion of viability was not part of its holding.

When the Court reconsidered *Roe* in *Casey*, it left no doubt about the importance of the viability rule. It described the rule as *Roe*'s "central holding," 505 U.S. at 860, 112 S.Ct. 2791, and repeatedly stated that the right it reaffirmed was "the right of the woman to choose to have an abortion *before viability*." *Id.*, at 846, 112 S.Ct. 2791 (emphasis added). See *id.*, at 871, 112 S.Ct. 2791 ("The woman's right to terminate her pregnancy *before viability* is the most central principle of *Roe* v. *Wade*. It is a rule of law and a component of liberty we cannot renounce" (emphasis added)); *id.*, at 872, 112 S.Ct. 2791 (A "woman has a right to choose to terminate or continue her pregnancy *before viability*" (emphasis added)); *id.*, at 879, 112 S.Ct. 2791 ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy *before viability*" (emphasis added)).

Our subsequent cases have continued to recognize the centrality of the viability rule. See *Whole Women's Health*, 579 U.S. at 589–590, 136 S.Ct. 2292 ("[A] provision of law is constitutionally invalid, if the 'purpose or effect' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion *before the fetus attains viability*' " (emphasis deleted and added)); *id.*, at 627, 136 S.Ct. 2292 ("[W]e now use *'viability'* as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health" (emphasis added)).

Not only is the new rule proposed by the concurrence inconsistent with *Casey*'s unambiguous "language," *post*, at 2314, it is also contrary to the judgment in that case and later abortion cases. In *Casey*, the Court held that Pennsylvania's spousal-notification provision was facially unconstitutional, not just that it was unconstitutional as applied to abortions sought prior to the time when a woman has had a reasonable opportunity to choose. See 505 U.S. at 887–898, 112 S.Ct. 2791. The same is true of *Whole Women's Health*, which held that certain rules that required physicians performing abortions to have admitting privileges at a nearby hospital were facially unconstitutional because they placed "a substantial obstacle in the path of women seeking *a previability abortion*." 579 U.S. at 591, 136 S.Ct. 2292 (emphasis added).

For all these reasons, *stare decisis* cannot justify the new "reasonable opportunity" rule propounded by the concurrence. If that rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents a correct interpretation of the Constitution. The concurrence does not claim that the right to a reasonable opportunity ***2283** to obtain an abortion is " 'deeply rooted in this Nation's history and tradition' " and " 'implicit in the concept of ordered liberty.' " *Glucksberg*, 521 U.S., at 720–721, 117 S.Ct. 2258. Nor does it propound any other theory that could show that the Constitution supports its new rule. And if the Constitution protects a woman's right to obtain an abortion, the opinion does not explain why that right should end after the point at which all "reasonable" women will have decided whether to seek an abortion. While the concurrence is moved by a desire for judicial minimalism, "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right." *Citizens United*, 558 U.S. at 375, 130 S.Ct. 876 (ROBERTS, C. J., concurring). For the reasons that we have explained, the concurrence's approach is not.

3

The concurrence would "leave for another day whether to reject any right to an abortion at all," *post*, at 2314, but "another day" would not be long in coming. Some States have set deadlines for obtaining an abortion that are shorter than Mississippi's. See, *e.g.*, *Memphis Center for Reproductive Health v. Slatery*, 14 F.4th at 414 (considering law with bans "at cascading intervals of two to three weeks" beginning at six weeks), reh'g en banc granted, 14 F. 4th at 550 (CA6 2021). If we held only that Mississippi's 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The "measured course" charted by the concurrence would be fraught with turmoil until the Court answered the question that the concurrence seeks to defer.

Even if the Court ultimately adopted the new rule suggested by the concurrence, we would be faced with the difficult problem of spelling out what it means. For example, if the period required to give women a "reasonable" opportunity to obtain an abortion

were pegged, as the concurrence seems to suggest, at the point when a certain percentage of women make that choice, see *post*, at 2310 – 2311, 2314 – 2316, we would have to identify the relevant percentage. It would also be necessary to explain what the concurrence means when it refers to "rare circumstances" that might justify an exception. *Post*, at 2315 – 2316. And if this new right aims to give women a reasonable opportunity to get an abortion, it would be necessary to decide whether factors other than promptness in deciding might have a bearing on whether such an opportunity was available.

In sum, the concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by *Roe* and *Casey* would be prolonged. It is far better—for this Court and the country—to face up to the real issue without further delay.

VI

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

A

Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history. See *supra,* at 2244 – 2262.

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged ***2284** under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson*, 372 U.S. at 729–730, 83 S.Ct. 1028; see also *Dandridge v. Williams*, 397 U.S. 471, 484–486, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance. See, *e.g.*,*Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–368, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) ("treatment of the disabled"); *Glucksberg*, 521 U.S., at 728, 117 S.Ct. 2258 ("assisted suicide"); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 32–35, 55, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) ("financing public education").

A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Id.,* at 320, 113 S.Ct. 2637; *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (*per curiam*); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491, 75 S.Ct. 461, 99 L.Ed. 563 (1955). These legitimate interests include respect for and preservation of prenatal life at all stages of development, *Gonzales*, 550 U.S. at 157–158, 127 S.Ct. 1610; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. See *id.*, at 156–157, 127 S.Ct. 1610; *Roe*, 410 U.S. at 150, 93 S.Ct. 705; cf. *Glucksberg*, 521 U.S., at 728–731, 117 S.Ct. 2258 (identifying similar interests).

B

These legitimate interests justify Mississippi's Gestational Age Act. Except "in a medical emergency or in the case of a severe fetal abnormality," the statute prohibits abortion "if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." Miss. Code Ann. § 41–41–191(4)(b). The Mississippi Legislature's findings recount the

stages of "human prenatal development" and assert the State's interest in "protecting the life of the unborn." § 2(b)(i). The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." § 2(b)(i)(8); see also *Gonzales*, 550 U.S. at 135–143, 127 S.Ct. 1610 (describing such procedures). These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.

VII

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

***2285** The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDICES

A

This appendix contains statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868. The statutes appear in chronological order.

1. Missouri (1825):

> Sec. 12. "That every person who shall wilfully and maliciously administer or cause to be administered to or taken by any person, any poison, or other noxious, poisonous or destructive substance or liquid, with an intention to harm him or her thereby to murder, or thereby *to cause or procure the miscarriage of any woman then being with child*, and shall thereof be duly convicted, shall suffer imprisonment not exceeding seven years, and be fined not exceeding three thousand dollars."[69]

69 1825 Mo. Laws p. 283 (emphasis added); see also, Mo. Rev. Stat., Art. II, §§ 10, 36 (1835) (extending liability to abortions performed by instrument and establishing differential penalties for pre- and post-quickening abortion) (emphasis added).

2. Illinois (1827):

> Sec. 46. "Every person who shall wilfully and maliciously administer, or cause to be administered to, or taken by any person, any poison, or other noxious or destructive substance or liquid, with an intention to cause the death of such person, *or to procure the miscarriage of any woman, then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and be fined in a sum not exceeding one thousand dollars."[70]

70 Ill. Rev. Code § 46 (1827) (emphasis added); see also Ill. Rev. Code § 46 (1833) (same); 1867 Ill. Laws p. 89 (extending liability to abortions "by means of any instrument[s]" and raising penalties to imprisonment "not less than two nor more than ten years").

3. New York (1828):

Sec. 9. "Every person who shall administer *to any woman pregnant with a quick child*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

Sec. 21. "Every person who shall willfully administer *to any pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument of other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."[71]

71 N. Y. Rev. Stat., pt. 4, ch. 1, Tit. 2, § 9 (emphasis added); Tit. 6, § 21 (1828) (emphasis added); 1829 N. Y. Laws p. 19 (codifying these provisions in the revised statutes).

4. Ohio (1834):

***2286** Sec. 1. "Be it enacted by the General Assembly of State of Ohio, That any physician, or other person, who shall wilfully administer *to any pregnant woman* any medicine, drug, substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Sec. 2. "That any physician, or other person, who shall administer *to any woman pregnant with a quick child*, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such child or mother in consequence thereof, be deemed guilty of high misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than seven years, nor less than one year."[72]

72 1834 Ohio Laws pp. 20–21 (emphasis deleted and added).

5. Indiana (1835):

Sec. 3. "That every person who shall wilfully administer *toany pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall upon conviction be punished by imprisonment in the county jail any term of [time] not exceeding twelve months and be fined any sum not exceeding five hundred dollars."[73]

73 1835 Ind. Laws p. 66 (emphasis added).

6. Maine (1840):

Sec. 13. "Every person, who shall administer *to any woman pregnant with child, whether such child be quick or not*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means whatever, with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done as necessary to preserve the life of the mother, shall be punished by imprisonment in the state prison, not more than five years, or by fine, not exceeding one thousand dollars, and imprisonment in the county jail, not more than one year."

Sec. 14. "Every person, who shall administer *to any woman, pregnant with child, whether such child shall be quick or not*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same shall have been done, as necessary to preserve her life, shall be punished by imprisonment in the county jail, not more than one year, or by fine, not exceeding one thousand dollars."[74]

74 Me. Rev. Stat., Tit. 12, ch. 160, §§ 13–14 (1840) (emphasis added).

7. Alabama (1841):

Sec. 2. "Every person who shall wilfully administer *to any pregnant woman* ***2287** any medicines, drugs, substance or thing whatever, or shall use and employ any instrument or means whatever with intent thereby to procure the miscarriage of such woman, unless the same shall be necessary to preserve her life, or shall have been advised by a respectable physician to be necessary for that purpose, shall upon conviction, be punished by fine not exceeding five hundred dollars, and by imprisonment in the county jail, not less than three, and not exceeding six months."[75]

75 1841 Ala. Acts p. 143 (emphasis added).

8. Massachusetts (1845):

Ch. 27. "Whoever, maliciously or without lawful justification, with intent to cause and procure the miscarriage *of a woman then pregnant with child*, shall administer to her, prescribe for her, or advise or direct her to take or swallow, any poison, drug, medicine or noxious thing, or shall cause or procure her with like intent, to take or swallow any poison, drug, medicine or noxious thing; and whoever maliciously and without lawful justification, shall use any instrument or means whatever with the like intent, and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned not more than twenty years, nor less than five years in the State Prison; and if the woman doth not die in consequence thereof, such offender shall be guilty of a misdemeanor, and shall be punished by imprisonment not exceeding seven years, nor less than one year, in the state prison or house of correction, or common jail, and by fine not exceeding two thousand dollars."[76]

76 1845 Mass. Acts p. 406 (emphasis added).

9. Michigan (1846):

Sec. 33. "Every person who shall administer *to any woman pregnant with a quick child*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter."

Sec. 34. "Every person who shall wilfully administer *toany pregnant woman* any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."[77]

77 Mich. Rev. Stat., Tit. 30, ch. 153, §§ 33–34 (1846) (emphasis added).

10. Vermont (1846):

Sec. 1. "Whoever maliciously, or without lawful justification with intent to cause and procure the miscarriage *of a woman, then pregnant with child,* shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, ***2288** drug, medicine or noxious thing, or shall cause or procure her, with like intent, to take or swallow any poison, drug,

medicine or noxious thing, and whoever maliciously and without lawful justification, shall use any instrument or means whatever, with the like intent, and every person, with the like intent, knowingly aiding and assisting such offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned in the state prison, not more than ten years, nor less than five years; and if the woman does not die in consequence thereof, such offenders shall be deemed guilty of a misdemeanor; and shall be punished by imprisonment in the state prison not exceeding three years, nor less than one year, and pay a fine not exceeding two hundred dollars."[78]

78 1846 Vt. Acts & Resolves pp. 34–35 (emphasis added).

11. Virginia (1848):

Sec. 9. "Any free person who shall administer *to any pregnant woman*, any medicine, drug or substance whatever, or use or employ any instrument or other means with intent thereby to destroy the child with which such woman may be pregnant, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, unless the same shall have been done to preserve the life of such woman, shall be punished, if the death of a quick child be thereby produced, by confinement in the penitentiary, for not less than one nor more than five years, or if the death of a child, not quick, be thereby produced, by confinement in the jail for not less than one nor more than twelve months."[79]

79 1848 Va. Acts p. 96 (emphasis added).

12. New Hampshire (1849):

Sec. 1. "That every person, who shall wilfully administer *to any pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or means whatever with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment at the discretion of the Court."

Sec. 2. "Every person who shall administer *to any woman pregnant with a quick child*, any medicine, drug or substance whatever, or shall use or employ any instrument or means whatever, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for such purpose, shall, upon conviction, be punished by fine not exceeding one thousand dollars, and by confinement to hard labor not less than one year, nor more than ten years."[80]

80 1849 N. H. Laws p. 708 (emphasis added).

13. New Jersey (1849):

"That if any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage *of a woman then pregnant with child*, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing; and if any person or persons maliciously, and without lawful justification, shall use any instrument or means whatever, with the like intent; ***2289** and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall, on conviction thereof, be adjudged guilty of a high misdemeanor; and if the woman die in consequence thereof, shall be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labour for any term not exceeding fifteen years, or both; and if the woman doth not die in consequence thereof, such offender shall, on conviction thereof, be adjudged guilty of a misdemeanor, and be punished by fine, not exceeding five hundred dollars, or imprisonment at hard labour, for any term not exceeding seven years, or both."[81]

81 1849 N. J. Laws pp. 266–267 (emphasis added).

14. California (1850):

Sec. 45. "And every person who shall administer or cause to be administered or taken, any medical substances, or shall use or cause to be used any instruments whatever, with the intention *to procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the State Prison for a term not less than two years, nor more than five years: Provided, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."[82]

82 1850 Cal. Stats. p. 233 (emphasis added and deleted).

15. Texas (1854):

Sec. 1. "If any person, with the intent to procure the miscarriage *of any woman being with child*, unlawfully and maliciously shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or any means whatever, with like intent, every such offender, and every person counselling or aiding or abetting such offender, shall be punished by confinement to hard labor in the Penitentiary not exceeding ten years."[83]

83 1854 Tex. Gen. Laws p. 58 (emphasis added).

16. Louisiana (1856):

Sec. 24. "Whoever shall feloniously administer or cause to be administered any drug, potion, or any other thing to any woman, for the purpose of procuring a premature delivery, and whoever shall administer or cause to be administered *to any woman pregnant with child*, any drug, potion, or any other thing, for the purpose of procuring abortion, or a premature delivery, shall be imprisoned at hard labor, for not less than one, nor more than ten years."[84]

84 La. Rev. Stat. § 24 (1856) (emphasis added).

17. Iowa (1858):

Sec. 1. "That every person who shall willfully administer *toany pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall upon conviction thereof, be punished by imprisonment in the county jail for a term of not exceeding one year, and be fined in a sum not exceeding one thousand dollars."[85]

85 1858 Iowa Acts p. 93 (codified in Iowa Rev. Laws § 4221) (emphasis added).

18. Wisconsin (1858):

***2290** Sec. 11. "Every person who shall administer *to any woman pregnant with a child* any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."[86]

Sec. 58. "Every person who shall administer *to any pregnant woman*, or prescribe for any such woman, or advise or procure any such woman to take, any medicine, drug, or substance or thing whatever, or shall use or employ any instrument or other means whatever, or advise or procure the same to be used, with intent thereby to procure the miscarriage of any such woman, shall upon conviction be punished by imprisonment in a county jail, not more than one year nor less than three months, or by fine, not exceeding five hundred dollars, or by both fine and imprisonment, at the discretion of the court."

86 Wis. Rev. Stat., ch. 164, § 11, ch. 169, § 58 (1858) (emphasis added).

19. Kansas (1859):

Sec. 10. "Every person who shall administer *to any woman, pregnant with a quick child*, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree."

Sec. 37. "Every physician or other person who shall wilfully administer *to any pregnant woman* any medicine, drug or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall, upon conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."[87]

87 1859 Kan. Laws pp. 233, 237 (emphasis added).

20. Connecticut (1860):

Sec. 1. "That any person with intent *to procure the miscarriage or abortion of any woman*, shall give or administer to her, prescribe for her, or advise, or direct, or cause or procure her to take, any medicine, drug or substance whatever, or use or advise the use of any instrument, or other means whatever, with the like intent, unless the same shall have been necessary to preserve the life of such woman, or of her unborn child, shall be deemed guilty of felony, and upon due conviction thereof shall be punished by imprisonment in the Connecticut state prison, not more than five years or less than one year, or by a fine of one thousand dollars, or both, at the discretion of the court."[88]

88 1860 Conn. Pub. Acts p. 65 (emphasis added).

21. Pennsylvania (1860):

***2291** Sec. 87. "If any person shall unlawfully administer *to any woman, pregnant or quick with child, or supposed and believed to be pregnant or quick with child*, any drug, poison, or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony, and shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years."

Sec. 88. "If any person, with intent *to procure the miscarriage of any woman*, shall unlawfully administer to her any poison, drug or substance whatsoever, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, such person shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years."[89]

89 1861 Pa. Laws pp. 404–405 (emphasis added).

22. Rhode Island (1861):

Sec. 1. "Every person who shall be convicted of wilfully administering *to any pregnant woman, or to any woman supposed by such person to be pregnant*, anything whatever, or shall employ any means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be imprisoned not exceeding one year, or fined not exceeding one thousand dollars."[90]

90 R. I. Acts & Resolves p. 133 (emphasis added).

23. Nevada (1861):

Sec. 42. "[E]very person who shall administer, or cause to be administered or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention *to procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison, for a term not less than two years, nor more than five years; provided, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."[91]

91 1861 Nev. Laws p. 63 (emphasis added and deleted).

24. West Virginia (1863):

West Virginia's Constitution adopted the laws of Virginia when it became its own State:

"Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature."[92]

92 W. Va. Const., Art. XI, § 8 (1862).

The Virginia law in force in 1863 stated:

Sec. 8. "Any free person who shall administer to, or cause to be taken, *by a woman*, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy ***2292** such child, or produce such abortion or miscarriage, shall be confined in the penitentiary not less than one, nor more than five years. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child."[93]

93 Va. Code, Tit. 54, ch. 191, § 8 (1849) (emphasis added); see also W. Va. Code, ch. 144, § 8 (1870) (similar).

25. Oregon (1864):

Sec. 509. "If any person shall administer *to any woman pregnant with child*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter."[94]

94 Ore. Gen. Laws, Crim. Code, ch. 43, § 509 (1865).

26. Nebraska (1866):

Sec. 42. "Every person who shall willfully and maliciously administer or cause to be administered to or taken by any person, any poison or other noxious or destructive substance or liquid, with the intention to cause the death of such person, and being thereof duly convicted, shall be punished by confinement in the penitentiary for a term not less than one year and not more than seven years. And every person who shall administer or cause to be administered or taken, any such poison, substance or liquid, with the intention *to procure the miscarriageof any woman then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary, and fined in a sum not exceeding one thousand dollars."[95]

95 Neb. Rev. Stat., Tit. 4, ch. 4, § 42 (1866) (emphasis added); see also Neb. Gen. Stat., ch. 58, §§ 6, 39 (1873) (expanding criminal liability for abortions by other means, including instruments).

27. Maryland (1868):

Sec. 2. "And be it enacted, That any person who shall knowingly advertise, print, publish, distribute or circulate, or knowingly cause to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference containing words or language, giving or conveying any notice, hint or reference to any person, or to the name of any person real or fictitious, from whom; or to any place, house, shop or office, when any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever; for the purpose of producing abortion, or who shall knowingly sell, or cause to be sold any such poison, drug, mixture, preparation, medicine or noxious thing or instrument of any kind whatever; or where any advice, direction, information or knowledge may be obtained *for the purpose of causing the miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy*, or shall knowingly sell or cause to be sold any medicine, or who shall knowingly use or cause to be used any means whatsoever for that purpose, shall be punished by imprisonment in the penitentiary for not less than three years, or by a fine of not less than five hundred nor more than one thousand dollars, or by both, in the discretion of the Court; and in case of fine being imposed, one half thereof shall be paid to the State of Maryland, and one-half to the School ***2293** Fund of the city or county where the offence was committed; provided, however, that nothing herein contained shall be construed so as to prohibit the supervision and management by a regular practitioner of medicine of all cases of abortion occurring spontaneously, either as the result of accident, constitutional debility, or any other natural cause, or the production of abortion by a regular practitioner of medicine when, after consulting with one or more respectable physicians, he shall be satisfied that the foetus is dead, or that no other method will secure the safety of the mother."[96]

96 1868 Md. Laws p. 315 (emphasis deleted and added).

28. Florida (1868):

Ch. 3, Sec. 11. "Every person who shall administer *to any woman pregnant with a quick child* any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

Ch. 8, Sec. 9. "Whoever, with intent *to procure miscarriage of any woman*, unlawfully administers to her, or advises, or prescribes for her, or causes to be taken by her, any poison, drug, medicine, or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the State penittentiary not exceeding seven years, nor less than one year, or by fine not exceeding one thousand dollars."[97]

97 1868 Fla. Laws, ch. 1637, pp. 64, 97 (emphasis added).

29. Minnesota (1873):

Sec. 1. "That any person who shall administer *to any woman with child*, or prescribe for any such woman, or suggest to, or advise, or procure her to take any medicine, drug, substance or thing whatever, or who shall use or employ, or advise or suggest the use or employment of any instrument or other means or force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for a term not more than ten (10) years nor less than three (3) years."

Sec. 2. "Any person who shall administer *to any woman with child*, or prescribe, or procure, or provide for any such woman, or suggest to, or advise, or procure any such woman to take any medicine, drug, substance or thing whatever, or shall use or employ, or suggest, or advise the use or employment of any instrument or other means or force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, shall upon conviction thereof be punished by imprisonment in the state prison for a term not more than two years nor less than one year, or by fine not more than five thousand dollars nor less than five hundred dollars, or by such ***2294** fine and imprisonment both, at the discretion of the court."[98]

98 1873 Minn. Laws pp. 117–118 (emphasis added).

30. Arkansas (1875):

Sec. 1. "That it shall be unlawful for any one to administer or prescribe any medicine or drugs *to any woman with child*, with intent to produce an abortion, or premature delivery of any foetus before the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending against the provision of this section, shall be fined in any sum not exceeding one thousand ($1000) dollars, and imprisoned in the penitentiary not less than one (1) nor more than five (5) years; provided, that this section shall not apply to any abortion produced by any regular practicing physician, for the purpose of saving the mother's life."[99]

99 1875 Ark. Acts p. 5 (emphasis added and deleted).

31. Georgia (1876):

Sec. 2. "That every person who shall administer *to any woman pregnant with a child*, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder."

Sec. 3. "That any person who shall wilfully administer *to any pregnant woman* any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia."[100]

100 1876 Ga. Acts & Resolutions p. 113 (emphasis added).

32. North Carolina (1881):

Sec. 1. "That every person who shall wilfully administer *to any woman either pregnant or quick with child*, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, shall be guilty of a felony, and shall be imprisoned in the state penitentiary for not less than one year nor more than ten years, and be fined at the discretion of the court."

Sec. 2. "That every person who shall administer *to any pregnant woman*, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or any thing whatsoever, with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, shall be guilty of a misdemeanor, and, on conviction, shall be imprisoned in the jail or state penitentiary for not less than one year or more than five years, and fined at the discretion of the court."[101]

101 1881 N. C. Sess. Laws pp. 584–585 (emphasis added).

***2295 33. Delaware (1883):**

Sec. 2. "Every person who, with the intent to procure the miscarriage *of any pregnant woman or women supposed by such person to be pregnant*, unless the same be necessary to preserve her life, shall administer to her, advise, or prescribe for her, or cause to be taken by her any poison, drug, medicine, or other noxious thing, or shall use any instrument or other means whatsoever, or shall aid, assist, or counsel any person so intending to procure a miscarriage, whether said miscarriage be accomplished or not, shall be guilty of a felony, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars and be imprisoned for a term not exceeding five years nor less than one year."[102]

102 1883 Del. Laws, ch. 226 (emphasis added).

34. Tennessee (1883):

Sec. 1. "That every person who shall administer *to any woman pregnant with child, whether such child be quick or not*, any medicine, drug or substance whatever, or shall use or employ any instrument, or other means whatever with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done with a view to preserve the life of the mother, shall be punished by imprisonment in the penitentiary not less than one nor more than five years."

Sec. 2. "Every person who shall administer any substance with the intention *to procure the miscarriageof a woman then being with child*, or shall use or employ any instrument or other means with such intent, unless the same shall have been done with a view to preserve the life of such mother, shall be punished by imprisonment in the penitentiary not less than one nor more than three years."[103]

103 1883 Tenn. Acts pp. 188–189 (emphasis added).

35. South Carolina (1883):

Sec. 1. "That any person who shall administer *to any woman with child*, or prescribe for any such woman, or suggest to or advise or procure her to take, any medicine, substance, drug or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the Penitentiary for a term not more than twenty years nor less than five years."

Sec. 2. "That any person who shall administer *to any woman with child*, or prescribe or procure or provide for any such woman, or advise or procure any such woman to take, any medicine, drug, substance or thing whatever, or shall use or employ or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, shall, upon conviction thereof, be punished by imprisonment in the Penitentiary for a term not more than five years, or by fine not more than five thousand dollars, or by such fine and imprisonment both, at the discretion of the Court; but no conviction shall be ***2296** had under the provisions of Section 1 or 2 of this Act upon the uncorroborated evidence of such woman."[104]

104 1883 S. C. Acts pp. 547–548 (emphasis added).

36. Kentucky (1910):

Sec. 1. "It shall be unlawful for any person to prescribe or administer *to any pregnant woman, or to any woman whom he has reason to believe pregnant, at any time during the period of gestation*, any drug, medicine or substance, whatsoever, with

the intent thereby to procure the miscarriage of such woman, or with like intent, to use any instrument or means whatsoever, unless such miscarriage is necessary to preserve her life; and any person so offending, shall be punished by a fine of not less than five hundred nor more than one thousand dollars, and imprisoned in the State prison for not less than one nor more than ten years."

Sec. 2. "If by reason of any of the acts described in Section 1 hereof, the miscarriage of such woman is procured, and she does miscarry, causing the death of the unborn child, whether before or after quickening time, the person so offending shall be guilty of a felony, and confined in the penitentiary for not less than two, nor more than twenty-one years."

Sec. 3. "If, by reason of the commission of any of the acts described in Section 1 hereof, the woman to whom such drug or substance has been administered, or upon whom such instrument has been used, shall die, the person offending shall be punished as now prescribed by law, for the offense of murder or manslaughter, as the facts may justify."

Sec. 4. "The consent of the woman to the performance of the operation or administering of the medicines or substances, referred to, shall be no defense, and she shall be a competent witness in any prosecution under this act, and for that purpose she shall not be considered an accomplice."[105]

105 1910 Ky. Acts pp. 189–190 (emphasis added).

37. Mississippi (1952):

Sec. 1. "Whoever, by means of any instrument, medicine, drug, or other means whatever shall willfully and knowingly cause *any woman pregnant with child* to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the state penitentiary no less than one (1) year, nor more than ten (10) years; or if the death of the mother results therefrom, the person procuring, causing, or attempting to procure or cause the abortion or miscarriage shall be guilty of murder."

Sec. 2. "No act prohibited in section 1 hereof shall be considered as necessary for the preservation of the mother's life unless upon the prior advice, in writing, of two reputable licensed physicians."

Sec. 3. "The license of any physician or nurse shall be automatically revoked upon conviction under the provisions of this act."[106]

106 1952 Miss. Laws p. 289 (codified at Miss. Code Ann. § 2223 (1956) (emphasis added)).

B

This appendix contains statutes criminalizing abortion at all stages in each of the Territories that became States and in ***2297** the District of Columbia. The statutes appear in chronological order of enactment.

1. Hawaii (1850):

Sec. 1. "Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing *to a woman then with child*, in order to produce her mis-carriage, or maliciously uses any instrument or other means with like intent, shall, if such woman be then quick with child, be punished by fine not exceeding one thousand dollars and imprisonment at hard labor not more than five years. And if she be then not quick with child, shall be punished by a fine not exceeding five hundred dollars, and imprisonment at hard labor not more than two years."

Sec. 2. "Where means of causing abortion are used for the purpose of saving the life of the woman, the surgeon or other person using such means is lawfully justified."[107]

107 Haw. Penal Code, ch. 12, §§ 1–2 (1850) (emphasis added). Hawaii became a State in 1959. See Presidential Proclamation No. 3309, 73 Stat. c74–c75.

2. Washington (1854):

Sec. 37. "Every person who shall administer *to any woman pregnant with a quick child*, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, on conviction thereof, be imprisoned in the penitentiary not more than twenty years, nor less than one year."

Sec. 38. "Every person who shall administer *to any pregnant woman, or to any woman who he supposes to be pregnant*, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall on conviction thereof, be imprisoned in the penitentiary not more than five years, nor less than one year, or be imprisoned in the county jail not more than twelve months, nor less than one month, and be fined in any sum not exceeding one thousand dollars."[108]

108 Terr. of Wash. Stat., ch. 2, §§ 37–38, p. 81 (1854) (emphasis added). Washington became a State in 1889. See Presidential Proclamation No. 8, 26 Stat. 1552–1553.

3. Colorado (1861):

Sec. 42. "[E]very person who shall administer substance or liquid, or who shall use or cause to be used any instrument, of whatsoever kind, with the intention *to procure the miscarriage of any woman then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and fined in a sum not exceeding one thousand dollars; and if any woman, by reason of such treatment, shall die, the person or persons administering, or causing to be administered, such poison, substance or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished accordingly."[109]

109 1861 Terr. of Colo. Gen. Laws pp. 296–297. Colorado became a State in 1876. See Presidential Proclamation No. 7, 19 Stat. 665–666.

4. Idaho (1864):

Sec. 42. "[E]very person who shall administer or cause to be administered, or taken, any medicinal substance, or shall use or cause to be used, any instruments ***2298** whatever, with the intention *to procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the territorial prison for a term not less than two years, nor more than five years: *Provided*, That no physician shall be effected by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."[110]

110 1863–1864 Terr. of Idaho Laws p. 443. Idaho became a State in 1890. See 26 Stat. 215–219.

5. Montana (1864):

Sec. 41. "[E]very person who shall administer, or cause to be administered, or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention *to produce the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years. *Provided*, That no physician shall be affected by the last clause of this section, who in the discharge of his professional duties deems it necessary to produce the miscarriage of any woman in order to save her life."[111]

111 1864 Terr. of Mont. Laws p. 184. Montana became a State in 1889. See Presidential Proclamation No. 7, 26 Stat. 1551–1552.

6. Arizona (1865):

Sec. 45. "[E]very person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention *to procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years: Provided, that no physician shall be affected by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."[112]

112 Howell Code, ch. 10, § 45 (1865). Arizona became a State in 1912. See Presidential Proclamation of Feb. 14, 1912, 37 Stat. 1728–1729.

7. Wyoming (1869):

Sec. 25. "[A]ny person who shall administer, or cause to be administered, or taken, any such poison, substance or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention *to procure the miscarriage of any woman then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, in the penitentiary, and fined in a sum not exceeding one thousand dollars; and if any woman by reason of such treatment shall die, the person, or persons, administering, or causing to be administered such poison, substance, or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished by imprisonment for a term not less than three years in the penitentiary, and fined in a sum not exceeding one thousand dollars, unless it appear that such miscarriage was procured or attempted by, or under advice of a physician or surgeon, with intent to save the life of such woman, or to prevent serious and permanent bodily injury to her."[113]

113 1869 Terr. of Wyo. Gen. Laws p. 104 (emphasis added). Wyoming became a State in 1889. See 26 Stat. 222–226.

***2299 8. Utah (1876):**

Sec. 142. "Every person who provides, supplies, or administers *to any pregnant woman*, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the penitentiary not less than two nor more than ten years."[114]

114 Terr. of Utah Comp. Laws § 1972 (1876) (emphasis added). Utah became a State in 1896. See Presidential Proclamation No. 9, 29 Stat. 876–877.

9. North Dakota (1877):

Sec. 337. "Every person who administers *to any pregnant woman*, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the territorial prison not exceeding three years, or in a county jail not exceeding one year."[115]

115 Dakota Penal Code § 337 (1877) (codified at N. D. Rev. Code § 7177 (1895)), and S. D. Rev. Penal Code Ann. § 337 (1883). North and South Dakota became States in 1889. See Presidential Proclamation No. 5, 26 Stat. 1548–1551.

10. South Dakota (1877):*Same as North Dakota*.

11. Oklahoma (1890):

Sec. 2187. "Every person who administers *to any pregnant woman*, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument, or other means

whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the Territorial prison not exceeding three years, or in a county jail not exceeding one year."[116]

116 Okla. Stat. § 2187 (1890) (emphasis added). Oklahoma became a State in 1907. See Presidential Proclamation of Nov. 16, 1907, 35 Stat. 2160–2161.

12. Alaska (1899):

Sec. 8. "That if any person shall administer *to any woman pregnant with a child* any medicine, drug, or substance whatever, or shall use any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter, and shall be punished accordingly."[117]

117 1899 Alaska Sess. Laws ch. 2, p. 3 (emphasis added). Alaska became a State in 1959. See Presidential Proclamation No. 3269, 73 Stat. c16.

13. New Mexico (1919):

Sec. 1. "Any person who shall administer *to any pregnant woman any medicine*, drug or substance whatever, or attempt by operation or any other method or means to produce an abortion or miscarriage upon such woman, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than two thousand ($2,000.00) Dollars, nor less than five hundred ($500.00) Dollars, or imprisoned in the penitentiary for a period of not less than one nor more than five years, or by both such fine and ***2300** imprisonment in the discretion of the court trying the case."

Sec. 2. "Any person committing such act or acts mentioned in section one hereof which shall culminate in the death of the woman shall be deemed guilty of murder in the second degree; *Provided*, however, an abortion may be produced when two physicians licensed to practice in the State of New Mexico, in consultation, deem it necessary to preserve the life of the woman, or to prevent serious and permanent bodily injury."

Sec. 3. "For the purpose of the act, the term "pregnancy" is defined as that condition of a woman *from the date of conception to the birth of her child*."[118]

118 N. M. Laws p. 6 (emphasis added). New Mexico became a State in 1912. See Presidential Proclamation of Jan. 6, 1912, 37 Stat. 1723–1724.

* * *

District of Columbia (1901):

Sec. 809. "Whoever, with intent *to procure the miscarriageof any woman*, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years."[119]

119 § 809, 31 Stat. 1322 (1901) (emphasis added).

Justice THOMAS, concurring.

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. Respondents invoke one source for that right: the Fourteenth Amendment's guarantee that no State shall "deprive any person of life, liberty, or property without due process of law." The Court well explains why, under our substantive due process precedents, the purported right to

abortion is not a form of "liberty" protected by the Due Process Clause. Such a right is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Washingtonv.Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal quotation marks omitted). "[T]he idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical." *June Medical Services L. L.C.v.Russo*, 591 U.S. ——, ——, 140 S.Ct. 2103, 2151, 207 L.Ed.2d 566 (2020) (THOMAS, J., dissenting).

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that "due process of law" merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. See, *e.g.,Johnson v. United States*, 576 U.S. 591, 623, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (THOMAS, J., concurring in judgment). Other sources, by contrast, suggest that "due process of law" prohibited legislatures "from authorizing the deprivation of a person's life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England." *United Statesv.Vaello Madero*, 596 U.S. ——, ——, 142 S.Ct. 1539, 1545, —— L.Ed.2d —— (2022) (THOMAS, J., concurring) (internal quotation ***2301** marks omitted). Either way, the Due Process Clause at most guarantees *process*. It does not, as the Court's substantive due process cases suppose, "forbi[d] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); see also, *e.g.,Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

As I have previously explained, "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." *Johnson*, 576 U.S. at 607–608, 135 S.Ct. 2551 (opinion of THOMAS, J.); see also, *e.g.,Vaello Madero*, 596 U.S., at ——, 142 S.Ct., at 1545 (THOMAS, J., concurring) ("[T]ext and history provide little support for modern substantive due process doctrine"). "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *McDonald v. Chicago*, 561 U.S. 742, 811, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment); see also *United States v. Carlton*, 512 U.S. 26, 40, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994) (Scalia, J., concurring in judgment). The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. Cases like *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (right of married persons to obtain contraceptives)[*]; *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (right to engage in private, consensual sexual acts); and *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) (right to same-sex marriage), are not at issue. The Court's abortion cases are unique, see *ante,* at 2257 – 2258, 2277 – 2278, 2280 – 2281, and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised," *McDonald*, 561 U.S. at 813, 130 S.Ct. 3020 (opinion of THOMAS, J.). Thus, I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion." *Ante,* at 2277 – 2278.

* *Griswold v.Connecticut* purported not to rely on the Due Process Clause, but rather reasoned "that specific guarantees in the Bill of Rights"—including rights enumerated in the First, Third, Fourth, Fifth, and Ninth Amendments—"have penumbras, formed by emanations," that create "zones of privacy." 381 U.S. at 484, 85 S.Ct. 1678. Since *Griswold,* the Court, perhaps recognizing the facial absurdity of *Griswold*'s penumbral argument, has characterized the decision as one rooted in substantive due process. See, *e.g.,Obergefell v. Hodges*, 576 U.S. 644, 663, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," *Ramos v.Louisiana*, 590 U.S. ——, ——, 140 S.Ct. 1390, 1424, 206 L.Ed.2d 583 (2020) (THOMAS, J., concurring in judgment), we have a duty to "correct the error" established in those precedents, *Gamble* v. *United States*, 587 U.S. ——, ——, 139 S.Ct. 1960, 1984-1985, 204 L.Ed.2d 322 (2019) (THOMAS, J., concurring). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions ***2302** guarantee the myriad rights that our substantive due process

cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. Amdt. 14, § 1; see *McDonald*, 561 U.S. at 806, 130 S.Ct. 3020 (opinion of THOMAS, J.). To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights. See *id.*, at 854, 130 S.Ct. 3020. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach. See *ante,* at 2248, n. 22.

Moreover, apart from being a demonstrably incorrect reading of the Due Process Clause, the "legal fiction" of substantive due process is "particularly dangerous." *McDonald*, 561 U.S. at 811, 130 S.Ct. 3020 (opinion of THOMAS, J.); accord, *Obergefell*, 576 U.S. at 722, 135 S.Ct. 2584 (THOMAS, J., dissenting). At least three dangers favor jettisoning the doctrine entirely.

First, "substantive due process exalts judges at the expense of the People from whom they derive their authority." *Ibid*. Because the Due Process Clause "speaks only to 'process,' the Court has long struggled to define what substantive rights it protects." *Timbs v.Indiana*, 586 U.S. ——, ——, 139 S.Ct. 682, 692, 203 L.Ed.2d 11 (2019) (THOMAS, J., concurring in judgment) (internal quotation marks omitted). In practice, the Court's approach for identifying those "fundamental" rights "unquestionably involves policymaking rather than neutral legal analysis." *Carlton*, 512 U.S. at 41–42, 114 S.Ct. 2018 (opinion of Scalia, J.); see also *McDonald*, 561 U.S. at 812, 130 S.Ct. 3020 (opinion of THOMAS, J.) (substantive due process is "a jurisprudence devoid of a guiding principle"). The Court divines new rights in line with "its own, extraconstitutional value preferences" and nullifies state laws that do not align with the judicially created guarantees. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (White, J., dissenting).

Nowhere is this exaltation of judicial policymaking clearer than this Court's abortion jurisprudence. In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Court divined a right to abortion because it "fe[lt]" that "the Fourteenth Amendment's concept of personal liberty" included a "right of privacy" that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.,* at 153, 93 S.Ct. 705. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court likewise identified an abortion guarantee in "the liberty protected by the Fourteenth Amendment," but, rather than a "right of privacy," it invoked an ethereal "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.*, at 851, 112 S.Ct. 2791. As the Court's preferred manifestation of "liberty" changed, so, too, did the test used to protect it, as *Roe*'s author lamented. See *Casey*, 505 U.S. at 930, 112 S.Ct. 2791 (Blackmun, J., concurring in part and dissenting in part) ("[T]he *Roe* framework is far more administrable, and far less manipulable, than the 'undue burden' standard").

Now, in this case, the nature of the purported "liberty" supporting the abortion right has shifted yet again. Respondents ***2303** and the United States propose no fewer than three different interests that supposedly spring from the Due Process Clause. They include "bodily integrity," "personal autonomy in matters of family, medical care, and faith," Brief for Respondents 21, and "women's equal citizenship," Brief for United States as *Amicus Curiae* 24. That 50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification.

Second, substantive due process distorts other areas of constitutional law. For example, once this Court identifies a "fundamental" right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. See, *e.g.*,*Eisenstadt v. Baird*, 405 U.S. 438, 453–454, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (relying on *Griswold* to invalidate a state statute prohibiting distribution of contraceptives to unmarried persons). Statutory classifications implicating certain "nonfundamental" rights, meanwhile, receive only cursory review. See, *e.g.*,*Armour v. Indianapolis*, 566 U.S. 673, 680, 132 S.Ct. 2073, 182 L.Ed.2d 998 (2012). Similarly, this Court deems unconstitutionally "vague" or "overbroad" those laws that impinge on its preferred rights, while letting slide those laws that implicate supposedly lesser values. See, *e.g.*, *Johnson*, 576 U.S. at 618–621, 135 S.Ct. 2551 (opinion of THOMAS, J.); *United States v.Sineneng-Smith*, 590 U.S. ——, —— – ——, 140 S.Ct. 1575, 1584-1585, 206 L.Ed.2d 866 (2020) (THOMAS, J., concurring). "In fact, our vagueness doctrine

served as the basis for the first draft of the majority opinion in *Roe v.Wade*," and it since has been "deployed ... to nullify even mild regulations of the abortion industry." *Johnson,* 576 U.S. at 620–621, 135 S.Ct. 2551 (opinion of THOMAS, J.). Therefore, regardless of the doctrinal context, the Court often "demand[s] extra justifications for encroachments" on "preferred rights" while "relax[ing] purportedly higher standards of review for lesspreferred rights." *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 640–642, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016) (THOMAS, J., dissenting). Substantive due process is the core inspiration for many of the Court's constitutionally unmoored policy judgments.

Third, substantive due process is often wielded to "disastrous ends." *Gamble*, 587 U.S., at ——, 139 S.Ct., at 1989 (THOMAS, J., concurring). For instance, in *Dred Scott v. Sandford*, 19 How. 393, 60 U.S. 393, 15 L.Ed. 691 (1857), the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories. See *id.,* at 452. While *Dred Scott* "was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox," *Obergefell*, 576 U.S. at 696, 135 S.Ct. 2584 (ROBERTS, C. J., dissenting), that overruling was "[p]urchased at the price of immeasurable human suffering," *Adarand Constructors, Inc. v.Peña*, 515 U.S. 200, 240, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (THOMAS, J., concurring in part and concurring in judgment). Now today, the Court rightly overrules *Roe* and *Casey*—two of this Court's "most notoriously incorrect" substantive due process decisions, *Timbs*, 586 U.S., at ——, 139 S.Ct., at 686-687 (opinion of THOMAS, J.)—after more than 63 million abortions have been performed, see National Right to Life Committee, Abortion Statistics (Jan. 2022), https://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf. The harm caused by ***2304** this Court's forays into substantive due process remains immeasurable.

* * *

Because the Court properly applies our substantive due process precedents to reject the fabrication of a constitutional right to abortion, and because this case does not present the opportunity to reject substantive due process entirely, I join the Court's opinion. But, in future cases, we should "follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away." *Carlton*, 512 U.S. at 42, 114 S.Ct. 2018 (opinion of Scalia, J.). Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

Justice KAVANAUGH, concurring.

I write separately to explain my additional views about why *Roe* was wrongly decided, why *Roe* should be overruled at this time, and the future implications of today's decision.

I

Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.

On the one side, many pro-choice advocates forcefully argue that the ability to obtain an abortion is critically important for women's personal and professional lives, and for women's health. They contend that the widespread availability of abortion has been essential for women to advance in society and to achieve greater equality over the last 50 years. And they maintain that women must have the freedom to choose for themselves whether to have an abortion.

On the other side, many pro-life advocates forcefully argue that a fetus is a human life. They contend that all human life should be protected as a matter of human dignity and fundamental morality. And they stress that a significant percentage of Americans with pro-life views are women.

When it comes to abortion, one interest must prevail over the other at any given point in a pregnancy. Many Americans of good faith would prioritize the interests of the pregnant woman. Many other Americans of good faith instead would prioritize the interests in protecting fetal life—at least unless, for example, an abortion is necessary to save the life of the mother. Of course, many Americans are conflicted or have nuanced views that may vary depending on the particular time in pregnancy, or the particular circumstances of a pregnancy.

The issue before this Court, however, is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. To be sure, this Court has held that the Constitution protects unenumerated rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains.[1]

[1] The Court's opinion today also recounts the pre-constitutional common-law history in England. That English history supplies background information on the issue of abortion. As I see it, the dispositive point in analyzing American history and tradition for purposes of the Fourteenth Amendment inquiry is that abortion was largely prohibited in most American States as of 1868 when the Fourteenth Amendment was ratified, and that abortion remained largely prohibited in most American States until *Roe* was decided in 1973.

***2305** On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.

Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States.

Instead of adhering to the Constitution's neutrality, the Court in *Roe* took sides on the issue and unilaterally decreed that abortion was legal throughout the United States up to the point of viability (about 24 weeks of pregnancy). The Court's decision today properly returns the Court to a position of neutrality and restores the people's authority to address the issue of abortion through the processes of democratic self-government established by the Constitution.

Some *amicus* briefs argue that the Court today should not only overrule *Roe* and return to a position of judicial neutrality on abortion, but should go further and hold that the Constitution *outlaws* abortion throughout the United States. No Justice of this Court has ever advanced that position. I respect those who advocate for that position, just as I respect those who argue that this Court should hold that the Constitution legalizes pre-viability abortion throughout the United States. But both positions are wrong as a constitutional matter, in my view. The Constitution neither outlaws abortion nor legalizes abortion.

To be clear, then, the Court's decision today *does notoutlaw* abortion throughout the United States. On the contrary, the Court's decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. Through that democratic process, the people and their representatives may decide to allow or limit abortion. As Justice Scalia stated, the "States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 979, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (opinion concurring in judgment in part and dissenting in part).

Today's decision therefore does not prevent the numerous States that readily allow abortion from continuing to readily allow abortion. That includes, if they choose, the *amici* States supporting the plaintiff in this Court: New York, California, Illinois, Maine, Massachusetts, Rhode Island, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Michigan, Wisconsin, Minnesota, New Mexico, Colorado, Nevada, Oregon, Washington, and Hawaii. By contrast, other States may

maintain laws that more strictly limit abortion. After today's decision, all of the States may evaluate the competing interests and decide how to address this consequential issue.[2]

2 In his dissent in *Roe*, Justice Rehnquist indicated that an exception to a State's restriction on abortion would be constitutionally required when an abortion is necessary to save the life of the mother. See *Roe v. Wade*, 410 U.S. 113, 173, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Abortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother. Some statutes also provide other exceptions.

***2306** In arguing for a *constitutional* right to abortion that would override the people's choices in the democratic process, the plaintiff Jackson Women's Health Organization and its *amici* emphasize that the Constitution does not freeze the American people's rights as of 1791 or 1868. I fully agree. To begin, I agree that constitutional rights apply to situations that were unforeseen in 1791 or 1868—such as applying the First Amendment to the Internet or the Fourth Amendment to cars. Moreover, the Constitution authorizes the creation of new rights—state and federal, statutory and constitutional. But when it comes to creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments. See generally Amdt. 9; Amdt. 10; Art. I, § 8; Art. V; J. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 7−21, 203−216 (2018); A. Amar, America's Constitution: A Biography 285−291, 315−347 (2005).

The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views. As Justice Rehnquist stated, this Court has not "been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court." *Furman v. Georgia*, 408 U.S. 238, 467, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (dissenting opinion); see *Washington v. Glucksberg*, 521 U.S. 702, 720–721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292–293, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (Scalia, J., concurring).

This Court therefore does not possess the authority either to declare a constitutional right to abortion *or* to declare a constitutional prohibition of abortion. See *Casey*, 505 U.S. at 953, 112 S.Ct. 2791 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id.,* at 980, 112 S.Ct. 2791 (opinion of Scalia, J.); *Roe v. Wade*, 410 U.S. 113, 177, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 222, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (White, J., dissenting).

In sum, the Constitution is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process. In my respectful view, the Court in *Roe* therefore erred by taking sides on the issue of abortion.

II

The more difficult question in this case is *stare decisis*—that is, whether to overrule the *Roe* decision.

The principle of *stare decisis* requires respect for the Court's precedents and for the accumulated wisdom of the judges who have previously addressed the same issue. *Stare decisis* is rooted in Article III of the Constitution and is fundamental to the American judicial system and to the stability of American law.

Adherence to precedent is the norm, and *stare decisis* imposes a high bar before ***2307** this Court may overrule a precedent. This Court's history shows, however, that *stare decisis* is not absolute, and indeed cannot be absolute. Otherwise, as the Court today explains, many long-since-overruled cases such as *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905); *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 60

S.Ct. 1010, 84 L.Ed. 1375 (1940); and *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), would never have been overruled and would still be the law.

In his canonical *Burnet* opinion in 1932, Justice Brandeis stated that in "cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815−407 (1932) (dissenting opinion). That description of the Court's practice remains accurate today. Every current Member of this Court has voted to overrule precedent. And over the last 100 years beginning with Chief Justice Taft's appointment in 1921, every one of the 48 Justices appointed to this Court has voted to overrule precedent. Many of those Justices have voted to overrule a substantial number of very significant and longstanding precedents. See, *e.g.*,*Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) (overruling *Baker v. Nelson*); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (overruling *Plessy v.Ferguson*); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (overruling *Adkins v.Children's Hospital of D. C.* and in effect *Lochner v.New York*).

But that history alone does not answer the critical question: When precisely should the Court overrule an erroneous constitutional precedent? The history of *stare decisis* in this Court establishes that a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests. See *Ramos v.Louisiana*, 590 U.S. ——, —— – ——, 140 S.Ct., at 1414-1415 (2020) (KAVANAUGH, J., concurring in part).

Applying those factors, I agree with the Court today that *Roe* should be overruled. The Court in *Roe* erroneously assigned itself the authority to decide a critically important moral and policy issue that the Constitution does not grant this Court the authority to decide. As Justice Byron White succinctly explained, *Roe* was "an improvident and extravagant exercise of the power of judicial review" because "nothing in the language or history of the Constitution" supports a constitutional right to abortion. *Bolton*, 410 U.S. at 221, 93 S.Ct. 739 −222 (dissenting opinion).

Of course, the fact that a precedent is wrong, even egregiously wrong, does not alone mean that the precedent should be overruled. But as the Court today explains, *Roe* has caused significant negative jurisprudential and real-world consequences. By taking sides on a difficult and contentious issue on which the Constitution is neutral, *Roe* overreached and exceeded this Court's constitutional authority; gravely distorted the Nation's understanding of this Court's proper constitutional role; and caused significant harm to what *Roe* itself recognized as the State's "important and legitimate interest" in protecting fetal life. 410 U.S. at 162, 93 S.Ct. 705. All of that explains why tens of millions of Americans—and the 26 States that explicitly ***2308** ask the Court to overrule *Roe*—do not accept *Roe* even 49 years later. Under the Court's longstanding *stare decisis* principles, *Roe* should be overruled.[3]

3 I also agree with the Court's conclusion today with respect to reliance. Broad notions of societal reliance have been invoked in support of *Roe*, but the Court has not analyzed reliance in that way in the past. For example, American businesses and workers relied on *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), and *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), to construct a laissez-faire economy that was free of substantial regulation. In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), the Court nonetheless overruled *Adkins* and in effect *Lochner*. An entire region of the country relied on *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), to enforce a system of racial segregation. In *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Court overruled *Plessy*. Much of American society was built around the traditional view of marriage that was upheld in *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), and that was reflected in laws ranging from tax laws to estate laws to family laws. In *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), the Court nonetheless overruled *Baker*.

But the *stare decisis* analysis here is somewhat more complicated because of *Casey*. In 1992, 19 years after *Roe*, *Casey* acknowledged the continuing dispute over *Roe*. The Court sought to find common ground that would resolve the abortion debate

and end the national controversy. After careful and thoughtful consideration, the *Casey* plurality reaffirmed a right to abortion through viability (about 24 weeks), while also allowing somewhat more regulation of abortion than *Roe* had allowed.[4]

4 As the Court today notes, *Casey*'s approach to *stare decisis* pointed in two directions. *Casey* reaffirmed *Roe*'s viability line, but it expressly overruled the *Roe* trimester framework and also expressly overruled two landmark post-*Roe* abortion cases—*Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986). See *Casey*, 505 U.S. at 870, 872, 112 S.Ct. 2791−873, 878−879, 882. *Casey* itself thus directly contradicts any notion of absolute *stare decisis* in abortion cases.

I have deep and unyielding respect for the Justices who wrote the *Casey* plurality opinion. And I respect the *Casey* plurality's good-faith effort to locate some middle ground or compromise that could resolve this controversy for America.

But as has become increasingly evident over time, *Casey*'s well-intentioned effort did not resolve the abortion debate. The national division has not ended. In recent years, a significant number of States have enacted abortion restrictions that directly conflict with *Roe*. Those laws cannot be dismissed as political stunts or as outlier laws. Those numerous state laws collectively represent the sincere and deeply held views of tens of millions of Americans who continue to fervently believe that allowing abortions up to 24 weeks is far too radical and far too extreme, and does not sufficiently account for what *Roe* itself recognized as the State's "important and legitimate interest" in protecting fetal life. 410 U.S. at 162, 93 S.Ct. 705. In this case, moreover, a majority of the States—26 in all—ask the Court to overrule *Roe* and return the abortion issue to the States.

In short, *Casey*'s *stare decisis* analysis rested in part on a predictive judgment about the future development of state laws and of the people's views on the abortion issue. But that predictive judgment has not borne out. As the Court today explains, the experience over the last 30 years conflicts with *Casey*'s predictive judgment and ***2309** therefore undermines *Casey*'s precedential force.[5]

5 To be clear, public opposition to a prior decision is not a basis for overruling (or reaffirming) that decision. Rather, the question of whether to overrule a precedent must be analyzed under this Court's traditional *stare decisis* factors. The only point here is that *Casey* adopted a special *stare decisis* principle with respect to *Roe* based on the idea of resolving the national controversy and ending the national division over abortion. The continued and significant opposition to *Roe*, as reflected in the laws and positions of numerous States, is relevant to assessing *Casey* on its own terms.

In any event, although *Casey* is relevant to the *stare decisis* analysis, the question of whether to overrule *Roe* cannot be dictated by *Casey* alone. To illustrate that *stare decisis* point, consider an example. Suppose that in 1924 this Court had expressly reaffirmed *Plessy v.Ferguson* and upheld the States' authority to segregate people on the basis of race. Would the Court in *Brown* some 30 years later in 1954 have reaffirmed *Plessy* and upheld racially segregated schools simply because of that intervening 1924 precedent? Surely the answer is no.

In sum, I agree with the Court's application today of the principles of *stare decisis* and its conclusion that *Roe* should be overruled.

III

After today's decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans. That issue will be resolved by the people and their representatives in the democratic process in the States or Congress. But the parties' arguments have raised other related questions, and I address some of them here.

First is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967);

and *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.

Second, as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the *Ex Post Facto* Clause. Cf. *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

Other abortion-related legal questions may emerge in the future. But this Court will no longer decide the fundamental question of whether abortion must be allowed throughout the United States through 6 weeks, or 12 weeks, or 15 weeks, or 24 weeks, or some other line. The Court will no longer decide how to evaluate the interests of the pregnant woman and the interests in protecting fetal life throughout pregnancy. Instead, those difficult moral and policy questions will be decided, as the Constitution dictates, by the people and their elected representatives through the constitutional processes of democratic self-government.

***2310** * * *

The *Roe* Court took sides on a consequential moral and policy issue that this Court had no constitutional authority to decide. By taking sides, the *Roe* Court distorted the Nation's understanding of this Court's proper role in the American constitutional system and thereby damaged the Court as an institution. As Justice Scalia explained, *Roe* "destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level." *Casey*, 505 U.S. at 995, 112 S.Ct. 2791 (opinion concurring in judgment in part and dissenting in part).

The Court's decision today properly returns the Court to a position of judicial neutrality on the issue of abortion, and properly restores the people's authority to resolve the issue of abortion through the processes of democratic selfgovernment established by the Constitution.

To be sure, many Americans will disagree with the Court's decision today. That would be true no matter how the Court decided this case. Both sides on the abortion issue believe sincerely and passionately in the rightness of their cause. Especially in those difficult and fraught circumstances, the Court must scrupulously adhere to the Constitution's neutral position on the issue of abortion.

Since 1973, more than 20 Justices of this Court have now grappled with the divisive issue of abortion. I greatly respect all of the Justices, past and present, who have done so. Amidst extraordinary controversy and challenges, all of them have addressed the abortion issue in good faith after careful deliberation, and based on their sincere understandings of the Constitution and of precedent. I have endeavored to do the same.

In my judgment, on the issue of abortion, the Constitution is neither pro-life nor pro-choice. The Constitution is neutral, and this Court likewise must be scrupulously neutral. The Court today properly heeds the constitutional principle of judicial neutrality and returns the issue of abortion to the people and their elected representatives in the democratic process.

Chief Justice ROBERTS, concurring in the judgment.
We granted certiorari to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. for Cert. i. That question is directly implicated here: Mississippi's Gestational Age Act, Miss. Code Ann. § 41–41–191 (2018), generally prohibits abortion after the fifteenth week of pregnancy—several weeks before a fetus is regarded as "viable" outside the womb. In urging our review, Mississippi stated that its case was "an ideal vehicle" to "reconsider the bright-line viability rule," and that a judgment in its favor would "not require the Court to overturn" *Roe v. Wade*, 410 U.S. 113, 93 S.Ct.

705, 35 L.Ed.2d 147 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Pet. for Cert. 5.

Today, the Court nonetheless rules for Mississippi by doing just that. I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability. Mississippi's law allows a woman three months to obtain an abortion, well ***2311** beyond the point at which it is considered "late" to discover a pregnancy. See A. Ayoola, Late Recognition of Unintended Pregnancies, 32 Pub. Health Nursing 462 (2015) (pregnancy is discoverable and ordinarily discovered by six weeks of gestation). I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*. The Court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us.

I

Let me begin with my agreement with the Court, on the only question we need decide here: whether to retain the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as "viable" outside the womb. I agree that this rule should be discarded.

First, this Court seriously erred in *Roe* in adopting viability as the earliest point at which a State may legislate to advance its substantial interests in the area of abortion. See *ante,* at 2268 – 2270. *Roe* set forth a rigid three-part framework anchored to viability, which more closely resembled a regulatory code than a body of constitutional law. That framework, moreover, came out of thin air. Neither the Texas statute challenged in *Roe* nor the Georgia statute at issue in its companion case, *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), included *any* gestational age limit. No party or *amicus* asked the Court to adopt a bright line viability rule. And as for *Casey*, arguments for or against the viability rule played only a *de minimis* role in the parties' briefing and in the oral argument. See Tr. of Oral Arg. 17–18, 51 (fleeting discussion of the viability rule).

It is thus hardly surprising that neither *Roe* nor *Casey* made a persuasive or even colorable argument for why the time for terminating a pregnancy must extend to viability. The Court's jurisprudence on this issue is a textbook illustration of the perils of deciding a question neither presented nor briefed. As has been often noted, *Roe*'s defense of the line boiled down to the circular assertion that the State's interest is compelling only when an unborn child can live outside the womb, because that is when the unborn child can live outside the womb. See 410 U.S. at 163–164, 93 S.Ct. 705; see also J. Ely, The Wages of Crying Wolf: A Comment on *Roe v.Wade*, 82 Yale L. J. 920, 924 (1973) (*Roe*'s reasoning "mistake[s] a definition for a syllogism").

Twenty years later, the best defense of the viability line the *Casey* plurality could conjure up was workability. See 505 U.S. at 870, 112 S.Ct. 2791. But see *ante,* at 2270 (opinion of the Court) (discussing the difficulties in applying the viability standard). Although the plurality attempted to add more content by opining that "it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child,"*Casey*, 505 U.S. at 870, 112 S.Ct. 2791, that mere suggestion provides no basis for choosing viability as the critical ***2312** tipping point. A similar implied consent argument could be made with respect to a law banning abortions after fifteen weeks, well beyond the point at which nearly all women are aware that they are pregnant, A. Ayoola, M. Nettleman, M. Stommel, & R. Canady, Time of Pregnancy Recognition

and Prenatal Care Use: A Population-based Study in the United States 39 (2010) (Pregnancy Recognition). The dissent, which would retain the viability line, offers no justification for it either.

This Court's jurisprudence since *Casey,* moreover, has "eroded" the "underpinnings" of the viability line, such as they were. *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). The viability line is a relic of a time when we recognized only two state interests warranting regulation of abortion: maternal health and protection of "potential life." *Roe*, 410 U.S. at 162–163, 93 S.Ct. 705. That changed with *Gonzales v. Carhart*, 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007). There, we recognized a broader array of interests, such as drawing "a bright line that clearly distinguishes abortion and infanticide," maintaining societal ethics, and preserving the integrity of the medical profession. *Id.,* at 157–160, 127 S.Ct. 1610. The viability line has nothing to do with advancing such permissible goals. Cf. *id.,* at 171, 127 S.Ct. 1610 (Ginsburg, J., dissenting) (*Gonzales* "blur[red] the line, firmly drawn in *Casey*, between previability and postviability abortions"); see also R. Beck, *Gonzales*, *Casey*, and the Viability Rule, 103 Nw. U. L. Rev. 249, 276–279 (2009).

Consider, for example, statutes passed in a number of jurisdictions that forbid abortions after twenty weeks of pregnancy, premised on the theory that a fetus can feel pain at that stage of development. See, *e.g.,* Ala. Code § 26–23B–2 (2018). Assuming that prevention of fetal pain is a legitimate state interest after *Gonzales*, there seems to be no reason why viability would be relevant to the permissibility of such laws. The same is true of laws designed to "protect[ ] the integrity and ethics of the medical profession" and restrict procedures likely to "coarsen society" to the "dignity of human life." *Gonzales*, 550 U.S. at 157, 127 S.Ct. 1610. Mississippi's law, for instance, was premised in part on the legislature's finding that the "dilation and evacuation" procedure is a "barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." Miss. Code Ann. § 41–41–191(2)(b)(i)(8). That procedure accounts for most abortions performed after the first trimester—two weeks before the period at issue in this case—and "involve[s] the use of surgical instruments to crush and tear the unborn child apart." *Ibid.*; see also *Gonzales*, 550 U.S. at 135, 127 S.Ct. 1610. Again, it would make little sense to focus on viability when evaluating a law based on these permissible goals.

In short, the viability rule was created outside the ordinary course of litigation, is and always has been completely unreasoned, and fails to take account of state interests since recognized as legitimate. It is indeed "telling that other countries almost uniformly eschew" a viability line. *Ante,* at 2270, 127 S.Ct. 1610 (opinion of the Court). Only a handful of countries, among them China and North Korea, permit elective abortions after twenty weeks; the rest have coalesced around a 12–week line. See The World's Abortion Laws, Center for Reproductive Rights (Feb. 23, 2021) (online source archived at www.supremecourt.gov) (Canada, China, Iceland, Guinea-Bissau, the Netherlands, North Korea, Singapore, and Vietnam permit elective abortions after twenty weeks). The Court rightly rejects the arbitrary viability rule today.

***2313** II

None of this, however, requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in *Roe*. Mississippi itself previously argued as much to this Court in this litigation.

When the State petitioned for our review, its basic request was straightforward: "clarify whether abortion prohibitions before viability are always unconstitutional." Pet. for Cert. 14. The State made a number of strong arguments that the answer is no, *id.*, at 15–26—arguments that, as discussed, I find persuasive. And it went out of its way to make clear that it was *not* asking the Court to repudiate entirely the right to choose whether to terminate a pregnancy: "To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*." *Id.,* at 5, 87 S.Ct. 1817. Mississippi tempered that statement with an oblique one-sentence footnote intimating that, if the Court could not reconcile *Roe* and *Casey* with current facts or other cases, it "should not retain erroneous precedent." Pet. for Cert. 5–6, n. 1. But the State never argued that we should grant review for that purpose.

After we granted certiorari, however, Mississippi changed course. In its principal brief, the State bluntly announced that the Court should overrule *Roe* and *Casey*. The Constitution does not protect a right to an abortion, it argued, and a State should be able to prohibit elective abortions if a rational basis supports doing so. See Brief for Petitioners 12–13.

The Court now rewards that gambit, noting three times that the parties presented "no half-measures" and argued that "we must either reaffirm or overrule *Roe* and *Casey*." *Ante,* at 2242, 2244, 2281, 127 S.Ct. 1610. Given those two options, the majority picks the latter.

This framing is not accurate. In its brief on the merits, Mississippi in fact argued at length that a decision simply rejecting the viability rule would result in a judgment in its favor. See Brief for Petitioners 5, 38–48. But even if the State had not argued as much, it would not matter. There is no rule that parties can confine this Court to disposing of their case on a particular ground —let alone when review was sought and granted on a different one. Our established practice is instead not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (quoting *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)); see also *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).

Following that "fundamental principle of judicial restraint," *Washington State Grange*, 552 U.S. at 450, 128 S.Ct. 1184, we should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand. See, *e.g.,Office of Personnel Management v. Richmond*, 496 U.S. 414, 423, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990). It is only where there is no valid narrower ground of decision that we should go on to address a broader issue, such as whether a constitutional decision should be overturned. See *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (declining to address the claim that a constitutional decision should be overruled when the appellant prevailed on its narrower constitutional argument).

***2314** Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 518, 521, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (plurality opinion) (rejecting *Roe*'s viability line as "rigid" and "indeterminate," while also finding "no occasion to revisit the holding of *Roe*" that, under the Constitution, a State must provide an opportunity to choose to terminate a pregnancy).

Of course, such an approach would not be available if the rationale of *Roe* and *Casey* was inextricably entangled with and dependent upon the viability standard. It is not. Our precedents in this area ground the abortion right in a woman's "right to choose." See *Carey v. Population Services Int'l*, 431 U.S. 678, 688–689, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) ("underlying foundation of the holdings" in *Roe* and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), was the "right of decision in matters of childbearing"); *Maher v. Roe*, 432 U.S. 464, 473, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (*Roe* and other cases "recognize a constitutionally protected interest in making certain kinds of important decisions free from governmental compulsion" (internal quotation marks omitted)); *id.*, at 473–474, 97 S.Ct. 2376 (*Roe* "did not declare an unqualified constitutional right to an abortion," but instead protected "the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" (internal quotation marks omitted)); *Webster*, 492 U.S. at 520, 109 S.Ct. 3040 (plurality opinion) (*Roe* protects "the claims of a woman to decide for herself whether or not to abort a fetus she [is] carrying"); *Gonzales*, 550 U.S. at 146, 127 S.Ct. 1610 (a State may not "prohibit any woman from making the ultimate decision to terminate her pregnancy"). If that is the basis for *Roe*, *Roe*'s viability line should be scrutinized from the same perspective. And there is nothing inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided. See *Webster*, 492 U.S. at 519, 109 S.Ct. 3040 (plurality opinion) (finding no reason "why the State's interest in protecting potential human life should come into existence only at the point of viability").

To be sure, in reaffirming the right to an abortion, *Casey* termed the viability rule *Roe*'s "central holding." 505 U.S. at 860, 112 S.Ct. 2791. Other cases of ours have repeated that language. See, *e.g.,Gonzales*, 550 U.S. at 145–146, 127 S.Ct. 1610. But

simply declaring it does not make it so. The question in *Roe* was whether there was any right to abortion in the Constitution. See Brief for Appellants and Brief for Appellees, in *Roe* v. *Wade*, O. T. 1971, No. 70–18. How far the right extended was a concern that was separate and subsidiary, and—not surprisingly—entirely unbriefed.

The Court in *Roe* just chose to address both issues in one opinion: It first recognized a right to "choose to terminate [a] pregnancy" under the Constitution, see 410 U.S. at 129–159, 93 S.Ct. 705, and then, having done so, explained that a line should be drawn at viability such that a State could not proscribe abortion before that period, see *id.*, at 163, 93 S.Ct. 705. The viability line is a separate rule fleshing out the metes and bounds of *Roe*'s core holding. Applying principles of *stare decisis*, I would excise that additional rule—and only that rule—from our jurisprudence.

The majority lists a number of cases that have stressed the importance of the ***2315** viability rule to our abortion precedents. See *ante,* at 2281 – 2282. I agree that—whether it was originally holding or dictum—the viability line is clearly part of our "past precedent," and the Court has applied it as such in several cases since *Roe*. *Ante,* at 2281 – 2282. My point is that *Roe* adopted two distinct rules of constitutional law: one, that a woman has the right to choose to terminate a pregnancy; two, that such right may be overridden by the State's legitimate interests when the fetus is viable outside the womb. The latter is obviously distinct from the former. I would abandon that timing rule, but see no need in this case to consider the basic right.

The Court contends that it is impossible to address *Roe*'s conclusion that the Constitution protects the woman's right to abortion, without also addressing *Roe*'s rule that the State's interests are not constitutionally adequate to justify a ban on abortion until viability. See *ibid*. But we have partially overruled precedents before, see, *e.g.*, *United States v. Miller*, 471 U.S. 130, 142–144, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985); *Daniels v. Williams*, 474 U.S. 327, 328–331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Batson v. Kentucky*, 476 U.S. 79, 90–93, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and certainly have never held that a distinct holding defining the contours of a constitutional right must be treated as part and parcel of the right itself.

Overruling the subsidiary rule is sufficient to resolve this case in Mississippi's favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right *Roe* protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation. See A. Branum & K. Ahrens, Trends in Timing of Pregnancy Awareness Among US Women, 21 Maternal & Child Health J. 715, 722 (2017). Almost all know by the end of the first trimester. Pregnancy Recognition 39. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. See I. Adibi et al., Abortion, 22 Geo. J. Gender & L. 279, 303 (2021). Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. See Centers for Disease Control and Prevention, Abortion Surveillance —United States 1 (2020). Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman "to decide for herself " whether to terminate her pregnancy. *Webster*, 492 U.S. at 520, 109 S.Ct. 3040 (plurality opinion).[1]

[1] The majority contends that "nothing like [my approach] was recommended by either party." *Ante,* at 2281, 109 S.Ct. 3040. But as explained, Mississippi in fact pressed a similar argument in its filings before this Court. See Pet. for Cert. 15–26; Brief for Petitioners 5, 38–48 (urging the Court to reject the viability rule and reverse); Reply Brief 20–22 (same). The approach also finds support in prior opinions. See *Webster*, 492 U.S. at 518–521, 109 S.Ct. 3040 (plurality opinion) (abandoning "key elements" of the *Roe* framework under *stare decisis* while declining to reconsider *Roe*'s holding that the Constitution protects the right to an abortion).

III

Whether a precedent should be overruled is a question "entirely within the discretion of the court." *Hertz v. Woodman*, 218 U.S. 205, 212, 30 S.Ct. 621, 54 L.Ed. 1001 (1910); see also *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (*stare decisis* is a "principle of policy"). In my respectful ***2316** view, the sound exercise of that discretion should have led the Court to resolve the case on the narrower grounds set forth above, rather than overruling *Roe* and *Casey* entirely.

The Court says there is no "principled basis" for this approach, *ante,* at 2281 – 2282, but in fact it is firmly grounded in basic principles of *stare decisis* and judicial restraint.

The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case.

Our cases say that the effect of overruling a precedent on reliance interests is a factor to consider in deciding whether to take such a step, and respondents argue that generations of women have relied on the right to an abortion in organizing their relationships and planning their futures. Brief for Respondents 36–41; see also *Casey*, 505 U.S. at 856, 112 S.Ct. 2791 (making the same point). The Court questions whether these concerns are pertinent under our precedents, see *ante,*at 2276 – 2277, but the issue would not even arise with a decision rejecting only the viability line: It cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks.

In support of its holding, the Court cites three seminal constitutional decisions that involved overruling prior precedents: *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937). See *ante,* at 2262 – 2264, 57 S.Ct. 578. The opinion in *Brown* was unanimous and eleven pages long; this one is neither. *Barnette* was decided only three years after the decision it overruled, three Justices having had second thoughts. And *West Coast Hotel* was issued against a backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent. It also was part of a sea change in this Court's interpretation of the Constitution, "signal[ing] the demise of an entire line of important precedents," *ante,* at 2262, 57 S.Ct. 578—a feature the Court expressly disclaims in today's decision, see *ante,* at 2257 – 2258, 2277 – 2278, 57 S.Ct. 578. None of these leading cases, in short, provides a template for what the Court does today.

The Court says we should consider whether to overrule *Roe* and *Casey* now, because if we delay we would be forced to consider the issue again in short order. See *ante*, at 2283 – 2284, 57 S.Ct. 578. There would be "turmoil" until we did so, according to the Court, because of existing state laws with "shorter deadlines or no deadline at all." *Ante*, at 2283, 57 S.Ct. 578. But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective.

* * *

Both the Court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of ***2317** conception must be treated the same under the Constitution as a ban after fifteen weeks. A thoughtful Member of this Court once counseled that the difficulty of a question "admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 372–373, 75 S.Ct. 845, 99 L.Ed. 1155 (1955) (Frankfurter, J., for the Court). I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

I therefore concur only in the judgment.

Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN, dissenting.

For half a century, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. See *Casey*, 505 U.S. at 853, 112 S.Ct. 2791; *Gonzales v. Carhart*, 550 U.S. 124, 171–172, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) (Ginsburg, J., dissenting). Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the "moral[ity]" of "terminating a pregnancy, even in its earliest stage." *Casey*, 505 U.S. at 850, 112 S.Ct. 2791. And the Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting" the "life of the fetus that may become a child." *Id.*, at 846, 112 S.Ct. 2791. So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life. *Ibid.*

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. The Mississippi law at issue here bars abortions after the 15th week of pregnancy. Under the majority's ruling, though, another State's law could do so after ten weeks, or five or three or one—or, again, from the moment ***2318** of fertilization. States have already passed such laws, in anticipation of today's ruling. More will follow. Some States have enacted laws extending to all forms of abortion procedure, including taking medication in one's own home. They have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist's child or a young girl her father's—no matter if doing so will destroy her life. So too, after today's ruling, some States may compel women to carry to term a fetus with severe physical anomalies—for example, one afflicted with Tay-Sachs disease, sure to die within a few years of birth. States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm. Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.

Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion. And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.

The majority tries to hide the geographically expansive effects of its holding. Today's decision, the majority says, permits "each State" to address abortion as it pleases. *Ante*, at 2284 – 2285, 112 S.Ct. 2791. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today's decision. In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services. Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens,

"the views of [an individual State's] citizens" will not matter. *Ante*, at 2240, 112 S.Ct. 2791. The challenge for a woman will be to finance a trip not to "New York [or] California" but to Toronto. *Ante*, at 2305 – 2306, 112 S.Ct. 2791 (KAVANAUGH, J., concurring).

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." *Casey*, 505 U.S. at 856, 112 S.Ct. 2791. But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or ***2319** the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "cast[s] doubt on precedents that do not concern abortion." *Ante*, at 2277 – 2278, 135 S.Ct. 2584; cf. *ante*, at 2301 – 2302, 135 S.Ct. 2584 (THOMAS, J., concurring) (advocating the overruling of *Griswold*, *Lawrence*, and *Obergefell*). But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. *Ante*, at 2257 – 2258, 135 S.Ct. 2584. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]." *Ante*, at 2248. So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The ***2320** Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, "contributes to the actual and perceived integrity of the judicial process" by ensuring that decisions are "founded in the law rather than in the proclivities of individuals." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d

720 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

I

We start with *Roe* and *Casey*, and with their deep connections to a broad swath of this Court's precedents. To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation's constitutional law. That is not true. After describing the decisions themselves, we explain how they are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations. The majority does not wish to talk about these matters for obvious reasons; to do so would both ground *Roe* and *Casey* in this Court's precedents and reveal the broad implications of today's decision. But the facts will not so handily disappear. *Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. So we do not (as the majority insists today) place everything within "the reach of majorities and [government] officials." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

A

Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman's life. The *Roe* Court knew it was treading on difficult and disputed ground. It understood that different people's "experiences," "values," and "religious training" and beliefs led to "opposing views" about abortion. 410 U.S. at 116, 93 S.Ct. 705. But by a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor. The Court explained that a long line of precedents, "founded in the Fourteenth Amendment's concept of personal liberty," protected individual decisionmaking related to "marriage, procreation, contraception, family relationships, and child rearing and education." *Id.*, at 152–153, 93 S.Ct. 705 (citations omitted). For the same reasons, the Court held, the Constitution must protect "a woman's decision whether or not to terminate her pregnancy." *Id.*, at 153, 93 S.Ct. 705. The Court recognized the myriad ways bearing a child can alter the "life and future" of a woman and other members of her family. *Ibid.* A State could not, "by adopting one theory of life," override all "rights of the pregnant woman." *Id.*, at 162, 93 S.Ct. 705.

***2321** At the same time, though, the Court recognized "valid interest[s]" of the State "in regulating the abortion decision." *Id.*, at 153, 93 S.Ct. 705. The Court noted in particular "important interests" in "protecting potential life," "maintaining medical standards," and "safeguarding [the] health" of the woman. *Id.*, at 154, 93 S.Ct. 705. No "absolut[ist]" account of the woman's right could wipe away those significant state claims. *Ibid.*

The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. The Court explained that early on, a woman's choice must prevail, but that "at some point the state interests" become "dominant." *Id.*, at 155, 93 S.Ct. 705. It then set some guideposts. In the first trimester of pregnancy, the State could not interfere at all with the decision to terminate a pregnancy. At any time after that point, the State could regulate to protect the pregnant woman's health, such as by insisting that abortion providers and facilities meet safety requirements. And after the fetus's viability—the point when the fetus "has the capability of meaningful life outside the mother's womb"—the State could ban abortions, except when necessary to preserve the woman's life or health. *Id.*, at 163–164, 93 S.Ct. 705.

In the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. Recognizing that "arguments [against *Roe*] continue to be made," we responded that the doctrine of *stare decisis* "demands respect in a society governed by the rule of law." *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419–420, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). And we avowed that the "vitality" of "constitutional principles cannot be allowed to yield simply because of disagreement with them." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986). So the Court, over and over, enforced the constitutional principles *Roe* had declared. See, *e.g.*, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990); *Simopoulos v. Virginia*, 462 U.S. 506, 103 S.Ct. 2532, 76 L.Ed.2d 755 (1983); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983); *H. L. v. Matheson*, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981); *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts. *Casey* is in significant measure a precedent about the doctrine of precedent—until today, one of the Court's most important. But we leave for later that aspect of the Court's decision. The key thing now is the substantive aspect of the Court's considered conclusion that "the essential holding of *Roev.Wade* should be retained and once again reaffirmed." 505 U.S. at 846, 112 S.Ct. 2791.

Central to that conclusion was a full-throated restatement of a woman's right to choose. Like *Roe*, *Casey* grounded that right in the Fourteenth Amendment's guarantee of "liberty." That guarantee encompasses realms of conduct not specifically referenced in the Constitution: "Marriage is mentioned nowhere" in that document, yet the Court was "no doubt correct" to protect the freedom to marry "against state interference." 505 U.S. at 847–848, 112 S.Ct. 2791. And the guarantee of liberty encompasses conduct today that was not protected at the time of the ***2322** Fourteenth Amendment. See *id.*, at 848, 112 S.Ct. 2791. "It is settled now," the Court said—though it was not always so—that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." *Id.*, at 849, 112 S.Ct. 2791 (citations omitted); see *id.*, at 851, 112 S.Ct. 2791 (similarly describing the constitutional protection given to "personal decisions relating to marriage, procreation, contraception, [and] family relationships"). Especially important in this web of precedents protecting an individual's most "personal choices" were those guaranteeing the right to contraception. *Ibid.*; see *id.*, at 852–853, 112 S.Ct. 2791. In those cases, the Court had recognized "the right of the individual" to make the vastly consequential "decision whether to bear" a child. *Id.*, at 851, 112 S.Ct. 2791 (emphasis deleted). So too, *Casey* reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision about abortion was central, in the same way, to her capacity to chart her life's course. See *id.*, at 853, 112 S.Ct. 2791.

In reaffirming the right *Roe* recognized, the Court took full account of the diversity of views on abortion, and the importance of various competing state interests. Some Americans, the Court stated, "deem [abortion] nothing short of an act of violence against innocent human life." 505 U.S. at 852, 112 S.Ct. 2791. And each State has an interest in "the protection of potential life"—as *Roe* itself had recognized. 505 U.S. at 871, 112 S.Ct. 2791 (plurality opinion). On the one hand, that interest was not conclusive. The State could not "resolve" the "moral and spiritual" questions raised by abortion in "such a definitive way that a woman lacks all choice in the matter." *Id.*, at 850, 112 S.Ct. 2791 (majority opinion). It could not force her to bear the "pain" and "physical constraints" of "carr[ying] a child to full term" when she would have chosen an early abortion. *Id.*, at 852, 112 S.Ct. 2791. But on the other hand, the State had, as *Roe* had held, an exceptionally significant interest in disallowing abortions in the later phase of a pregnancy. And it had an ever-present interest in "ensur[ing] that the woman's choice is informed" and in presenting the case for "choos[ing] childbirth over abortion." 505 U.S. at 878, 112 S.Ct. 2791 (plurality opinion).

So *Casey* again struck a balance, differing from *Roe*'s in only incremental ways. It retained *Roe*'s "central holding" that the State could bar abortion only after viability. 505 U.S. at 860, 112 S.Ct. 2791 (majority opinion). The viability line, *Casey* thought, was "more workable" than any other in marking the place where the woman's liberty interest gave way to a State's efforts to preserve potential life. *Id.*, at 870, 112 S.Ct. 2791 (plurality opinion). At that point, a "second life" was capable of "independent existence." *Ibid.* If the woman even by then had not acted, she lacked adequate grounds to object to "the State's intervention

on [the developing child's] behalf." *Ibid.* At the same time, *Casey* decided, based on two decades of experience, that the *Roe* framework did not give States sufficient ability to regulate abortion prior to viability. In that period, *Casey* now made clear, the State could regulate not only to protect the woman's health but also to "promot[e] prenatal life." 505 U.S. at 873, 112 S.Ct. 2791 (plurality opinion). In particular, the State could ensure informed choice and could try to promote childbirth. See *id.*, at 877–878, 112 S.Ct. 2791. But the State still could not place an "undue burden"—or "substantial obstacle"—"in the path of a woman seeking an abortion." *Id.*, at 878, 112 S.Ct. 2791. Prior to viability, the woman, consistent with the constitutional "meaning of ***2323** liberty," must "retain the ultimate control over her destiny and her body." *Id.*, at 869, 112 S.Ct. 2791.

We make one initial point about this analysis in light of the majority's insistence that *Roe* and *Casey*, and we in defending them, are dismissive of a "State's interest in protecting prenatal life." *Ante*, at 2261. Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman's liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment.[1] But what *Roe* and *Casey* also recognized—which today's majority does not—is that a woman's freedom and equality are likewise involved. That fact—the presence of countervailing interests—is what made the abortion question hard, and what necessitated balancing. The majority scoffs at that idea, castigating us for "repeatedly prais[ing] the 'balance' " the two cases arrived at (with the word "balance" in scare quotes). *Ante*, at 2261. To the majority "balance" is a dirty word, as moderation is a foreign concept. The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman's rights to equality and freedom. Today's Court, that is, does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life. *Roe* and *Casey* thought that one-sided view misguided. In some sense, that is the difference in a nutshell between our precedents and the majority opinion. The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's).

1 For this reason, we do not understand the majority's view that our analogy between the right to an abortion and the rights to contraception and same-sex marriage shows that we think "[t]he Constitution does not permit the States to regard the destruction of a 'potential life' as a matter of any significance." *Ante*, at 2261. To the contrary. The liberty interests underlying those rights are, as we will describe, quite similar. See *infra*, at 2252 – 2253. But only in the sphere of abortion is the state interest in protecting potential life involved. So only in that sphere, as both *Roe* and *Casey* recognized, may a State impinge so far on the liberty interest (barring abortion after viability and discouraging it before). The majority's failure to understand this fairly obvious point stems from its rejection of the idea of balancing interests in this (or maybe in any) constitutional context. Cf. *New York State Rifle & Pistol Assn., Inc. v.Bruen*, 597 U.S. ——, ——, —— – ——, 142 S.Ct. 2111, 2125–2126, 2129–2131, —— L.Ed.2d —— (2022). The majority thinks that a woman has *no* liberty or equality interest in the decision to bear a child, so a State's interest in protecting fetal life necessarily prevails.

B

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the Fourteenth Amendment was ratified"? *Ante*, at 2252 – 2253. The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. See *ante*, at 2249, 142 S.Ct. 2111. But that turns out to be wheel-spinning. First, it is not clear what relevance ***2324** such early history should have, even to the majority. See *New York State Rifle & Pistol Assn., Inc. v.Bruen*, 597 U.S. ——, ——, 142 S.Ct. 2111, 2136, —— L.Ed.2d —— (2022) ("Historical evidence that long predates [ratification] may not illuminate the scope of the right"). If the early history obviously supported abortion rights, the majority would no doubt say that only the views of the Fourteenth Amendment's ratifiers are germane. See *ibid.* (It is "better not to go too far back into antiquity," except if olden "law survived to become our Founders' law"). Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before

"quickening"—the point when the fetus moved in the womb.[2] And early American law followed the common-law rule.[3] So the criminal law of that early time might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of *Roe*. See *ante*, at 2253, 2260, 142 S.Ct. 2111. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *New York State Rifle & Pistol Assn., Inc.*, 597 U.S., at ——– – ——, 142 S.Ct., at 2137. Had the pre-*Roe* liberalization of abortion laws occurred more quickly and more widely in the 20th century, the majority would say (once again) that only the ratifiers' views are germane.

2 See, *e.g.*, 1 W. Blackstone, Commentaries on the Laws of England 129–130 (7th ed. 1775) (Blackstone); E. Coke, Institutes of the Laws of England 50 (1644).

3 See J. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800–1900, pp. 3–4 (1978). The majority offers no evidence to the contrary—no example of a founding-era law making prequickening abortion a crime (except when a woman died). See *ante*, at 2251 – 2252. And even in the mid-19th century, more than 10 States continued to allow pre-quickening abortions. See Brief for American Historical Association et al. as *Amici Curiae* 27, and n. 14.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. See *ante*, at 2267 ("[T]he most important historical fact [is] how the States regulated abortion when the Fourteenth Amendment was adopted"); see also *ante*, at 2242 – 2243, 2248 – 2249, and n. 24, 23, 25, 28. If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers —both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community ***2325** embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

Casey itself understood this point, as will become clear. See *infra*, at 2252 – 2253. It recollected with dismay a decision this Court issued just five years after the Fourteenth Amendment's ratification, approving a State's decision to deny a law license to a woman and suggesting as well that a woman had no legal status apart from her husband. See 505 U.S. at 896–897, 112 S.Ct. 2791 (majority opinion) (citing *Bradwell v. State*, 16 Wall. 130, 83 U.S. 130, 21 L.Ed. 442 (1873)). "There was a time," *Casey* explained, when the Constitution did not protect "men and women alike." 505 U.S. at 896, 112 S.Ct. 2791. But times had changed. A woman's place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was "no longer consistent with our understanding" of the Constitution. *Id.*, at 897, 112 S.Ct. 2791. Now, "[t]he Constitution protects all individuals, male or female," from "the abuse of governmental power" or "unjustified state interference." *Id.*, at 896, 898, 112 S.Ct. 2791.

So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? How is it that our Constitution subjects discrimination against them to heightened judicial scrutiny? How is it that our Constitution, through the

Fourteenth Amendment's liberty clause, guarantees access to contraception (also not legally protected in 1868) so that women can decide for themselves whether and when to bear a child? How is it that until today, that same constitutional clause protected a woman's right, in the event contraception failed, to end a pregnancy in its earlier stages?

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders," we recently wrote, "knew they were writing a document designed to apply to ever-changing circumstances over centuries." *NLRB v. Noel Canning*, 573 U.S. 513, 533–534, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014). Or in the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly," if at all. *McCulloch v. Maryland*, 4 Wheat. 316, 415, 4 L.Ed. 579 (1819). That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

***2326** Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court there confronted a claim, based on *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), that the Fourteenth Amendment "must be defined in a most circumscribed manner, with central reference to specific historical practices"—exactly the view today's majority follows. *Obergefell*, 576 U.S. at 671, 135 S.Ct. 2584. And the Court specifically rejected that view.[4] In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant for interracial marriage. See *ibid.* The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), read the Fourteenth Amendment to embrace the Lovings' union. If, *Obergefell* explained, "rights were defined by who exercised them in the past, then received practices could serve as their own continued justification"—even when they conflict with "liberty" and "equality" as later and more broadly understood. 576 U.S. at 671, 135 S.Ct. 2584. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

4 The majority ignores that rejection. See *ante*, at 2242 – 2243, 2247, 2260, 135 S.Ct. 2584. But it is unequivocal: The *Glucksberg* test, *Obergefell* said, "may have been appropriate" in considering physician-assisted suicide, but "is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy." 576 U.S. at 671, 135 S.Ct. 2584.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." *Ante*, at 2247. At least, that idea is what the majority *sometimes* tries to convey. At other times, the majority (or, rather, most of it) tries to assure the public that it has no designs on rights (for example, to contraception) that arose only in the back half of the 20th century—in other words, that it is happy to pick and choose, in accord with individual preferences. See *ante*, at 2257 – 2258, 2277 – 2278, 2280 – 2281; *ante*, at 2309 (KAVANAUGH, J., concurring); but see *ante*, at 2301 – 2302 (THOMAS, J., concurring). But that is a matter we discuss later. See *infra*, at 2330–. For now, our point is different: It is that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (dissenting opinion). Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. *Ibid.* Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. ***2327** That is why Americans, to go back to *Obergefell*'s example, have a right to marry across racial lines. And it is why, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

All that is what *Casey* understood. *Casey* explicitly rejected the present majority's method. "[T]he specific practices of States at the time of the adoption of the Fourteenth Amendment," *Casey* stated, do not "mark[ ] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." 505 U.S. at 848, 112 S.Ct. 2791.[5] To hold otherwise—as the majority does today—"would be inconsistent with our law." *Id.*, at 847, 112 S.Ct. 2791. Why? Because the Court has "vindicated [the] principle" over and over that (no matter the sentiment in 1868) "there is a realm of personal liberty which the government may not enter"—especially relating to "bodily integrity" and "family life." *Id.*, at 847, 849, 851. *Casey* described in detail the Court's contraception cases. See *id.*, at 848–849, 851–853, 112 S.Ct. 2791. It noted decisions protecting the right to marry, including to someone of another race. See *id.*, at 847–848, 112 S.Ct. 2791 ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference"). In reviewing decades and decades of constitutional law, *Casey* could draw but one conclusion: Whatever was true in 1868, "[i]t is settled now, as it was when the Court heard arguments in *Roe* v. *Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." *Id.*, at 849, 112 S.Ct. 2791.

5 In a perplexing paragraph in its opinion, the majority declares that it need not say whether that statement from *Casey* is true. See *ante*, at 2257 – 2259. But how could that be? Has not the majority insisted for the prior 30 or so pages that the "specific practice[ ]" respecting abortion at the time of the Fourteenth Amendment precludes its recognition as a constitutional right? *Ante*, at 2258 – 2259, 112 S.Ct. 2791. It has. And indeed, it has given no other reason for overruling *Roe* and *Casey*. *Ante*, at 2248 – 2249. We are not mindreaders, but here is our best guess as to what the majority means. It says next that "[a]bortion is nothing new." *Ante*, at 2258, 112 S.Ct. 2791. So apparently, the Fourteenth Amendment might provide protection for things wholly unknown in the 19th century; maybe one day there could be constitutional protection for, oh, time travel. But as to anything that was known back then (such as abortion or contraception), no such luck.

And that conclusion still held good, until the Court's intervention here. It was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe*'s recognition and *Casey*'s reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy. See *ante*, at 2257 – 2258, 112 S.Ct. 2791 (asserting that recognizing a relationship among them, as addressing aspects of personal autonomy, would ineluctably "license fundamental rights" to illegal "drug use [and] prostitution"). But that is flat wrong. The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

***2328** And eliminating that right, we need to say before further describing our precedents, is not taking a "neutral" position, as Justice KAVANAUGH tries to argue. *Ante*, at 2304 – 2305, 2306, 2307 – 2308, 2309 – 2310 (concurring opinion). His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being "scrupulously neutral" if it allowed New York and California to ban all the guns they want? *Ante*, at 2305, 112 S.Ct. 2791. If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to put restrictions on church attendance? We could go on—and in fact we will. Suppose Justice KAVANAUGH were to say (in line with the majority opinion) that the rights we just listed are more textually or historically grounded than the right to choose. What, then, of the right to contraception or same-sex marriage? Would it be "scrupulously neutral" for the Court to eliminate those rights too? The point of all these examples is that when it comes to rights, the Court does not act "neutrally" when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. And to apply that point to the case here: When the Court decimates a right women have held for 50 years, the Court is not being "scrupulously neutral." It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. Justice KAVANAUGH cannot obscure that point by appropriating the rhetoric of even-handedness. His position just is what it is: A brook-no-compromise refusal to recognize a woman's right to choose, from the first day of a pregnancy. And that position, as we will now show, cannot be squared with this Court's longstanding

view that women indeed have rights (whatever the state of the world in 1868) to make the most personal and consequential decisions about their bodies and their lives.

Consider first, then, the line of this Court's cases protecting "bodily integrity." *Casey*, 505 U.S. at 849, 112 S.Ct. 2791. "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every individual to the possession and control of his own person." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891); see *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (Every adult "has a right to determine what shall be done with his own body"). Or to put it more simply: Everyone, including women, owns their own bodies. So the Court has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments. See, *e.g.*, *Winston v. Lee*, 470 U.S. 753, 766–767, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985) (forced surgery); *Rochin v. California*, 342 U.S. 165, 166, 173–174, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (forced stomach pumping); *Washington v. Harper*, 494 U.S. 210, 229, 236, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (forced administration of antipsychotic drugs).

Casey recognized the "doctrinal affinity" between those precedents and *Roe*. 505 U.S. at 857, 112 S.Ct. 2791. And that doctrinal affinity is born of a factual likeness. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. For every woman, those experiences involve all manner of physical changes, medical treatments (including the possibility of a cesarean section), and medical risk. Just as one example, an American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion. See *Whole Woman's Health v. Hellerstedt*, 579 2329U.S. 582, 618, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016). That women happily undergo those burdens and hazards of their own accord does not lessen how far a State impinges on a woman's body when it compels her to bring a pregnancy to term. And for some women, as *Roe* recognized, abortions are medically necessary to prevent harm. See 410 U.S. at 153, 93 S.Ct. 705. The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment.

So too, *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. See *Casey*, 505 U.S. at 851, 857, 112 S.Ct. 2791; *Roe*, 410 U.S. at 152–153, 93 S.Ct. 705; see also *ante*, at 2257 – 2258, 93 S.Ct. 705 (listing the myriad decisions of this kind that *Casey* relied on). Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. In varied cases, the Court explained that those choices—"the most intimate and personal" a person can make—reflect fundamental aspects of personal identity; they define the very "attributes of personhood." *Casey*, 505 U.S. at 851, 112 S.Ct. 2791. And they inevitably shape the nature and future course of a person's life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim —because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. Compare *Obergefell*, 576 U.S. at 672–675, 135 S.Ct. 2584, with *ante*, at 2245 – 2246, 135 S.Ct. 2584. So before *Roe* and *Casey*, the Court expanded in successive cases those who could claim the right to marry—though their relationships would have been outside the law's protection in the mid-19th century. See, *e.g.*, *Loving*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (interracial couples); *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (prisoners); see also, *e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651–652, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (offering constitutional protection to untraditional "family unit[s]"). And after *Roe* and *Casey*, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. See *Lawrence*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508; *Obergefell*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609. In considering that question, the Court held, "[h]istory and tradition," especially as reflected in the course of our precedent, "guide and discipline [the] inquiry." *Id.*, at 664, 135 S.Ct. 2584. But the sentiments of 1868 alone do not and cannot "rule the present." *Ibid.*

Casey similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. See *supra*, at 2248. A woman then, *Casey* wrote, "had no ***2330** legal existence separate from her husband." 505 U.S. at 897, 112 S.Ct. 2791. Women were seen only "as the center of home and family life," without "full and independent legal status under the Constitution." *Ibid.* But that could not be true any longer: The State could not now insist on the historically dominant "vision of the woman's role." *Id.*, at 852, 112 S.Ct. 2791. And equal citizenship, *Casey* realized, was inescapably connected to reproductive rights. "The ability of women to participate equally" in the "life of the Nation"—in all its economic, social, political, and legal aspects—"has been facilitated by their ability to control their reproductive lives." *Id.*, at 856, 112 S.Ct. 2791. Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. Over the course of three cases, the Court had held that a right to use and gain access to contraception was part of the Fourteenth Amendment's guarantee of liberty. See *Griswold*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510; *Eisenstadt*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349; *Carey v. Population Services Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). That clause, we explained, necessarily conferred a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453, 92 S.Ct. 1029; see *Carey*, 431 U.S. at 684–685, 97 S.Ct. 2010. *Casey* saw *Roe* as of a piece: In "critical respects the abortion decision is of the same character." 505 U.S. at 852, 112 S.Ct. 2791. "[R]easonable people," the Court noted, could also oppose contraception; and indeed, they could believe that "some forms of contraception" similarly implicate a concern with "potential life." *Id.*, at 853, 859, 112 S.Ct. 2791. Yet the views of others could not automatically prevail against a woman's right to control her own body and make her own choice about whether to bear, and probably to raise, a child. When an unplanned pregnancy is involved—because either contraception or abortion is outlawed—"the liberty of the woman is at stake in a sense unique to the human condition." *Id.*, at 852, 112 S.Ct. 2791. No State could undertake to resolve the moral questions raised "in such a definitive way" as to deprive a woman of all choice. *Id.*, at 850, 112 S.Ct. 2791.

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) Today's decision, the majority first says, "does not undermine" the decisions cited by *Roe* and *Casey*—the ones involving "marriage, procreation, contraception, [and] family relationships"—"in any way." *Ante*, at 2257 – 2258; *Casey*, 505 U.S. at 851, 112 S.Ct. 2791. Note that this first assurance does not extend to rights recognized after *Roe* and *Casey*, and partly based on them—in particular, rights to same-sex intimacy and marriage. See *supra*, at 2329 – 2330.[6] On ***2331** its later tries, though, the majority includes those too: "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Ante*, at 2277 – 2278, 112 S.Ct. 2791; see *ante*, at 2280 – 2281, 112 S.Ct. 2791. That right is unique, the majority asserts, "because [abortion] terminates life or potential life." *Ante*, at 2277, 112 S.Ct. 2791 (internal quotation marks omitted); see *ante*, at 2257 – 2258, 2280 – 2281. So the majority depicts today's decision as "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (Roberts, J., dissenting). Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

6 And note, too, that the author of the majority opinion recently joined a statement, written by another member of the majority, lamenting that *Obergefell* deprived States of the ability "to resolve th[e] question [of same-sex marriage] through legislation." *Davisv.Ermold*, 592 U.S. ——, ——, 141 S.Ct. 3, 3, 208 L.Ed.2d 137 (2020) (statement of THOMAS, J.). That might sound familiar. Cf. *ante*, at 2252 – 2253, 141 S.Ct. 3, —— (lamenting that *Roe* "short-circuited the democratic process"). And those two Justices hardly seemed content to let the matter rest: The Court, they said, had "created a problem that only it can fix." *Davis*, 592 U.S., at ——, 141 S.Ct., at 4.

The first problem with the majority's account comes from Justice THOMAS's concurrence—which makes clear he is not with the program. In saying that nothing in today's opinion casts doubt on non-abortion precedents, Justice THOMAS explains, he means

only that they are not at issue in this very case. See *ante*, at 2303 – 2304 ("[T]his case does not present the opportunity to reject" those precedents). But he lets us know what he wants to do when they are. "[I]n future cases," he says, "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." *Ante*, at 2301; see also *supra*, at 2253 – 2254, and n. 6. And when we reconsider them? Then "we have a duty" to "overrul[e] these demonstrably erroneous decisions." *Ante*, at 2301. So at least one Justice is planning to use the ticket of today's decision again and again and again.

Even placing the concurrence to the side, the assurance in today's opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey*: the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority's analysis. To the contrary, the majority takes pride in not expressing a view "about the status of the fetus." *Ante*, at 2277; see *ante*, at 2257 – 2258 (aligning itself with *Roe*'s and *Casey*'s stance of not deciding whether life or potential life is involved); *ante*, at 2261 – 2262 (similar). The majority's departure from *Roe* and *Casey* rests instead—and only—on whether a woman's decision to end a pregnancy involves any Fourteenth Amendment liberty interest (against which *Roe* and *Casey* balanced the state interest in preserving fetal life).[7] According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the ***2332** 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even "undermine"—any number of other constitutional rights. *Ante*, at 2257 – 2258.[8]

7 Indulge a few more words about this point. The majority had a choice of two different ways to overrule *Roe* and *Casey*. It could claim that those cases underrated the State's interest in fetal life. Or it could claim that they overrated a woman's constitutional liberty interest in choosing an abortion. (Or both.) The majority here rejects the first path, and we can see why. Taking that route would have prevented the majority from claiming that it means only to leave this issue to the democratic process—that it does not have a dog in the fight. See *ante*, at 2261 – 2262, 2277. And indeed, doing so might have suggested a revolutionary proposition: that the fetus is itself a constitutionally protected "person," such that an abortion ban is constitutionally *mandated.* The majority therefore chooses the second path, arguing that the Fourteenth Amendment does not conceive of the abortion decision as implicating liberty, because the law in the 19th century gave that choice no protection. The trouble is that the chosen path—which is, again, the solitary rationale for the Court's decision—provides no way to distinguish between the right to choose an abortion and a range of other rights, including contraception.

8 The majority briefly (very briefly) gestures at the idea that some *stare decisis* factors might play out differently with respect to these other constitutional rights. But the majority gives no hint as to why. And the majority's (mis)treatment of *stare decisis* in this case provides little reason to think that the doctrine would stand as a barrier to the majority's redoing any other decision it considered egregiously wrong. See *infra*, at 2256–.

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout's honor. Still, the future significance of today's opinion will be decided in the future. And law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines. Rights can expand in that way. Dissenting in *Lawrence*, Justice Scalia explained why he took no comfort in the Court's statement that a decision recognizing the right to same-sex intimacy did "not involve" same-sex marriage. 539 U.S. at 604, 123 S.Ct. 2472. That could be true, he wrote, "only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court." *Id.*, at 605, 123 S.Ct. 2472. Score one for the dissent, as a matter of prophecy. And logic and principle are not one-way ratchets. Rights can contract in the same way and for the same reason —because whatever today's majority might say, one thing really does lead to another. We fervently hope that does not happen because of today's decision. We hope that we will not join Justice Scalia in the book of prophets. But we cannot understand how anyone can be confident that today's opinion will be the last of its kind.

Consider, as our last word on this issue, contraception. The Constitution, of course, does not mention that word. And there is no historical right to contraception, of the kind the majority insists on. To the contrary, the American legal landscape in the decades after the Civil War was littered with bans on the sale of contraceptive devices. So again, there seem to be two choices. See *supra*, at 2242 – 2243, 2254 – 2255. If the majority is serious about its historical approach, then *Griswold* and its progeny are in the line of fire too. Or if it is not serious, then ... what *is* the basis of today's decision? If we had to guess, we suspect the prospects of this Court approving bans on contraception are low. But once again, the future significance of today's opinion will be decided in the future. At the least, today's opinion will fuel the fight to get contraception, and any other issues with a moral dimension, out of the Fourteenth Amendment and into state legislatures.[9]

9 As this Court has considered this case, some state legislators have begun to call for restrictions on certain forms of contraception. See I. Stevenson, After *Roe* Decision, Idaho Lawmakers May Consider Restricting Some Contraception, Idaho Statesman (May 10, 2022), https://www.idahostatesman.com/news/politics-government/state-politics/article261207007.html; T. Weinberg, "Anything's on the Table": Missouri Legislature May Revisit Contraceptive Limits Post-*Roe*, Missouri Independent (May 20, 2022), https://www.missouriindependent.com/2022/05/ 20/anythings-on-the-table-missouri-legislature-may-revisit-contraceptivelimits-post-roe/.

***2333** Anyway, today's decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nation's history and traditions, and the step-by-step evolution of the Court's precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.

As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command. Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty. Even before we get to *stare decisis*, we dissent.

II

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. "*Stare decisis*" means "to stand by things decided." Black's Law Dictionary 1696 (11th ed. 2019). Blackstone called it the "established rule to abide by former precedents." 1 Blackstone 69. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U.S. at 827, 111 S.Ct. 2597. It maintains a stability that allows people to order their lives under the law. See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 568–569 (1994).

Stare decisis also "contributes to the integrity of our constitutional system of government" by ensuring that decisions "are founded in the law rather than in the proclivities of individuals." *Vasquez*, 474 U.S. at 265, 106 S.Ct. 617. As Hamilton wrote: It "avoid[s] an arbitrary discretion in the courts." The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). And as Blackstone said before him: It "keep[s] the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 Blackstone 69. The "glory" of our legal system is that it "gives preference to precedent rather than ... jurists." H. Humble, Departure From Precedent, 19 Mich. L. Rev. 608, 614 (1921). That is why, the story goes, Chief Justice John ***2334** Marshall donned a plain black robe when he swore the oath of office. That act personified an American tradition. Judges' personal preferences do not make law; rather, the law speaks through them.

That means the Court may not overrule a decision, even a constitutional one, without a "special justification." *Gamblev.United States*, 587 U.S. ——, ——, 139 S.Ct. 1960, 1969, 204 L.Ed.2d 322 (2019). *Stare decisis* is, of course, not an "inexorable command"; it is sometimes appropriate to overrule an earlier decision. *Pearson v. Callahan*, 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). But the Court must have a good reason to do so over and above the belief "that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014). "[I]t is not alone sufficient that we would decide a case differently now than we did then." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015).

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does, as further described below and in the Appendix. See *infra*, at 2350–2354. In some, the Court only partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (The majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases. See *ante*, at 2279.) None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives. First, for all the reasons we have given, *Roe* and *Casey* were correct. In holding that a State could not "resolve" the debate about abortion "in such a definitive way that a woman lacks all choice in the matter," the Court protected women's liberty and women's equality in a way comporting with our Fourteenth Amendment precedents. *Casey*, 505 U.S. at 850, 112 S.Ct. 2791. Contrary to the majority's view, the legal status of abortion in the 19th century does not weaken those decisions. And the majority's repeated refrain about "usurp[ing]" state legislatures' "power to address" a publicly contested question does not help it on the key issue here. *Ante*, at 2265, 112 S.Ct. 2791; see *ante*, at 2240, 112 S.Ct. 2791. To repeat: The point of a right is to shield individual actions and decisions "from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638, 63 S.Ct. 1178; *supra*, at 2243 – 2244, 63 S.Ct. 1178. However divisive, a right is not at the people's mercy.

In any event "[w]hether or not we ... agree" with a prior precedent is the beginning, not the end, of our analysis—and the remaining "principles of *stare decisis* weigh heavily against overruling" *Roe* and *Casey*. *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). *Casey* itself applied those principles, in one of this Court's most important precedents about precedent. After assessing the traditional *stare decisis* factors, *Casey* reached the only conclusion possible —that *stare decisis* operates powerfully here. It still does. The standards *Roe* and *Casey* set out are perfectly workable. No changes in either law or fact have eroded the two decisions. And tens of millions of American women have ***2335** relied, and continue to rely, on the right to choose. So under traditional *stare decisis* principles, the majority has no special justification for the harm it causes.

And indeed, the majority comes close to conceding that point. The majority barely mentions any legal or factual changes that have occurred since *Roe* and *Casey*. It suggests that the two decisions are hard for courts to implement, but cannot prove its case. In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* "egregiously wrong." *Ante*, at 2279 – 2280, 120 S.Ct. 2326. That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees. So how does that approach prevent the "scale of justice" from "waver[ing] with every new judge's opinion"? 1 Blackstone 69. It does not. It makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

A

Contrary to the majority's view, there is nothing unworkable about *Casey*'s "undue burden" standard. Its primary focus on whether a State has placed a "substantial obstacle" on a woman seeking an abortion is "the sort of inquiry familiar to judges across a variety of contexts." *June Medical Services L.L.C.v.Russo*, 591 U.S. ——, ——, 140 S.Ct. 2103, 2136, 207 L.Ed.2d 566 (2020) (ROBERTS, C. J., concurring in judgment). And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day.

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitution's broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad of unforeseeable circumstances. See *Dickerson*, 530 U.S. at 441, 120 S.Ct. 2326 ("No court laying down a general rule can possibly foresee the various circumstances" in which it must apply). So, for example, the Court asks about undue or substantial burdens on speech, on voting, and on interstate commerce. See, *e.g.*, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011); *Burdick v. Takushi*, 504 U.S. 428, 433–434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The *Casey* undue burden standard is the same. It also resembles general standards that courts work with daily in other legal spheres—like the "rule of reason" in antitrust law or the "arbitrary and capricious" standard for agency decisionmaking. See *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 62, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42–43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Applying general standards to particular cases is, in many contexts, just what it means to do law.

And the undue burden standard has given rise to no unusual difficulties. Of course, it has provoked some disagreement among judges. *Casey* knew it would: That much "is to be expected in the application of any legal standard which must accommodate life's complexity." 505 U.S. at 878, 112 S.Ct. 2791 (plurality opinion). Which is to say: That much is to be expected in the application of any legal standard. But the majority vastly overstates the divisions among judges applying the standard. We ***2336** count essentially two. THE CHIEF JUSTICE disagreed with other Justices in the *June Medical* majority about whether *Casey* called for weighing the benefits of an abortion regulation against its burdens. See 591 U.S., at —— – ——, 140 S.Ct., at 2114-2115; *ante*, at 2273 – 2274, 2274, and n. 53.[10] We agree that the *June Medical* difference is a difference—but not one that would actually make a difference in the result of most cases (it did not in *June Medical*), and not one incapable of resolution were it ever to matter. As for lower courts, there is now a one-year-old, one-to-one Circuit split about how the undue burden standard applies to state laws that ban abortions for certain reasons, like fetal abnormality. See *ante*, at 2274, and n. 57. That is about it, as far as we can see.[11] And that is not much. This Court mostly does not even grant certiorari on one-year-old, one-to-one Circuit splits, because we know that a bit of disagreement is an inevitable part of our legal system. To borrow an old saying that might apply here: Not one or even a couple of swallows can make the majority's summer.

10 Some lower courts then differed over which opinion in *June Medical* was controlling—but that is a dispute not about the undue burden standard, but about the "*Marks* rule," which tells courts how to determine the precedential effects of a divided decision.

11 The rest of the majority's supposed splits are, shall we say, unimpressive. The majority says that lower courts have split over how to apply the undue burden standard to parental notification laws. See *ante*, at 2274, and n. 54. But that is not so. The state law upheld had an exemption for minors demonstrating adequate maturity, whereas the ones struck down did not. Compare *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 383–384 (C.A.4 1998), with *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 981 (C.A.7 2019), cert. granted, judgment vacated, 591 U.S. ——, 141 S.Ct. 187, 207 L.Ed.2d 1112 (2020), and *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (C.A.8 1995). The majority says there is a split about bans on certain types of abortion procedures. See *ante*, at 2274, and n. 55. But the one court to have separated itself on that issue did so based on a set of factual findings significantly different from those in other cases. Compare *Whole Woman's Health v. Paxton*, 10 F.4th 430, 447–453 (C.A.5 2021), with *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 960 F.3d 785, 798–806 (C.A.6 2020), and *West Ala. Women's Center v. Williamson*, 900 F.3d 1310, 1322–1324 (C.A.11 2018). Finally, the majority says there is a split about whether an increase in travel time to reach a clinic is an undue burden. See *ante*, at 2274, and n. 56. But the cases to which the majority refers predate this Court's decision in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016), which clarified how to apply the undue burden standard to that context.

Anyone concerned about workability should consider the majority's substitute standard. The majority says a law regulating or banning abortion "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Ante*, at 2284, 136 S.Ct. 2292. And the majority lists interests like "respect for and preservation of prenatal life," "protection of maternal health," elimination of certain "medical procedures," "mitigation of fetal pain," and others. *Ante*, at 2284, 136 S.Ct. 2292. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment's protection of liberty and ***2337** equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management? See generally L. Harris, Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of *Roe v. Wade*, 386 New England J. Med. 2061 (2022).[12]

12 To take just the last, most medical treatments for miscarriage are identical to those used in abortions. See Kaiser Family Foundation (Kaiser), G. Weigel, L. Sobel, & A. Salganicoff, Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws (Dec. 4, 2019), https://www.kff.org/womens-health-policy/issue-brief/ understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-andfetal-harm-laws/. Blanket restrictions on "abortion" procedures and medications therefore may be understood to deprive women of effective treatment for miscarriages, which occur in about 10 to 30 percent of pregnancies. See Health Affairs, J. Strasser, C. Chen, S. Rosenbaum, E. Schenk, & E. Dewhurst, Penalizing Abortion Providers Will Have Ripple Effects Across Pregnancy Care (May 3, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20220503.129912/.

Finally, the majority's ruling today invites a host of questions about interstate conflicts. See *supra*, at 2318; see generally D. Cohen, G. Donley, & R. Rebouché, The New Abortion Battleground, 123 Colum. L. Rev. (forthcoming 2023), https://ssrn.com/abstract=4032931. Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming "interjurisdictional abortion wars." *Id.*, at —— (draft, at 1).

In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested issues, including moral and philosophical ones, that the majority criticizes *Roe* and *Casey* for addressing.

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis. A review of the Appendix to this dissent proves the point. See *infra*, at 2350 – 2354, 136 S.Ct. 2292. Most "successful proponent[s] of overruling precedent," this Court once said, have carried "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez*, 474 U.S. at 266, 106 S.Ct. 617. Certainly, that was so of the main examples the majority cites: *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937). But it is not so today. Although nodding to some arguments others have made about "modern developments," the majority does not really rely on them, no doubt seeing their slimness. *Ante*, at 2258 – 2259; see *ante*, at 2259. The majority briefly invokes the current controversy over abortion. See *ante*, at 2279 – 2281, 57 S.Ct. 578. But it has to acknowledge that the same dispute has existed for decades: Conflict ***2338** over abortion is not a change but a constant. (And as we will later discuss, the presence of that continuing division provides more of a reason to stick with, than to jettison, existing precedent.

See *infra*, at 2347–2349.) In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law. See *ante*, at 2264 – 2265.

1

Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited, decisions which recognize a constitutional right for an individual to make her own choices about "intimate relationships, the family," and contraception. *Casey*, 505 U.S. at 857, 112 S.Ct. 2791. *Roe* and *Casey* have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. As discussed earlier, the Court relied on *Casey* to hold that the Fourteenth Amendment protects same-sex intimate relationships. See *Lawrence*, 539 U.S. at 578, 123 S.Ct. 2472; *supra*, at 2329 – 2330, 123 S.Ct. 2472. The Court later invoked the same set of precedents to accord constitutional recognition to same-sex marriage. See *Obergefell*, 576 U.S. at 665–666, 135 S.Ct. 2584; *supra*, at 2329 – 2330, 135 S.Ct. 2584. In sum, *Roe* and *Casey* are inextricably interwoven with decades of precedent about the meaning of the Fourteenth Amendment. See *supra*, at 2328 – 2330. While the majority might wish it otherwise, *Roe* and *Casey* are the very opposite of " 'obsolete constitutional thinking.' " *Agostini v. Felton*, 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Casey*, 505 U.S. at 857, 112 S.Ct. 2791).

Moreover, no subsequent factual developments have undermined *Roe* and *Casey*. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death. Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. See *supra*, at 2328 – 2329. Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase.[13] Pregnancy and childbirth may also impose large-scale financial costs. The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. See *ante*, at 2258 – 2259, 112 S.Ct. 2791. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away.[14] ***2339** Women also continue to face pregnancy discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20 percent of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom quartile of wage earners.[15]

13 See L. Harris, Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of *Roe v. Wade*, 386 New England J. Med. 2061, 2063 (2022). This projected racial disparity reflects existing differences in maternal mortality rates for black and white women. Black women are now three to four times more likely to die during or after childbirth than white women, often from preventable causes. See Brief for Howard University School of Law Human and Civil Rights Clinic as *Amicus Curiae* 18.

14 See Centers for Medicare and Medicaid Services, Issue Brief: Improving Access to Maternal Health Care in Rural Communities 4, 8, 11 (Sept. 2019), https://www.cms.gov/About-CMS/Agency-Information/ OMH/equity-initiatives/rural-health/09032019-Maternal-Health-Care-in-Rural-Communities.pdf. In Mississippi, for instance, 19 percent of women of reproductive age are uninsured and 60 percent of counties lack a single obstetrician-gynecologist. Brief for Lawyers' Committee for Civil Rights Under Law et al. as *Amici Curiae* 12–13.

15 Dept. of Labor, National Compensation Survey: Employee Benefits in the United States, Table 31 (Sept. 2020), https://www.bls.gov/ncs/ebs/ benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf# page=299.

The majority briefly notes the growing prevalence of safe haven laws and demand for adoption, see *ante*, at 2259, 112 S.Ct. 2791, and nn. 45–46, but, to the degree that these are changes at all, they too are irrelevant.[16] Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. The reality is that few women denied an abortion

will choose adoption.[17] The vast majority will continue, just as in *Roe* and *Casey*'s time, to shoulder the costs of childrearing. Whether or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.[18]

16 Safe haven laws, which allow parents to leave newborn babies in designated safe spaces without threat of prosecution, were not enacted as an alternative to abortion, but in response to rare situations in which birthing mothers in crisis would kill their newborns or leave them to die. See Centers for Disease Control and Prevention (CDC), R. Wilson, J. Klevens, D. Williams, & L. Xu, Infant Homicides Within the Context of Safe Haven Laws—United States, 2008–2017, 69 Morbidity and Mortality Weekly Report 1385 (2020).

17 A study of women who sought an abortion but were denied one because of gestational limits found that only 9 percent put the child up for adoption, rather than parenting themselves. See G. Sisson, L. Ralph, H. Gould, & D. Foster, Adoption Decision Making Among Women Seeking Abortion, 27 Women's Health Issues 136, 139 (2017).

18 The majority finally notes the claim that "people now have a new appreciation of fetal life," partly because of viewing sonogram images. *Ante*, at 2259, 112 S.Ct. 2791. It is hard to know how anyone would evaluate such a claim and as we have described above, the majority's reasoning does not rely on any reevaluation of the interest in protecting fetal life. See *supra*, at 2331, and n. 7. It is worth noting that sonograms became widely used in the 1970s, long before *Casey*. Today, 60 percent of women seeking abortions have at least one child, and one-third have two or more. See CDC, K. Kortsmit et al., Abortion Surveillance—United States, 2019, 70 Morbidity and Mortality Weekly Report 6 (2021). These women know, even as they choose to have an abortion, what it is to look at a sonogram image and to value a fetal life.

Mississippi's own record illustrates how little facts on the ground have changed since *Roe* and *Casey*, notwithstanding the majority's supposed "modern developments." *Ante*, at 2258 – 2259, 112 S.Ct. 2791. Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use.[19] The State ***2340** neither bans pregnancy discrimination nor requires provision of paid parental leave. Brief for Yale Law School Information Society Project as *Amicus Curiae* 13 (Brief for Yale Law School); Brief for National Women's Law Center et al. as *Amici Curiae* 32. It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without basic medical care or enough food. See Brief for 547 Deans, Chairs, Scholars and Public Health Professionals et al. as *Amici Curiae* 32–34 (Brief for 547 Deans). Although 86 percent of pregnancy-related deaths in the State are due to postpartum complications, Mississippi rejected federal funding to provide a year's worth of Medicaid coverage to women after giving birth. See Brief for Yale Law School 12–13. Perhaps unsurprisingly, health outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country, and some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death.[20] It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion. See Brief for 547 Deans 9–10. We do not say that every State is Mississippi, and we are sure some have made gains since *Roe* and *Casey* in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health. See Brief for 547 Deans 23–34.

19 Guttmacher Institute, K. Kost, Unintended Pregnancy Rates at the State Level: Estimates for 2010 and Trends Since 2002, Table 1 (2015), https://www.guttmacher.org/sites/default/files/report_pdf/stateup10.pdf; Kaiser, State Requirements for Insurance Coverage of Contraceptives (May 1, 2022), https://www.kff.org/state-category/womens-health/family-planning; Miss. Code Ann. § 37–13–171(2)(d) (Cum. Supp. 2021) ("In no case shall the instruction or program include any demonstration of how condoms or other contraceptives are applied").

20 See CDC, Infant Mortality Rates by State (Mar. 3, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant _mortality.htm; Mississippi State Dept. of Health, Infant Mortality Report 2019 & 2020, pp. 18–19 (2021), https://www.msdh.ms.gov/msdhsite/_static/resources/18752.pdf; CDC, Percentage of Babies Born Low Birthweight by State (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/lbw_births/lbw.htm; CDC, Cesarean Delivery Rate by State (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/cesarean_births/cesareans.htm; Mississippi State Dept. of Health, Mississippi Maternal Mortality Report 2013–2016, pp. 5, 25 (Mar. 2021), https://www.msdh.ms.gov/msdhsite/_static/resources/8127.pdf.

The only notable change we can see since *Roe* and *Casey* cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. The majority, like the Mississippi Legislature, claims that the United States is an extreme outlier when it comes to abortion regulation. See *ante*, at 2243 and n. 15. The global trend, however, has been toward increased provision of legal and safe abortion care. A number of countries, including New Zealand, the Netherlands, and Iceland, permit abortions up to a roughly similar time as *Roe* and *Casey* set. See Brief for International and Comparative Legal Scholars as *Amici Curiae* 18–22. Canada has decriminalized abortion at any point in a pregnancy. See *id.*, at 13–15, 31 S.Ct. 502. Most Western European countries impose restrictions on abortion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a woman's physical or mental health. See *id.*, at 24–27, 31 S.Ct. 502; Brief for European Law Professors as *Amici Curiae* 16–17, Appendix. They also typically make access to early abortion easier, for example, by helping cover its cost.[21] Perhaps most notable, ***2341** more than 50 countries around the world—in Asia, Latin America, Africa, and Europe—have expanded access to abortion in the past 25 years. See Brief for International and Comparative Legal Scholars as *Amici Curiae* 28–29. In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

21 See D. Grossman, K. Grindlay, & B. Burns, Public Funding for Abortion Where Broadly Legal, 94 Contraception 451, 458 (2016) (discussing funding of abortion in European countries).

In sum, the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of *Roe* and *Casey*. It continues to be true that, within the constraints those decisions established, a woman, not the government, should choose whether she will bear the burdens of pregnancy, childbirth, and parenting.

2

In support of its holding, see *ante*, at 2262 – 2263, 112 S.Ct. 2791, the majority invokes two watershed cases overruling prior constitutional precedents: *West Coast Hotel Co.v.Parrish* and *Brownv.Board of Education*. But those decisions, unlike today's, responded to changed law and to changed facts and attitudes that had taken hold throughout society. As *Casey* recognized, the two cases are relevant only to show—by stark contrast—how unjustified overturning the right to choose is. See 505 U.S. at 861–864, 112 S.Ct. 2791.

West Coast Hotel overruled *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), and a whole line of cases beginning with *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). *Adkins* had found a state minimum-wage law unconstitutional because, in the Court's view, the law interfered with a constitutional right to contract. 261 U.S. at 554–555, 43 S.Ct. 394. But then the Great Depression hit, bringing with it unparalleled economic despair. The experience undermined—in fact, it disproved—*Adkins*'s assumption that a wholly unregulated market could meet basic human needs. As Justice Jackson (before becoming a Justice) wrote of that time: "The older world of *laissez faire* was recognized everywhere outside the Court to be dead." The Struggle for Judicial Supremacy 85 (1941). In *West Coast Hotel*, the Court caught up, recognizing through the lens of experience the flaws of existing legal doctrine. See also *ante*, at 2316, 43 S.Ct. 394 (ROBERTS, C. J., concurring in judgment). The havoc the Depression had worked on ordinary Americans, the Court noted, was "common knowledge through the length and breadth of the land." 300 U.S. at 399, 57 S.Ct. 578. The *laissez-faire* approach had led to "the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living." *Ibid.* And since *Adkins* was decided, the law had also changed. In several decisions, the Court had started to recognize the power of States to implement economic policies designed to enhance their citizens' economic well-being. See, *e.g.*, *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 324 (1931). The statements in those decisions, *West Coast Hotel* explained, were "impossible to reconcile" with *Adkins*. 300 U.S. at 398, 57 S.Ct. 578. There was no escaping the need for *Adkins* to go.

Brownv.Board of Education overruled *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), along with its doctrine of "separate but equal." By 1954, decades of Jim Crow had made clear what *Plessy*'s turn of phrase actually meant: "inherent[ ] [in]equal[ity]." *Brown*, 347 U.S. at 495, 74 S.Ct. 686. Segregation was not, and could not ever be, consistent with ***2342** the Reconstruction Amendments, ratified to give the former slaves full citizenship. Whatever might have been thought in *Plessy*'s time, the *Brown* Court explained, both experience and "modern authority" showed the "detrimental effect[s]" of state-sanctioned segregation: It "affect[ed] [children's] hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494, 74 S.Ct. 686. By that point, too, the law had begun to reflect that understanding. In a series of decisions, the Court had held unconstitutional public graduate schools' exclusion of black students. See, *e.g.*, *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *Sipuel v. Board of Regents of Univ. ofOkla.,* 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247 (1948) (*per curiam*); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938). The logic of those cases, *Brown* held, "appl[ied] with added force to children in grade and high schools." 347 U.S. at 494, 74 S.Ct. 686. Changed facts and changed law required *Plessy*'s end.

The majority says that in recognizing those changes, we are implicitly supporting the half-century interlude between *Plessy* and *Brown*. See *ante*, at 2279 – 2280, 74 S.Ct. 686. That is not so. First, if the *Brown* Court had used the majority's method of constitutional construction, it might not ever have overruled *Plessy*, whether 5 or 50 or 500 years later. *Brown* thought that whether the ratification-era history supported desegregation was "[a]t best ... inconclusive." 347 U.S. at 489, 74 S.Ct. 686. But even setting that aside, we are not saying that a decision can *never* be overruled just because it is terribly wrong. Take *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, which the majority also relies on. See *ante*, at 2262 – 2264, 2279 – 2280. That overruling took place just three years after the initial decision, before any notable reliance interests had developed. It happened as well because individual Justices changed their minds, not because a new majority wanted to undo the decisions of their predecessors. Both *Barnette* and *Brown*, moreover, share another feature setting them apart from the Court's ruling today. They protected individual rights with a strong basis in the Constitution's most fundamental commitments; they did not, as the majority does here, take away a right that individuals have held, and relied on, for 50 years. To take *that* action based on a new and bare majority's declaration that two Courts got the result egregiously wrong? And to justify that action by reference to *Barnette*? Or to *Brown*—a case in which the Chief Justice also wrote an (11-page) opinion in which the entire Court could speak with one voice? These questions answer themselves.

Casey itself addressed both *West Coast Hotel* and *Brown*, and found that neither supported *Roe*'s overruling. In *West Coast Hotel*, *Casey* explained, "the facts of economic life" had proved "different from those previously assumed." 505 U.S. at 862, 112 S.Ct. 2791. And even though "*Plessy* was wrong the day it was decided," the passage of time had made that ever more clear to ever more citizens: "Society's understanding of the facts" in 1954 was "fundamentally different" than in 1896. *Id.*, at 863, 112 S.Ct. 2791. So the Court needed to reverse course. "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations." *Id.*, at 864, 112 S.Ct. 2791. And because such dramatic change had occurred, the public could understand why the Court was acting. "[T]he Nation could accept each decision" as a "response to the Court's constitutional duty." *Ibid*. But that would not be true of a reversal of *Roe*—"[b]ecause neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed." 505 U.S. at 864, 112 S.Ct. 2791.

***2343** That is just as much so today, because *Roe* and *Casey* continue to reflect, not diverge from, broad trends in American society. It is, of course, true that many Americans, including many women, opposed those decisions when issued and do so now as well. Yet the fact remains: *Roe* and *Casey* were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. Only a dozen years before *Roe*, the Court described women as "the center of home and family life," with "special responsibilities" that precluded their full legal status under the Constitution. *Hoyt v. Florida*, 368 U.S. 57, 62, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961). By 1973, when the Court decided *Roe*, fundamental social change was underway regarding the place of women—and the law had begun to follow. See *Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) (recognizing that the Equal Protection Clause prohibits sex-based discrimination). By 1992, when the Court decided *Casey*, the traditional view of a woman's role as only a wife and mother was "no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U.S. at 897, 112 S.Ct. 2791; see *supra*, at 2324 – 2325, 2329 – 2330. Under that charter,

Casey understood, women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions. Nothing since *Casey*—no changed law, no changed fact—has undermined that promise.

C

The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. The Court adheres to precedent not just for institutional reasons, but because it recognizes that stability in the law is "an essential thread in the mantle of protection that the law affords the individual." *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 154, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (Stevens, J., concurring). So when overruling precedent "would dislodge [individuals'] settled rights and expectations," *stare decisis* has "added force." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991). *Casey* understood that to deny individuals' reliance on *Roe* was to "refuse to face the fact[s]." 505 U.S. at 856, 112 S.Ct. 2791. Today the majority refuses to face the facts. "The most striking feature of the [majority] is the absence of any serious discussion" of how its ruling will affect women. *Ante*, at 2261, 112 S.Ct. 2791. By characterizing *Casey*'s reliance arguments as "generalized assertions about the national psyche," *ante*, at 2276, 112 S.Ct. 2791, it reveals how little it knows or cares about women's lives or about the suffering its decision will cause.

In *Casey*, the Court observed that for two decades individuals "have organized intimate relationships and made" significant life choices "in reliance on the availability of abortion in the event that contraception should fail." 505 U.S. at 856, 112 S.Ct. 2791. Over another 30 years, that reliance has solidified. For half a century now, in *Casey*'s words, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.*; see *supra*, at 2330, 112 S.Ct. 2791. Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*'s and *Casey*'s protections.

The disruption of overturning *Roe* and *Casey* will therefore be profound. Abortion is a common medical procedure and a familiar experience in women's lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of ***2344** American women will have an abortion before the age of 45.[22] Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life. See Brief for Economists as *Amici Curiae* 13 (showing that abortion availability has "large effects on women's education, labor force participation, occupations, and earnings" (footnotes omitted)).

22 See CDC, K. Kortsmit et al., Abortion Surveillance—United States, 2019, 70 Morbidity and Mortality Weekly Report 7 (2021); Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 9.

The majority's response to these obvious points exists far from the reality American women actually live. The majority proclaims that " 'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.' " *Ante*, at 2276, 112 S.Ct. 2791 (quoting *Casey*, 505 U.S. at 856, 112 S.Ct. 2791).[23] The facts are: 45 percent of pregnancies in the United States are unplanned. See Brief for 547 Deans 5. Even the most effective contraceptives fail, and effective contraceptives are not universally accessible.[24] Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. See Brief for Legal Voice et al. as *Amici Curiae* 18–19. The Mississippi law at issue here, for example, has no exception for rape or incest, even for underage women. Finally, the majority ignores, as explained

above, that some women decide to have an abortion because their circumstances change during a pregnancy. See *supra*, at 2344. Human bodies care little for hopes and plans. Events can occur after conception, from unexpected medical risks to changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected that they will get to decide, perhaps in consultation with their families or doctors but free from state interference, whether to continue a pregnancy. For those who will now have to undergo that pregnancy, the loss of *Roe* and *Casey* could be disastrous.

23 Astoundingly, the majority casts this statement as a "conce[ssion]" from *Casey* with which it "agree[s]." *Ante*, at 2276, 112 S.Ct. 2791. In fact, *Casey* used this language as part of describing an argument that it *rejected*. See 505 U.S. at 856, 112 S.Ct. 2791. It is only today's Court that endorses this profoundly mistaken view.

24 See Brief for 547 Deans 6–7 (noting that 51 percent of women who terminated their pregnancies reported using contraceptives during the month in which they conceived); Brief for Lawyers' Committee for Civil Rights Under Law et al. as *Amici Curiae* 12–14 (explaining financial and geographic barriers to access to effective contraceptives).

That is especially so for women without money. When we "count[ ] the cost of [*Roe*'s] repudiation" on women who once relied on that decision, it is not hard to see ***2345** where the greatest burden will fall. *Casey*, 505 U.S. at 855, 112 S.Ct. 2791. In States that bar abortion, women of means will still be able to travel to obtain the services they need.[25] It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. See Brief for 547 Deans 7; Brief for Abortion Funds and Practical Support Organizations as *Amici Curiae* 8 (Brief for Abortion Funds). Even with *Roe*'s protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. See Brief for Abortion Funds 7–12.[26] After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives.[27]

25 This statement of course assumes that States are not successful in preventing interstate travel to obtain an abortion. See *supra*, at 2318, 2336 – 2337. Even assuming that is so, increased out-of-state demand will lead to longer wait times and decreased availability of service in States still providing abortions. See Brief for State of California et al. as *Amici Curiae* 25–27. This is what happened in Oklahoma, Kansas, Colorado, New Mexico, and Nevada last fall after Texas effectively banned abortions past six weeks of gestation. See *United States v.Texas*, 595 U.S. ——, ——, 142 S.Ct. 14, 16–17, 211 L.Ed.2d 225 (2021) (SOTOMAYOR, J., concurring in part and dissenting in part).

26 The average cost of a first-trimester abortion is about $500. See Brief for Abortion Funds 7. Federal insurance generally does not cover the cost of abortion, and 35 percent of American adults do not have cash on hand to cover an unexpected expense that high. Guttmacher Institute, M. Donovan, In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact (Jan. 5, 2017), https://www. guttmacher.org/gpr/2017/01/real-life-federal-restrictions-abortion-coverage-and-women-they-impact#:~:text=Although%20the%20Hyde%20Amendment%20bars, provide%20abortion%20coverage%20to%20enrollees; Brief for Abortion Funds 11.

27 Mississippi is likely to be one of the States where these costs are highest, though history shows that it will have company. As described above, Mississippi provides only the barest financial support to pregnant women. See *supra*, at 2339 – 2340. The State will greatly restrict abortion care without addressing any of the financial, health, and family needs that motivate many women to seek it. The effects will be felt most severely, as they always have been, on the bodies of the poor. The history of state abortion restrictions is a history of heavy costs exacted from the most vulnerable women. It is a history of women seeking illegal abortions in hotel rooms and home kitchens; of women trying to self-induce abortions by douching with bleach, injecting lye, and penetrating themselves with knitting needles, scissors, and coat hangers. See L. Reagan, When Abortion Was a Crime 42–43, 198–199, 208–209 (1997). It is a history of women dying.

Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. See *Casey*, 505 U.S. at 856, 112 S.Ct. 2791. That expectation helps define a woman as an "equal citizen[ ]," with all the rights, privileges, and obligations that status entails. *Gonzales*, 550 U.S. at 172, 127 S.Ct. 1610 (Ginsburg, J., dissenting); see *supra*, at 2329 – 2330. It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a ***2346** sphere of freedom, in which a person has the capacity to make choices free of government control. As *Casey* recognized, the right "order[s]" her "thinking" as well as her "living." 505 U.S. at 856, 112 S.Ct. 2791. Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants.

Withdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from women and given it to the States. To allow a State to exert control over one of "the most intimate and personal choices" a woman may make is not only to affect the course of her life, monumental as those effects might be. *Id.*, at 851, 112 S.Ct. 2791. It is to alter her "views of [herself]" and her understanding of her "place[ ] in society" as someone with the recognized dignity and authority to make these choices. *Id.*, at 856, 112 S.Ct. 2791. Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense.

The Court's failure to perceive the whole swath of expectations *Roe* and *Casey* created reflects an impoverished view of reliance. According to the majority, a reliance interest must be "very concrete," like those involving "property" or "contract." *Ante*, at 2276, 112 S.Ct. 2791. While many of this Court's cases addressing reliance have been in the "commercial context," *Casey*, 505 U.S. at 855, 112 S.Ct. 2791, none holds that interests must be analogous to commercial ones to warrant *stare decisis* protection.[28] This unprecedented assertion is, at bottom, a radical claim to power. By disclaiming any need to consider broad swaths of individuals' interests, the Court arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law, costs that this Court's *stare decisis* doctrine instructs us to privilege when deciding whether to change course.

28 The majority's sole citation for its "concreteness" requirement is *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). But *Payne* merely discounted reliance interests in cases involving "procedural and evidentiary rules." *Id.*, at 828, 111 S.Ct. 2597. Unlike the individual right at stake here, those rules do "not alter primary conduct." *Hohn v. United States*, 524 U.S. 236, 252, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). Accordingly, they generally "do not implicate the reliance interests of private parties" at all. *Alleyne v. United States*, 570 U.S. 99, 119, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (SOTOMAYOR, J., concurring).

The majority claims that the reliance interests women have in *Roe* and *Casey* are too "intangible" for the Court to consider, even if it were inclined to do so. *Ante*, at 2277 – 2278, 133 S.Ct. 2151. This is to ignore as judges what we know as men and women. The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion. For millions of women, *Roe* and *Casey* have been critical in giving them control of their bodies and their lives. Closing our eyes to the suffering today's decision will impose will not make that suffering disappear. The majority cannot escape its obligation to "count[ ] the cost[s]" of its decision by invoking the "conflicting arguments" of "contending sides." ***2347** *Casey*, 505 U.S. at 855, 112 S.Ct. 2791; *ante*, at 2277 – 2278. *Stare decisis* requires that the Court calculate the costs of a decision's repudiation on those who have relied on the decision, not on those who have disavowed it. See *Casey*, 505 U.S. at 855, 112 S.Ct. 2791.

More broadly, the majority's approach to reliance cannot be reconciled with our Nation's understanding of constitutional rights. The majority's insistence on a "concrete," economic showing would preclude a finding of reliance on a wide variety of decisions recognizing constitutional rights—such as the right to express opinions, or choose whom to marry, or decide how to educate children. The Court, on the majority's logic, could transfer those choices to the State without having to consider a person's settled understanding that the law makes them hers. That must be wrong. All those rights, like the right to obtain an abortion, profoundly

affect and, indeed, anchor individual lives. To recognize that people have relied on these rights is not to dabble in abstractions, but to acknowledge some of the most "concrete" and familiar aspects of human life and liberty. *Ante*, at 2276, 112 S.Ct. 2791.

All those rights, like the one here, also have a societal dimension, because of the role constitutional liberties play in our structure of government. See, *e.g.*, *Dickerson*, 530 U.S. at 443, 120 S.Ct. 2326 (recognizing that *Miranda* "warnings have become part of our national culture" in declining to overrule *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight. *Roe* and *Casey* have of course aroused controversy and provoked disagreement. But the right those decisions conferred and reaffirmed is part of society's understanding of constitutional law and of how the Court has defined the liberty and equality that women are entitled to claim.

After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision.

D

One last consideration counsels against the majority's ruling: the very controversy surrounding *Roe* and *Casey*. The majority accuses *Casey* of acting outside the bounds of the law to quell the conflict over abortion—of imposing an unprincipled "settlement" of the issue in an effort to end "national division." *Ante*, at 2278, 86 S.Ct. 1602. But that is not what *Casey* did. As shown above, *Casey* applied traditional principles of *stare decisis*—which the majority today ignores—in reaffirming *Roe*. *Casey* carefully assessed changed circumstances (none) and reliance interests (profound). It considered every aspect of how *Roe*'s framework operated. It adhered to the law in its analysis, and it reached the conclusion that the law required. True enough that *Casey* took notice of the "national controversy" about abortion: The Court knew in 1992, as it did in 1973, that abortion was a "divisive issue." *Casey*, 505 U.S. at 867–868, 112 S.Ct. 2791; see *Roe*, 410 U.S. at 116, 93 S.Ct. 705. But *Casey*'s reason for acknowledging public conflict was the exact opposite of what the majority insinuates. *Casey* addressed the national controversy in order to emphasize how important it was, in that case of all cases, ***2348** for the Court to stick to the law. Would that today's majority had done likewise.

Consider how the majority itself summarizes this aspect of *Casey*:

> "The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not 'social and political pressures.' There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial 'watershed' decision, such as *Roe*. A decision overruling *Roe* would be perceived as having been made 'under fire' and as a 'surrender to political pressure.' " *Ante*, at 2278, 93 S.Ct. 705 (citations omitted).

That seems to us a good description. And it seems to us right. The majority responds (if we understand it correctly): well, yes, but we have to apply the law. See *ante*, at 2278, 93 S.Ct. 705. To which *Casey* would have said: That is exactly the point. Here, more than anywhere, the Court needs to apply the law—particularly the law of *stare decisis*. Here, we know that citizens will continue to contest the Court's decision, because "[m]en and women of good conscience" deeply disagree about abortion. *Casey*, 505 U.S. at 850, 112 S.Ct. 2791. When that contestation takes place—but when there is no legal basis for reversing course—the Court needs to be steadfast, to stand its ground. That is what the rule of law requires. And that is what respect for this Court depends on.

"The promise of constancy, once given" in so charged an environment, *Casey* explained, "binds its maker for as long as" the "understanding of the issue has not changed so fundamentally as to render the commitment obsolete." *Id.*, at 868, 112 S.Ct. 2791. A breach of that promise is "nothing less than a breach of faith." *Ibid.* "[A]nd no Court that broke its faith with the people could sensibly expect credit for principle." *Ibid.* No Court breaking its faith in that way would *deserve* credit for principle. As one of *Casey*'s authors wrote in another case, "Our legitimacy requires, above all, that we adhere to *stare decisis*" in "sensitive political contexts" where "partisan controversy abounds." *Bush v. Vera*, 517 U.S. 952, 985, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (opinion of O'Connor, J.).

Justice Jackson once called a decision he dissented from a "loaded weapon," ready to hand for improper uses. *Korematsu v. United States*, 323 U.S. 214, 246, 65 S.Ct. 193, 89 L.Ed. 194 (1944). We fear that today's decision, departing from *stare decisis* for no legitimate reason, is its own loaded weapon. Weakening *stare decisis* threatens to upend bedrock legal doctrines, far beyond any single decision. Weakening *stare decisis* creates profound legal instability. And as *Casey* recognized, weakening *stare decisis* in a hotly contested case like this one calls into question this Court's commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today's decision takes aim, we fear, at the rule of law.

III

"Power, not reason, is the new currency of this Court's decisionmaking." *Payne*, 501 U.S. at 844, 111 S.Ct. 2597 (Marshall, J., dissenting). *Roe* has stood for fifty years. *Casey*, a precedent about precedent specifically confirming *Roe*, has stood for thirty. And the doctrine of *stare decisis*—a critical element of the rule of law—stands foursquare behind their continued existence. The right those decisions established and preserved is embedded in our constitutional law, both originating in and leading to other rights protecting bodily ***2349** integrity, personal autonomy, and family relationships. The abortion right is also embedded in the lives of women—shaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality. Since the right's recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court.

Mississippi—and other States too—knew exactly what they were doing in ginning up new legal challenges to *Roe* and *Casey*. The 15-week ban at issue here was enacted in 2018. Other States quickly followed: Between 2019 and 2021, eight States banned abortion procedures after six to eight weeks of pregnancy, and three States enacted all-out bans.[29] Mississippi itself decided in 2019 that it had not gone far enough: The year after enacting the law under review, the State passed a 6-week restriction. A state senator who championed both Mississippi laws said the obvious out loud. "[A] lot of people thought," he explained, that "finally, we have" a conservative Court "and so now would be a good time to start testing the limits of *Roe*."[30] In its petition for certiorari, the State had exercised a smidgen of restraint. It had urged the Court merely to roll back *Roe* and *Casey*, specifically assuring the Court that "the questions presented in this petition do not require the Court to overturn" those precedents. Pet. for Cert. 5; see *ante*, at 2313, 111 S.Ct. 2597 (ROBERTS, C. J., concurring in judgment). But as Mississippi grew ever more confident in its prospects, it resolved to go all in. It urged the Court to overrule *Roe* and *Casey*. Nothing but everything would be enough.

29 Guttmacher Institute, E. Nash, State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century (Dec. 16, 2021), https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century; Guttmacher Institute, E. Nash, L. Mohammed, O. Cappello, & S. Naide, State Policy Trends 2020: Reproductive Health and Rights in a Year Like No Other (Dec. 15, 2020), https://www.guttmacher.org/article/2020/12/state-policy-trends-2020reproductive-health-and-rights-year-no-other; Guttmacher Institute, E. Nash, L. Mohammed, O. Cappello, & S. Naide, State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back (Dec. 10, 2019), https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back.

30 A. Pittman, Mississippi's Six-Week Abortion Ban at 5th Circuit Appeals Court Today, Jackson Free Press (Oct. 7, 2019), https://www.jacksonfreepress.com/news/2019/oct/07/mississippis-six-week-abortion-ban-5th-circuit-app/.

Earlier this Term, this Court signaled that Mississippi's stratagem would succeed. Texas was one of the fistful of States to have recently banned abortions after six weeks of pregnancy. It added to that "flagrantly unconstitutional" restriction an unprecedented scheme to "evade judicial scrutiny." *Whole Woman's Healthv.Jackson*, 594 U.S. ——, ——, 141 S.Ct. 2494, 2498, 210 L.Ed.2d 1014 (2021) (SOTOMAYOR, J., dissenting). And five Justices acceded to that cynical maneuver. They let Texas defy this Court's constitutional rulings, nullifying *Roe* and *Casey* ahead of schedule in the Nation's second largest State.

And now the other shoe drops, courtesy of that same five-person majority. (We believe that THE CHIEF JUSTICE's opinion is wrong too, but no one should think that there is not a large difference between upholding a 15-week ban on the ***2350** grounds he does and allowing States to prohibit abortion from the time of conception.) Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*. It converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total abortion bans. See *ante*, at 2272 – 2273, 2273 – 2274, 2275 – 2276, 141 S.Ct. 2494, 2498, and nn. 61–64 (relying on former dissents). It eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy.

Casey itself made the last point in explaining why it would not overrule *Roe*—though some members of its majority might not have joined *Roe* in the first instance. Just as we did here, *Casey* explained the importance of *stare decisis*; the inappositeness of *West Coast Hotel* and *Brown*; the absence of any "changed circumstances" (or other reason) justifying the reversal of precedent. 505 U.S. at 864, 112 S.Ct. 2791; see *supra*, at 2333 – 2335, 2337 – 2343, 112 S.Ct. 2791. "[T]he Court," *Casey* explained, "could not pretend" that overruling *Roe* had any "justification beyond a present doctrinal disposition to come out differently from the Court of 1973." 505 U.S. at 864, 112 S.Ct. 2791. And to overrule for that reason? Quoting Justice Stewart, *Casey* explained that to do so—to reverse prior law "upon a ground no firmer than a change in [the Court's] membership"—would invite the view that "this institution is little different from the two political branches of the Government." *Ibid.* No view, *Casey* thought, could do "more lasting injury to this Court and to the system of law which it is our abiding mission to serve." *Ibid.* For overruling *Roe*, *Casey* concluded, the Court would pay a "terrible price." 505 U.S. at 864, 112 S.Ct. 2791.

The Justices who wrote those words—O'Connor, Kennedy, and Souter—they were judges of wisdom. They would not have won any contests for the kind of ideological purity some court watchers want Justices to deliver. But if there were awards for Justices who left this Court better than they found it? And who for that reason left this country better? And the rule of law stronger? Sign those Justices up.

They knew that "the legitimacy of the Court [is] earned over time." *Id.*, at 868, 112 S.Ct. 2791. They also would have recognized that it can be destroyed much more quickly. They worked hard to avert that outcome in *Casey*. The American public, they thought, should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new "doctrinal school," could "by dint of numbers" alone expunge their rights. *Id.*, at 864, 112 S.Ct. 2791. It is hard—no, it is impossible—to conclude that anything else has happened here. One of us once said that "[i]t is not often in the law that so few have so quickly changed so much." S. Breyer, Breaking the Promise of *Brown*: The Resegregation of America's Schools 30 (2022). For all of us, in our time on this Court, that has never been more true than today. In overruling *Roe* and *Casey*, this Court betrays its guiding principles.

With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.

APPENDIX

This Appendix analyzes in full each of the 28 cases the majority says support today's decision to overrule ***2351** *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). As explained herein, the Court in each case relied on traditional *stare decisis* factors in overruling.

A great many of the overrulings the majority cites involve a prior precedent that had been rendered out of step with or effectively abrogated by contemporary case law in light of intervening developments in the broader doctrine. See *Ramosv.Louisiana*, 590 U.S. ——, ——, 140 S.Ct. 1390, 1406, 206 L.Ed.2d 583 (2020) (holding the Sixth Amendment requires a unanimous jury verdict in state prosecutions for serious offenses, and overruling *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), because "in the years since *Apodaca*, this Court ha[d] spoken inconsistently about its meaning" and had undercut its validity "on at least eight occasions"); *Ring v. Arizona*, 536 U.S. 584, 608–609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (recognizing a Sixth Amendment right to have a jury find the aggravating factors necessary to impose a death sentence and, in so doing, rejecting *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), as overtaken by and irreconcilable with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)); *Agostini v. Felton*, 521 U.S. 203, 235–236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (considering the Establishment Clause's constraint on government aid to religious instruction, and overruling *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), in light of several related doctrinal developments that had so undermined *Aguilar* and the assumption on which it rested as to render it no longer good law); *Batson v. Kentucky*, 476 U.S. 79, 93–96, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (recognizing that a defendant may make a prima facie showing of purposeful racial discrimination in selection of a jury venire by relying solely on the facts in his case, and, based on subsequent developments in equal protection law, rejecting part of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), which had imposed a more demanding evidentiary burden); *Brandenburg v. Ohio*, 395 U.S. 444, 447–448, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*) (holding that mere advocacy of violence is protected by the First Amendment, unless intended to incite it or produce imminent lawlessness, and rejecting the contrary rule in *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927), as having been "thoroughly discredited by later decisions"); *Katz v. United States*, 389 U.S. 347, 351, 353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (recognizing that the Fourth Amendment extends to material and communications that a person "seeks to preserve as private," and rejecting the more limited construction articulated in *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), because "we have since departed from the narrow view on which that decision rested," and "the underpinnings of *Olmstead* ... have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling"); *Miranda v. Arizona*, 384 U.S. 436, 463–467, 479, n. 48, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (recognizing that the Fifth Amendment requires certain procedural safeguards for custodial interrogation, and rejecting *Crooker v. California*, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958), and *Cicenia v. Lagay*, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958), which had already been undermined by *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)); ***2352** *Malloy v. Hogan*, 378 U.S. 1, 6–9, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (explaining that the Fifth Amendment privilege against "self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States," and rejecting *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908), in light of a "marked shift" in Fifth Amendment precedents that had "necessarily repudiated" the prior decision); *Gideon v. Wainwright*, 372 U.S. 335, 343–345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (acknowledging a right to counsel for indigent criminal defendants in state court under the Sixth and Fourteenth Amendments, and overruling the earlier precedent failing to recognize such a right, *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942));[31] *Smith v. Allwright*, 321 U.S. 649, 659–662, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (recognizing all-white primaries are unconstitutional after reconsidering in light of "the unitary character of the electoral process" recognized in *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), and overruling *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935)); *United States v. Darby*, 312 U.S. 100, 115–117, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (recognizing Congress's Commerce Clause power to regulate employment conditions and explaining as "inescapable" the "conclusion ... that *Hammer v. Dagenhart*, [247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918)]," and its contrary rule had "long since been" overtaken by precedent construing the Commerce Clause power more broadly); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78–80, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (applying state substantive law in diversity actions in federal courts and overruling *Swift v. Tyson*, 16 Pet. 1, 41 U.S. 1, 10 L.Ed. 865 (1842), because an intervening decision had "made clear" the "fallacy underlying the rule").

31 We have since come to understand *Gideon* as part of a larger doctrinal shift—already underway at the time of *Gideon*—where "the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments." *McDonald v. Chicago*, 561 U.S. 742, 763, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010); see also *id.*, at 766, 130 S.Ct. 3020.

Additional cases the majority cites involved fundamental factual changes that had undermined the basic premise of the prior precedent. See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 364, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (expanding First Amendment protections for campaign-related speech and citing technological changes that undermined the distinctions of the earlier regime and made workarounds easy, and overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), and partially overruling *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003)); *Crawford v. Washington*, 541 U.S. 36, 62–65, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (expounding on the Sixth Amendment right to confront witnesses and rejecting the prior framework, based on its practical failing to keep out core testimonial evidence, and overruling *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)); *Mapp v. Ohio*, 367 U.S. 643, 651–652, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (holding that the exclusionary rule under the Fourth Amendment applies to the States, and overruling the contrary rule of *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), after considering and rejecting "the current validity of the factual grounds upon which *Wolf* was based").

Some cited overrulings involved *both* significant doctrinal developments *and* changed facts or understandings that had ***2353** together undermined a basic premise of the prior decision. See *Janusv.State, County, and Municipal Employees*, 585 U.S. ——, ——, —— – ——, 138 S.Ct., at 2482-2483, 2485-2486, 201 L.Ed.2d 924 (2018) (holding that requiring public-sector union dues from nonmembers violates the First Amendment, and overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), based on "both factual and legal" developments that had "eroded the decision's underpinnings and left it an outlier among our First Amendment cases" (internal quotation marks omitted)); *Obergefell v. Hodges*, 576 U.S. 644, 659–663, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) (holding that the Fourteenth Amendment protects the right of same-sex couples to marry in light of doctrinal developments, as well as fundamentally changed social understanding); *Lawrence v. Texas*, 539 U.S. 558, 572–578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), after finding anti-sodomy laws to be inconsistent with the Fourteenth Amendment in light of developments in the legal doctrine, as well as changed social understanding of sexuality); *United States v. Scott*, 437 U.S. 82, 101, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975), three years after it was decided, because of developments in the Court's double jeopardy case law, and because intervening practice had shown that government appeals from midtrial dismissals requested by the defendant were practicable, desirable, and consistent with double jeopardy values); *Craig v. Boren*, 429 U.S. 190, 197–199, 210, n. 23, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (holding that sex-based classifications are subject to intermediate scrutiny under the Fourteenth Amendment's Equal Protection Clause, including because *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), and other equal protection cases and social changes had overtaken any "inconsistent" suggestion in *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948)); *Taylor v. Louisiana*, 419 U.S. 522, 535–537, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) (recognizing as "a foregone conclusion from the pattern of some of the Court's cases over the past 30 years, as well as from legislative developments at both federal and state levels," that women could not be excluded from jury service, and explaining that the prior decision approving such practice, *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), had been rendered inconsistent with equal protection jurisprudence).

Other overrulings occurred very close in time to the original decision so did not engender substantial reliance and could not be described as having been "embedded" as "part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000); see *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (revising procedural rules of evidence that had barred admission of certain victim-impact evidence during the penalty phase of capital cases, and overruling *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), and *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), which had been decided two and four years prior, respectively); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that Congress cannot abrogate state-sovereign immunity under its Article I commerce power, and rejecting the result in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), seven years later; the decision in *Union Gas* never garnered a majority); ***2354** *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (holding that local

governments are not constitutionally immune from federal employment laws, and overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), after "eight years" of experience under that regime showed *Usery*'s standard was unworkable and, in practice, undermined the federalism principles the decision sought to protect).

The rest of the cited cases were relatively minor in their effect, modifying part or an application of a prior precedent's test or analysis. See *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (citing workability and practical concerns with additional layers of prophylactic procedural safeguards for defendants' right to counsel, as had been enshrined in *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)); *Illinois v. Gates*, 462 U.S. 213, 227–228, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (replacing a two-pronged test under *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), in favor of a traditional totality-of-the-circumstances approach to evaluate probable cause for issuance of a warrant); *Wesberry v. Sanders*, 376 U.S. 1, 4, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), and *Baker v. Carr*, 369 U.S. 186, 202, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (clarifying that the "political question" passage of the minority opinion in *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946), was not controlling law).

In sum, none of the cases the majority cites is analogous to today's decision to overrule 50- and 30-year-old watershed constitutional precedents that remain unweakened by any changes of law or fact.

All Citations

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APPENDIX 8

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NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

James LEPAGE and Emily LePage, individually and as parents and next friends of two deceased LePage **embryos**, **Embryo** A and **Embryo** B; and William Tripp Fonde and Caroline Fonde, individually and as parents and next friends of two deceased Fonde **embryos**, **Embryo** C and **Embryo** D

v.

The CENTER FOR REPRODUCTIVE MEDICINE, P.C., and Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center

Felicia Burdick-Aysenne and Scott Aysenne, in their individual capacities and as parents and next friends of Baby Aysenne, deceased **embryo**/minor

v.

The Center for Reproductive Medicine, P.C., and Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center

SC-2022-0515 and SC-2022-0579

|

February 16, 2024

Synopsis

Background: Fertility clinic patients brought action against clinic and hospital that was in same building as clinic's cryogenic nursery, alleging claims under Wrongful Death of a Minor Act and, in the alternative, common-law claims of negligence and wantonness arising from death of patients' **frozen** **embryos** at the alleged hands of a hospital patient. The Circuit Court, Mobile County, Nos. CV-21-901607 and CV-21-901640, dismissed. Plaintiffs appealed, and appeals were consolidated.

Holdings: The Supreme Court, en banc, Mitchell, J., held that:

[1] Wrongful Death of a Minor Act applies to all children, born and unborn, including **frozen** **embryos** kept in a cryogenic nursery, and

[2] common-law claims were moot.

Affirmed in part, reversed in part, and remanded.

Parker, C.J., filed specially concurring opinion.

Shaw, J., filed specially concurring opinion in which Stewart, J., joined.

Mendheim, J., filed opinion concurring in result.

Sellers, J., filed opinion concurring in result in part and dissenting in part.

Cook, J., filed dissenting opinion.

West Headnotes (9)

[1] **Appeal and Error** 🔑 De novo review

Appeal and Error 🔑 Dismissal and nonsuit in general

Supreme Court reviews a trial court's judgment granting a motion to dismiss de novo, without any presumption of correctness.

[2] **Death** 🔑 Right of action of person injured

Unborn children are "children" under the Wrongful Death of a Minor Act, which provides a cause of action for the death of any minor child, without exception based on developmental stage, physical location, or any other ancillary characteristics. Ala. Code § 6-5-391.

[3] **Statutes** 🔑 Natural, obvious, or accepted meaning

Statutes 🔑 Technical terms

Courts interpreting statutes are required to give words their natural, ordinary, commonly understood meaning, unless there is some textual indication that an unusual or technical meaning applies.

[4] **Constitutional Law** 🔑 Operation as to statutes previously in force

Constitutional Law 🔑 Life in general

State constitutional amendment on the sanctity of unborn life represents the supreme law of the state, meaning that all statutes must yield to it, whether or not they were enacted prior to its adoption. Ala. Const. art. 1, § 36.06.

[5] **Death** 🔑 Right of action of person injured

Phrase "minor child" means the same in the Wrongful Death of a Minor Act, which provides a cause of action for the death of any minor child, as it does in everyday parlance: an unborn or recently born individual member of the human species, from fertilization until the age of majority. Ala. Code § 6-5-391.

[6] **Death** 🔑 Right of action of person injured

Wrongful Death of a Minor Act, providing a cause of action for the death of any minor child, applies to all children, born and unborn children, without limitation, including **frozen embryos** kept in a fertility clinic's cryogenic nursery. Ala. Code § 6-5-391.

[7] **Constitutional Law** Inquiry into Legislative Judgment

Constitutional Law Policy

Judges are required to conform their rulings to the expressions of the legislature, to the letter of the statute, and to the Constitution, without indulging a speculation, either upon the impolicy, or the hardship, of the law.

[8] **Appeal and Error** Substantive questions and issues

Fertility clinic patients' claims of common-law negligence and wantonness against clinic and hospital arising from death of patients' **frozen embryos** kept in cryogenic nursery became moot on appeal, where claims were alternative theories that patients pleaded only as a fallback in case the Supreme Court held that the Wrongful Death of a Minor Act, which provided a cause of action for the death of any minor child, did not apply to **frozen embryos**, and the Court held that the Act applied to the **frozen embryos**. Ala. Code § 6-5-391.

[9] **Appeal and Error** Necessity of presentation in general

Supreme Court is a court of review, not a court of first instance.

Appeal from Mobile Circuit Court (CV-21-901607) (CV-21-901640)

Opinion

MITCHELL, Justice.[1]

***1** This Court has long held that unborn children are "children" for purposes of Alabama's Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975, a statute that allows parents of a deceased child to recover punitive damages for their child's death. The central question presented in these consolidated appeals, which involve the death of **embryos** kept in a cryogenic nursery, is whether the Act contains an unwritten exception to that rule for extrauterine children -- that is, unborn children who are located outside of a biological uterus at the time they are killed. Under existing black-letter law, the answer to that question is no: the Wrongful Death of a Minor Act applies to all unborn children, regardless of their location.

Facts and Procedural History

The plaintiffs in these consolidated appeals are the parents of several embryonic children, each of whom was created through in vitro fertilization ("IVF") and -- until the incident giving rise to these cases -- had been kept alive in a cryogenic nursery while they awaited implantation. James LePage and Emily LePage are the parents of two **embryos** whom they call "**Embryo** A" and "**Embryo** B"; William Tripp Fonde and Caroline Fonde are the parents of two other **embryos** called "**Embryo** C" and "**Embryo** D"; and Felicia Burdick-Aysenne and Scott Aysenne are the parents of one **embryo** called "Baby Aysenne."

Between 2013 and 2016, each set of parents went to a fertility clinic operated by the Center for Reproductive Medicine, P.C. ("the Center"), to undergo IVF treatments. During those treatments, doctors were able to help the plaintiffs conceive children by joining the mother's eggs and the father's sperm "in vitro" -- that is, outside the mother's body. The Center artificially gestated each **embryo** to "a few days" of age and then placed the **embryos** in the Center's "cryogenic nursery," which is a facility designed to keep extrauterine **embryos** alive at a fixed stage of development by preserving them at an extremely low

temperature. The parties agree that, if properly safeguarded, an **embryo** can remain alive in a cryogenic nursery "indefinitely" -- several decades, perhaps longer.

The plaintiffs' IVF treatments led to the creation of several **embryos**, some of which were implanted and resulted in the births of healthy babies. The plaintiffs contracted to have their remaining **embryos** kept in the Center's cryogenic nursery, which was located within the same building as the local hospital, the Mobile Infirmary Medical Center ("the Hospital"). The Hospital is owned and operated by the Mobile Infirmary Association ("the Association").

The plaintiffs allege that the Center was obligated to keep the cryogenic nursery secured and monitored at all times. But, in December 2020, a patient at the Hospital managed to wander into the Center's fertility clinic through an unsecured doorway. The patient then entered the cryogenic nursery and removed several **embryos**. The subzero temperatures at which the **embryos** had been stored **freeze**-burned the patient's hand, causing the patient to drop the **embryos** on the floor, killing them.

***2** The plaintiffs brought two lawsuits against the Center and the Association. The first suit was brought jointly by the LePages and the Fondes; the second was brought by the Aysennes. Each set of plaintiffs asserted claims under Alabama's Wrongful Death of a Minor Act, § 6-5-391. In the alternative, each set of plaintiffs asserted common-law claims of negligence (in the LePages and Fondes' case) or negligence and wantonness (in the Aysennes' case), for which they sought compensatory damages, including damages for mental anguish and emotional distress. The plaintiffs specified, however, that their common-law claims were pleaded "in the alternative, and only [apply] should the Courts of this State or the United States Supreme Court ultimately rule that [an extrauterine **embryo**] is not a minor child, but is instead property." In addition to those claims, the Aysennes brought breach-of-contract and bailment claims against the Center.

The Center and the Association filed joint motions in each case asking the trial court to dismiss the plaintiffs' wrongful-death and negligence/wantonness claims against them in accordance with Rules 12(b)(1) and 12(b)(6), Ala. R. Civ. P. The trial court granted those motions. In each of its judgments, the trial court explained its view that "[t]he cryopreserved, in vitro **embryos** involved in this case do not fit within the definition of a 'person' " or " 'child,' " and it therefore held that their loss could not give rise to a wrongful-death claim.

The trial court also concluded that the plaintiffs' negligence and wantonness claims could not proceed. Specifically, the court reasoned that, to the extent those claims sought recovery for the value of embryonic children, the claims were barred by Alabama's longstanding prohibition on the recovery of compensatory damages for loss of human life. And to the extent the claims sought emotional-distress damages, the trial court said that they were barred by the traditional limits to Alabama's "zone of danger test," which "limits recovery for emotional injury only to plaintiffs who sustained a physical injury ... or were placed in immediate risk of physical harm ...."

The trial court's judgments disposed entirely of the LePages' and the Fondes' claims, and left the Aysennes with only their breach-of-contract and bailment claims. The Aysennes asked the trial court to certify its judgment as final under Rule 54(b), Ala. R. Civ. P., which the trial court did. Both sets of plaintiffs appealed.

Standard of Review

[1] We review a trial court's judgment granting a motion to dismiss de novo, without any presumption of correctness. Hawkins v. Ivey, 365 So. 3d 1058, 1060 (Ala. 2022).

Analysis

The parties to these cases have raised many difficult questions, including ones about the ethical status of extrauterine children, the application of the 14th Amendment to the United States Constitution to such children, and the public-policy implications of treating extrauterine children as human beings. But the Court today need not address these questions because, as explained below, the relevant statutory text is clear: the Wrongful Death of a Minor Act applies on its face to all unborn children, without limitation. That language resolves the only issue on appeal with respect to the plaintiffs' wrongful-death claims and renders moot their common-law negligence and wantonness claims.

A. Wrongful-Death Claims

Before analyzing the parties' disagreement about the scope of the Wrongful Death of a Minor Act, we begin by explaining some background points of agreement. All parties to these cases, like all members of this Court, agree that an unborn child is a genetically unique human being whose life begins at fertilization and ends at death. The parties further agree that an unborn child usually qualifies as a "human life," "human being," or "person," as those words are used in ordinary conversation and in the text of Alabama's wrongful-death statutes. That is true, as everyone acknowledges, throughout all stages of an unborn child's development, regardless of viability.

***3** The question on which the parties disagree is whether there exists an unwritten exception to that rule for unborn children who are not physically located "in utero" -- that is, inside a biological uterus -- at the time they are killed. The defendants argue that this Court should recognize such an exception because, they say, an unborn child ceases to qualify as a "child or "person" if that child is not contained within a biological womb.

The plaintiffs, for their part, argue that the proposed exception for extrauterine children would introduce discontinuity within Alabama law. They contend, for example, that the defendants' proposed exception would deprive parents of any civil remedy against someone who kills their unborn child in a "partial-birth" posture -- that is, after the child has left the uterus but before the child has been fully delivered from the birth canal -- despite this State's longstanding criminal prohibition on partial-birth abortion, see Ala. Code 1975, § 26-23-3.

The plaintiffs also argue that the defendants' proposed exception would raise serious constitutional questions. For instance, one latent implication of the defendants' position -- though not one that the defendants seem to have anticipated -- is that, under the defendants' test, even a full-term infant or toddler conceived through IVF and gestated to term in an in vitro environment would not qualify as a "child" or "person," because such a child would both be (1) "unborn" (having never been delivered from a biological womb) and (2) not "in utero."[2] And if such children were not legal "children" or "persons," then their lives would be unprotected by Alabama law. The plaintiffs argue that this sort of unequal treatment would offend the Equal Protection Clause of the 14th Amendment to the United States Constitution, which prohibits states from withholding legal protection from people based on immutable features of their birth or ancestry. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 208, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023) (" 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' " (citations omitted)).[3]

***4** **[2]** These are weighty concerns. But these cases do not require the Court to resolve them because, as explained below, neither the text of the Wrongful Death of a Minor Act nor this Court's precedents exclude extrauterine children from the Act's coverage. Unborn children are "children" under the Act, without exception based on developmental stage, physical location, or any other ancillary characteristics.

1. The Text of the Wrongful Death of a Minor Act Applies to All Children, Without Exception

First enacted in 1872, the Wrongful Death of a Minor Act allows the parents of a deceased child to bring a claim seeking punitive damages "[w]hen the death of a minor child is caused by the wrongful act, omission, or negligence of any person," provided

that they do so within six months of the child's passing. § 6-5-391(a). The Act does not define either "child" or "minor child," but this Court held in Mack v. Carmack, 79 So. 3d 597 (Ala. 2011), that an unborn child qualifies as a "minor child" under the Act, regardless of that child's viability or stage of development. Id. at 611. We reaffirmed that conclusion in Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012), explaining that "Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child." Id. at 735.

None of the parties before us contest the holdings in Mack and Hamilton,[4] and for good reason: the ordinary meaning of "child" includes children who have not yet been born. "This Court's most cited dictionary defines 'child' as 'an unborn or recently born person,' " Ex parte Ankrom, 152 So. 3d 397, 431 (Ala. 2013) (Shaw, J., concurring in part and concurring in the result) (citing Merriam-Webster's Collegiate Dictionary 214 (11th ed. 2003)), and all other mainstream dictionaries are in accord. See, e.g., 3 The Oxford English Dictionary 113 (2d ed. 1989) (defining "child" as an "unborn or newly born human being; foetus, infant"); Webster's Third New International Dictionary 388 (2002) (defining "child" as "an unborn or recently born human being"). There is simply no "patent or latent ambiguity in the word 'child'; it is not a term of art and contains no inherent uncertainty." Ankrom, 152 So. 3d at 431 (Shaw, J., concurring in part and concurring in the result).

***5** The parties have given us no reason to doubt that the same was true in 1872, when the Wrongful Death of a Minor Act first became law. See Act No. 62, Ala. Acts 1871-72 (codified at § 2899, Ala. Code 1876). Indeed, the leading dictionary of that time defined the word "child" as "the immediate progeny of parents" and indicated that this term encompassed children in the womb. Noah Webster et al., An American Dictionary of the English Language 198 (1864) ("[t]o be with child [means] to be pregnant").[5] And Blackstone's Commentaries, the leading authority on the common law, expressly grouped the rights of unborn children with the "Rights of Persons," consistently described unborn children as "infant[s]" or "child[ren]," and spoke of such children as sharing in the same right to life that is "inherent by nature in every individual." 1 William Blackstone, Commentaries on the Laws of England 125-26.[6] Those expressions are in keeping with the United States Supreme Court's recent observation that, even as far back as the 18th century, the unborn were widely recognized as living persons with rights and interests. See Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 246-48, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022).

[3] Courts interpreting statutes are required to give words their " ' "natural, ordinary, commonly understood meaning," ' " unless there is some textual indication that an unusual or technical meaning applies. Swindle v. Remington, 291 So. 3d 439, 457 (Ala. 2019) (citations omitted). Here, the parties have not pointed us to any such indication, which reflects the overwhelming consensus in this State that an unborn child is just as much a "child" under the law as he or she is a "child" in everyday conversation.

***6** **[4]** Even if the word "child" were ambiguous, however, the Alabama Constitution would require courts to resolve the ambiguity in favor of protecting unborn life. Article I, § 36.06(b), of the Constitution of 2022 "acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." That section, which is titled "Sanctity of Unborn Life," operates in this context as a constitutionally imposed canon of construction, directing courts to construe ambiguous statutes in a way that "protect[s] ... the rights of the unborn child" equally with the rights of born children, whenever such construction is "lawful and appropriate." Id.[7] When it comes to the Wrongful Death of a Minor Act, that means coming down on the side of including, rather than excluding, children who have not yet been born.

[5] **[6]** The upshot here is that the phrase "minor child" means the same thing in the Wrongful Death of a Minor Act as it does in everyday parlance: "an unborn or recently born" individual member of the human species, from fertilization until the age of majority. See Merriam-Webster's Collegiate Dictionary 214 (11th ed. 2020) (defining "child"); accord Noah Webster et al., An American Dictionary of the English Language 198 (defining "child"). Nothing about the Act narrows that definition to unborn children who are physically "in utero." Instead, the Act provides a cause of action for the death of any "minor child," without exception or limitation. As this Court observed in Hamilton, "Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child." 97 So. 3d at 735 (emphasis added).

2. This Court's Precedents Do Not Compel Creation of an Unwritten Exception for Extrauterine Children

The defendants do not meaningfully engage with the text or history of the Wrongful Death of a Minor Act. Instead, they ask us to recognize an unwritten exception for extrauterine children in the wrongful-death context because, they say, our own precedents compel that outcome. Specifically, the defendants argue that: (1) this Court's precedents require complete congruity between "the definition of who is a person" under our criminal-homicide laws and "the definition of who is a person" under our civil wrongful-death laws; (2) extrauterine children are not within the class of persons protected by our criminal-homicide laws; and (3) as a result, extrauterine children cannot be protected by the Wrongful Death of a Minor Act. Appellees' brief in appeal no. SC-2022-0579 at 47; Appellees' brief in appeal no. SC-2022-0515 at 49.

***7** The most immediate problem with the defendants' argument is that its major premise is unsound:[8] nothing in this Court's precedents requires one-to-one congruity between the classes of people protected by Alabama's criminal-homicide laws and our civil wrongful-death laws. The defendants' error stems from their misreading of this Court's opinions in Mack and Stinnett v. Kennedy, 232 So. 3d 202 (Ala. 2016). As mentioned earlier, Mack held, based on "numerous considerations," that previable unborn children qualify as "children" under the Wrongful Death of a Minor Act. 79 So. 3d at 611. One of those considerations involved the fact that Alabama's criminal-homicide laws -- as amended by the Brody Act, Act No. 2006-419, Ala. Acts 2006 -- expressly included (and continues to include) unborn children as " 'person[s],' " " 'regardless of viability.' " 79 So. 3d at 600 (quoting Ala. Code 1975, § 13A-6-1(a)(3)). The Mack Court noted that it would be " 'incongruous' if 'a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly.' " 79 So. 3d at 611 (citation omitted). Stinnett echoed that reasoning. See 232 So. 3d at 215.

The defendants interpret the "incongruity" language in Mack and Stinnett to mean that the definition of "child" in the Wrongful Death of a Minor Act must precisely mirror the definition of "person" in our criminal-homicide laws. But the main opinions in Mack and Stinnett did not say that. Those opinions simply observed that it would be perverse for Alabama law to hold a defendant criminally liable for killing an unborn child while immunizing the defendant from civil liability for the same offense. The reason that such a result would be anomalous is because criminal liability is, by its nature, more severe than civil liability -- so the set of conduct that can support a criminal prosecution is almost always narrower than the conduct that can support a civil suit.[9]

The defendants flip that reasoning on its head. Instead of concluding that civil-homicide laws should sweep at least as broadly as criminal ones (as Mack and Stinnett reasoned), the defendants insist that the civil law can never sweep more broadly than the criminal law. That type of maneuver is not only illogical, it was rejected in Stinnett itself:

> "[Mack's] attempt to harmonize who is a 'person' protected from homicide under both the Homicide Act and Wrongful Death Act, however, was never intended to synchronize civil and criminal liability under those acts, or the defenses to such liability. Although we noted that it would be unfair for a tortfeasor to be subject to criminal punishment, but not civil liability, for fetal homicide, it simply does not follow that a person not subject to criminal punishment under the Homicide Act should not face tort liability under the Wrongful Death Act. This argument, followed to its logical conclusion, would prohibit wrongful-death actions arising from a tortfeasor's simple negligence, something we have never held to be criminally punishable but which often forms the basis of wrongful-death actions."

232 So. 3d at 215. As this passage from Stinnett makes clear, the definition of "person" in criminal-homicide law provides a floor for the definition of personhood in wrongful-death actions, not a ceiling. So even if it is true, as the defendants argue, that individuals cannot be convicted of criminal homicide for causing the death of extrauterine **embryos** (a question we have no occasion to reach), it would not follow that they must also be immune from civil liability for the same conduct.

3. The Defendants' Public-Policy Concerns Cannot Override Statutory Text

***8** Finally, the defendants and their amicus devote large portions of their briefs to emphasizing undesirable public-policy outcomes that, they say, will arise if this Court does not create an exception to wrongful-death liability for extrauterine children. In particular, they assert that treating extrauterine children as "children" for purposes of wrongful-death liability will "substantially increase the cost of IVF in Alabama" and could make cryogenic preservation onerous. Medical Association of the State of Alabama amicus brief at 42; see also Appellees' brief in appeal no. SC-2022-0515 at 36 (arguing that "costs and storage issues would be prohibitive").

[7] While we appreciate the defendants' concerns, these types of policy-focused arguments belong before the Legislature, not this Court. Judges are required to conform our rulings "to the expressions of the legislature, to the letter of the statute," and to the Constitution, "without indulging a speculation, either upon the impolicy, or the hardship, of the law." Priestman v. United States, 4 U.S. 28, 30 n.1, 4 Dall. 28, 1 L.Ed. 727 (1800) in the reporter's synopsis (1800) (Chase, J., writing for the federal circuit court).

Here, the text of the Wrongful Death of a Minor Act is sweeping and unqualified. It applies to all children, born and unborn, without limitation. It is not the role of this Court to craft a new limitation based on our own view of what is or is not wise public policy. That is especially true where, as here, the People of this State have adopted a Constitutional amendment directly aimed at stopping courts from excluding "unborn life" from legal protection. Art. I, § 36.06, Ala. Const. 2022.[10]

B. Negligence and Wantonness Claims

[8] The second question raised in these consolidated appeals is whether the trial court erred in dismissing the plaintiffs' common-law negligence and wantonness claims. As discussed above, both sets of plaintiffs made clear in their operative complaints that those claims were "alternative" theories pleaded only as a fallback in case this Court held that extrauterine children are not protected by the Wrongful Death of a Minor Act. Since we now hold that the Act does protect extrauterine children, the plaintiffs' alternative negligence and wantonness claims are moot, and we affirm the trial court's dismissal of those claims on that basis.

C. Remaining Issues

During oral argument in these cases, the defendants suggested that the plaintiffs may be either contractually or equitably barred from pursuing wrongful-death claims. In particular, the defendants pointed out that all the plaintiffs signed contracts with the Center in which their embryonic children were, in many respects, treated as nonhuman property: the Fondes elected in their contract to automatically "destroy" any **embryos** that had remained **frozen** longer than five years; the LePages chose to donate similar **embryos** to medical researchers whose projects would "result in the destruction of the **embryos**"; and the Aysennes agreed to allow any "abnormal **embryos**" created through IVF to be experimented on for "research" purposes and then "discarded." The defendants contended at oral argument that these provisions are fundamentally incompatible with the plaintiffs' wrongful-death claims.

***9** **[9]** If the defendants are correct on that point, then they may be able to invoke waiver, estoppel, or similar affirmative defenses. But those defenses have not been briefed and were not considered by the trial court, so we will not attempt to resolve them here. We are "a court of review, not a court of first instance." Henry v. White, 222 Ala. 228, 228, 131 So. 899, 899 (1931). The trial court remains free to consider these and any other outstanding issues on remand.

Conclusion

We reverse the trial court's dismissal of the plaintiffs' wrongful-death claims in both appeal no. SC-2022-0515 and appeal no. SC-2022-0579. Because the plaintiffs' alternative negligence and wantonness claims are now moot, we affirm the trial court's dismissal of those claims on that basis.

SC-2022-0515 — AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SC-2022-0579 — AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Wise and Bryan, JJ., concur.

Parker, C.J., concurs specially, with opinion.

Shaw, J., concurs specially, with opinion, which Stewart, J., joins.

Mendheim, J., concurs in the result, with opinion.

Sellers, J., concurs in the result in part and dissents in part, with opinion.

Cook, J., dissents, with opinion.

PARKER, Chief Justice (concurring specially).

A good judge follows the Constitution instead of policy, except when the Constitution itself commands the judge to follow a certain policy. In these cases, that means upholding the sanctity of unborn life, including unborn life that exists outside the womb. Our state Constitution contains the following declaration of public policy: "This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life." Art. I, § 36.06(a), Ala. Const. 2022 (adopted Nov. 6, 2018) (sometimes referred to as "the Sanctity of Unborn Life Amendment"). As noted in the main opinion, these cases involve unborn life -- a fact that no party in these cases disputes. Therefore, I take this opportunity to examine the meaning of the term "sanctity of unborn life" as used in § 36.06 and to explore the legal effect of the adoption of the Sanctity of Unborn Life Amendment as a constitutional statement of public policy.

I. Meaning of "Sanctity"

The Alabama Constitution does not expressly define the phrase "sanctity of unborn life." But because the parties have raised § 36.06 in their arguments, these cases call for us to interpret what this phrase means. The goal of constitutional interpretation is to discern the original public meaning, which is " 'the meaning the people understood a provision to have at the time they enacted it.' " Barnett v. Jones, 338 So. 3d 757, 767 (Ala. 2021) (Mitchell, J., joined by Parker, C.J., concurring specially) (citation and emphasis omitted). Constitutional interpretation must start with the text, but it also must include the context of the time in which it was adopted. Id.; see also Hagan v. Commissioner's Court of Limestone Cnty., 160 Ala. 544, 554, 49 So. 417, 420 (1909) (holding that the Alabama Constitution "must be understood and enforced according to the plain, common-sense meaning of its terms"); Antonin Scalia, A Matter of Interpretation 37 (new ed. 2018) ("In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation -- though not an interpretation that the language will not bear.").

***10** Helpful sources in interpretation include contemporaneous dictionaries, but the analysis must also "draw from deeper wells" instead of relying "solely on dictionaries." Gulf Shores City Bd. of Educ. v. Mackey, [Ms. 1210353, Dec. 22, 2022] —— So. 3d ——, ——, 2022 WL 17843037 (Ala. 2022) (Parker, C.J., concurring in part and concurring in the result). Such "deeper wells" include (1) the history of the period, (2) similar provisions in predecessor constitutions, (3) the records of the constitutional convention, inasmuch as they shed light on what the public thought, (4) the common law, (5) cases, (6) legal

treatises, (7) evidence of contemporaneous general public understanding, especially as found in other state constitutions and court decisions interpreting them, (8) contemporaneous lay-audience advocacy for (or against) its adoption, and (9) any other evidence of original public meaning, which could include corpus linguistics. Gulf Shores, —— So. 3d at —— (Parker, C.J., concurring in part and concurring in the result in part); Young Ams. for Liberty at Univ. of Alabama at Huntsville v. St. John, [Ms. 1210309, Nov. 18, 2022] —— So. 3d ——, ——, 2022 WL 17843037 (Ala. 2022) (Parker, C.J., concurring in part and concurring in the result); Barnett, 338 So. 3d at 766-67 (Mitchell, J., concurring specially).

Section 36.06 specifically recognizes the sanctity of unborn life. Nevertheless, the phrase "sanctity of unborn life" involves the same terms and concepts as the broader and more common phrase, "sanctity of life." Thus, the history and meaning of the phrase "sanctity of life" informs our understanding of "sanctity of unborn life" as that phrase is used in § 36.06.

At the time § 36.06 was adopted, "sanctity" was defined as: "1. holiness of life and character: GODLINESS; 2 a: the quality or state of being holy or sacred: INVIOLABILITY b *pl*: sacred objects, obligations, or rights." Merriam-Webster's Collegiate Dictionary 1100 (11th ed. 2003). Recent advocates of the sanctity of life have attempted to articulate the principle on purely secular philosophical grounds. See, e.g., John Keown, The Law and Ethics of Medicine 3 (2012); Neil M. Gorsuch, The Future of Assisted Suicide and Euthanasia 157-58 (2009) (arguing that "human life is fundamentally and inherently valuable" based on the "secular moral theory" that human life is a "basic good" that "ultimately comes not from abstract logical constructs (or religious beliefs)"). Such advocates have preferred to use the term "inviolability" rather than "sanctity" to avoid what one scholar calls "distracting theological connotations." Keown, supra, at 3. But even though "inviolability" is certainly a synonym of "sanctity" in that the meaning of the two words largely overlap, the two words cannot simply be substituted for each other because each word carries its own set of implications. When the People of Alabama adopted § 36.06, they did not use the term "inviolability," with its secular connotations, but rather they chose the term "sanctity," with all of its connotations.

This kind of acceptance is not foreign to our Constitution, which in its preamble "invok[es] the favor and guidance of Almighty God," pmbl., Ala. Const. 2022, and which declares that "all men ... are endowed [with life] by their Creator," Art. I, § 1, Ala. Const. 2022.[11] The Alabama Constitution's recognition that human life is an endowment from God emphasizes a foundational principle of English common law, which has been expressly incorporated as part of the law of Alabama. § 1-3-1, Ala. Code 1975 ("The common law of England ... shall ... be the rule of decisions, and shall continue in force ...."). In his Commentaries on the Laws of England, Sir William Blackstone declared that "[l]ife is the immediate gift of God, a right inherent by nature in every individual."[12] 1 William Blackstone, Commentaries on the Laws of England *125. He later described human life as being "the immediate donation of the great creator." Id. at *129.

***11** Only recently has the phrase "sanctity of life" been widely used as shorthand for the general principle that human life can never be intentionally taken without adequate justification. The phrase was first used in the modern bioethical debate by Rev. John Sutherland Bonnell as the title to his 1951 article opposing euthanasia: The Sanctity of Human Life. 8 Theology Today 194-201. Glanville Williams later employed the phrase in his groundbreaking book, The Sanctity of Life and the Criminal Law, in 1957. The common usage of this phrase has continued into the 21st century, referring to the view that all human beings bear God's image from the moment of conception. See, e.g., Manhattan Declaration: A Call of Christian Conscience (Nov. 20, 2009) (at the time of this decision, this document could be located at: https://www.manhattandeclaration.org) (referring multiple times to the "sanctity of life" in response to abortion).[13]

The phrase appeared only twice in our precedents before 2018. In 1982, Justice Faulkner used it to describe the argument that so-called "wrongful birth" actions should not be cognizable at law because the "sanctity of life" precluded them. Boone v. Mullendore, 416 So. 2d 718, 724 (Ala. 1982) (Faulkner, J., concurring specially). More recently, however, it was used in a 2014 special concurrence referring to this Court's decisions in Ex parte Ankrom, 152 So. 3d 397 (Ala. 2013), Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012), and Mack v. Carmack, 79 So. 3d 597 (Ala. 2011). Ex parte Hicks, 153 So. 3d 53, 72 (Ala. 2014) (Parker, J., concurring specially) ("This case presents an opportunity for this Court to continue a line of decisions affirming Alabama's recognition of the sanctity of life from the earliest stages of development. We have done so in three recent cases [Ankrom, Hamilton, and Mack]; we do so again today." (footnote omitted)).

But the principle itself -- that human life is fundamentally distinct from other forms of life and cannot be taken intentionally without justification -- has deep roots that reach back to the creation of man "in the image of God." Genesis 1:27 (King James). One 17th-century commentator has explained the significance of man's creation in God's image as follows:

> "[T]he chief excellence and prerogative of created man is in the image of his Creator. For while God has impressed as it were a vestige of himself upon all the rest of the creatures ... so that from all the creatures you can gather the presence and efficiency of the Creator, or as the apostle [Paul] says, you can clearly see his eternal power and divinity, yet only man did he bless with his own image, that from it you may recognize not only what the Creator is, but also who he is, or what his qualities are.
>
> "... God did this: (1) so that he might as it were contemplate and delight himself in man, as in a copy of himself, or a most highly polished mirror, for which reason his delights are said to be with the children of men. (2) So that he might, as much as can be done, propagate himself as it were in man.... (3) So that he would have on earth one who would know, love, and worship him and all that is his, which could not be obtained in the least apart from the image of God .... (4) So that he might have one with whom he would live most blessed for eternity, with whom he would converse as with a friend .... Therefore, so that God could eternally dwell and abide with man, he willed him to be in some manner similar to him, to bear his image ....
>
> "....
>
> "Therefore, the image of God in man is nothing except a conformity of man whereby he in measure reflects the highest perfection of God."

***12** 3 Petrus Van Mastricht, Theoretical-Practical Theology 282-85 (Joel R. Beeke ed., Todd M. Rester trans., Reformation Heritage Books 2021) (1698-99).[14]

Van Mastricht's assessment of the significance of man's creation in the image of God accords with that of Thomas Aquinas centuries earlier. Following Augustine, Aquinas distinguished human life from other things God made, including nonhuman life, on the ground that man was made in God's image.

> "As Augustine observes, man surpasses other things, not in the fact that God Himself made man, as though He did not make other things; since it is written, 'The work of Thy hands is the heaven,' and elsewhere, 'His hands laid down the dry land,' but in this, that man is made to God's image."

Thomas Aquinas, Summa Theologica First Part, Treatise on Man, Question 91, Art. 4 (Fathers of the English Dominican Province trans., Benziger Bros., Inc. 1947). Further, Aquinas explained that every man has the image of God in that he "possesses a natural aptitude for understanding and loving God," which imitates God chiefly in "that God understands and loves Himself." Id., First Part, Question 93, Art. 4. Thus, man's creation in God's image directs man to his last end, which is to know and love God. Id., Second Part, Question 1, Art. 8.

Man's creation in God's image is the basis of the general prohibition on the intentional taking of human life. See Genesis 9:6 (King James) ("Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man."). John Calvin, in expounding that text, explains:

> "For the greater confirmation of the above doctrine [of capital punishment for murder], God declares, that he is not thus solicitous respecting human life rashly, and for no purpose. Men are indeed unworthy of God's care, if respect be had only to themselves; but since they bear the image of God engraven on them, He deems himself violated in their person. Thus, although they have nothing of their own by which they obtain the favour of God, he looks upon his own gifts in them, and is thereby excited to love and to care for them. This doctrine, however, is to be carefully observed, that no one can be injurious to his brother without wounding God himself. Were this doctrine deeply fixed in our minds, we should be much more reluctant than we are to inflict injuries. Should any one object, that this divine image has been obliterated, the solution is easy; first, there yet exists some remnant of it, so that man is possessed of no small dignity; and secondly, the Celestial Creator himself, however corrupted man may be, still keeps in view the end of his original creation; and according to his example, we ought to consider for what end he created men, and what excellence he has bestowed upon them above the rest of living beings."

***13** John Calvin, Commentaries on the First Book of Moses Called Genesis 295-96 (John King trans., Calvin Translation Society 1847) (1554) (emphasis added). Likewise, the Geneva Bible, which was the "most popular book in colonial homes,"[15] includes a footnote to Genesis 9:6 that provides: "Therefore to kill man is to deface God's image, and so injury is not only done to man, but also to God." Genesis 9:6 n.2 (Geneva Bible 1599).

Finally, the doctrine of the sanctity of life is rooted in the Sixth Commandment: "You shall not murder." Exodus 20:13 (NKJV 1982). See John Eidsmoe, Those Ten Commandments: Why Won't They Just Go Away? 31 Regent U. L. Rev. 11, 15 (2018) (arguing that the Sixth Commandment is the basis for "Respect for Life" in Western law); see also Van Orden v. Perry, 545 U.S. 677, 686-90, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (discussing the impact of the Ten Commandments on America generally). Aquinas taught that "it is in no way lawful to slay the innocent" because "we ought to love the nature which God has made, and which is destroyed by slaying him." Aquinas, supra, Second Part of the Second Part, Treatise on Prudence and Justice, Question 64, Art. 6. Likewise, Calvin explained the reason for the Sixth Commandment this way: "Man is both the image of God and our flesh. Wherefore, if we would not violate the image of God, we must hold the person of man sacred." 2 John Calvin, Institutes of the Christian Religion 256 (Henry Beveridge trans., Hendrickson Publishers 2008) (1559). These and many similar writings, creeds, catechisms, and teachings have informed the American public's view of life as sacred.

In summary, the theologically based view of the sanctity of life adopted by the People of Alabama encompasses the following: (1) God made every person in His image; (2) each person therefore has a value that far exceeds the ability of human beings to calculate; and (3) human life cannot be wrongfully destroyed without incurring the wrath of a holy God, who views the destruction of His image as an affront to Himself. Section 36.06 recognizes that this is true of unborn human life no less than it is of all other human life -- that even before birth, all human beings bear the image of God, and their lives cannot be destroyed without effacing his glory.

II. Effect of Constitutional Policy

Having discussed the meaning of the phrase "sanctity of unborn life," I will briefly explore the legal effect of its inclusion in the Alabama Constitution as a statement of public policy. Again, I will start with the text. Section 36.06 provides, in relevant part:

> "(a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.
>
> "(b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate."

In 2018, the term "public policy" was a legal term that meant: "The collective rules, principles, or approaches to problems that affect the commonwealth or (esp.) promote the general good; specif., principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole society." Black's Law Dictionary 1426 (10th ed. 2014); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 73 (Thomson/West 2012) (noting that ordinary legal meaning governs instead of common meaning when the law is the subject). Notice that the dictionary does not just say that "public policy" is something like "whatever is in the best interests of Alabama," which really is for the Legislature and not this Court to decide. Instead, it refers to the collective rules, principles, or approaches to problems or principles and standards. Because this term refers to fixed standards and not subjective opinions of whatever serves the public good, this Court can look to this § 36.06 in appropriate cases to aid it in its decisions.

***14** When considering a question concerning "public policy," an Alabama judge is supposed to look to "the Constitution, the statutes, or definite principles of customary law which have been recognized and developed by the course of judicial decisions," such as the common law, but not "some considerations of policy which might properly have weight with the Legislature if it had occasion to deal with the question." Couch v. Hutchison, 2 Ala. App. 444, 447, 57 So. 75, 76 (1911). Thus, Alabama precedents

confirm that the Judiciary can look to the Constitution, statutes, and principles of customary law to determine what the public policy of this state is. It must not, however, usurp the role of the Legislature by attempting to guess what policy decision the Legislature might have made if it had considered other factors. That decision must be left for the Legislature itself.

Now that we know what "public policy" means, we must consider what effect it has on statutory interpretation. In one of its oldest decisions considering that question, this Court held: "It is not denied that where public policy or substantial justice obviously requires it, Courts should strongly incline to such liberal construction of the statute as will effect the object." Jones v. Watkins, 1 Stew. 81, 85 (Ala. 1827). However, in more modern times, this Court has repeatedly emphasized adherence to the plain language of the statute, and I agree with this approach. See generally Jay Mitchell, Textualism in Alabama, 74 Ala. L. Rev. 1089, 1100-10 (2023). Consequently, I believe that, ordinarily, this Court may consider public policy in statutory interpretation only if (1) there is substantial doubt about the meaning of the statute and (2) the precepts of public policy and jurisprudence to which we look are settled. Ex parte Z.W.E., 335 So. 3d 650, 660 (Ala. 2021) (Parker, C.J., concurring in the result) (citing Old Republic Ins. Co. v. Lanier, 644 So. 2d 1258, 1260-62 (Ala. 1994); Allgood v. State, 20 Ala. App. 665, 667, 104 So. 847, 848 (1925); 82 C.J.S. Statutes § 472 (2009); 73 Am. Jur. 2d Statutes § 91 (2012)). Thus, I agree with the main opinion that, if the Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975, were ambiguous, then the Sanctity of Unborn Life Amendment would resolve the matter in favor of the plaintiffs.

But a special problem arises when the People of Alabama enshrine a specific statement of public policy in their Constitution. Instead of gleaning bits and pieces of the state's public policy from the Constitution, statutes, common law, and precedents, the People of Alabama explicitly told the Legislature, the Executive, and the Judiciary what they are supposed to do. Ordinarily, we resort to public-policy considerations in statutory interpretation as a last resort, so that the Judiciary does not usurp the role of the Legislature. But in this case, the People explicitly told all three branches of government what they ought to do. See The Federalist No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that "the power of the people is superior to both" the judicial and legislative powers). Consequently, as Alexander Hamilton wrote in The Federalist No. 78, "where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former." Id. Thus, as a constitutional statement of public policy, § 36.06 circumscribes the Legislature's discretion to determine public policy with regard to unborn life. Accordingly, any legislative (or executive) act that contravenes the sanctity of unborn life is potentially subject to a constitutional challenge under the Alabama Constitution.

Putting this all together, § 36.06 does much more than simply declare a moral value that the People of Alabama like. Instead, this constitutional provision tilts the scales of the law in favor of protecting unborn life. Although § 36.06 may not resolve every case involving unborn life, if reasonable minds could differ on whether a common-law rule, a statute, or even a constitutional provision protects life, § 36.06 instructs the Alabama government to construe the law in favor of protecting the unborn. Furthermore, to exclude the unborn from § 36.06's protection, the Legislature would have to do so very clearly and for a reason that is consistent with upholding the sanctity of life.

***15** Justice Cook argues in his dissent that applying § 36.06 and the Wrongful Death of a Minor Act to **frozen embryos** will have disastrous consequences for the in vitro fertilization ("IVF") industry in Alabama. Although it is for the Legislature to decide how to address this issue, I note briefly that many other Westernized countries have adopted IVF practices or regulations that allow IVF to continue while drastically reducing the chances of **embryos** being killed, whether in the creation process, the implantation process, the **freezing** process, or by willful killing when they become inconvenient. For decades, IVF has been largely unregulated in the United States, with some commentators even comparing it to the Wild West. See, e.g., Alexander N. Hecht, The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology, 1 Hous. J. Health L. & Pol'y 227, 228 (2001) ("Unfortunately, this industry remains largely unregulated. The near-absence of federal and state law combined with ineffective and unheeded industry guidelines leads to a lawless free-for-all." (footnotes omitted)); see also Myrisha S. Lewis, The American Democratic Deficit in Assisted Reproductive Technology Innovation, 45 Am. J. L. & Med. 130, 144 & n.77 (2019) (noting that IVF in the United States is still unregulated and that commentators are still comparing it to the Wild West). In Alabama, the only statutes that mention IVF address the issue of determining parentage of children conceived through IVF, but they do not govern the practice of IVF itself. See The Alabama Uniform Parentage Act, § 26-17-101 et seq., Ala. Code

1975. And the only administrative regulation of IVF in Alabama governs IVF clinics' use of radioactive materials, but not any other IVF practice. Ala. Admin. Code (State Bd. Of Health, Dep't of Pub. Health), r. 420-3-26-.02. If the Legislature agrees that it is time to regulate the IVF industry, then the good news is it need not reinvent the wheel. Other Westernized countries have given Alabama some examples to consider.

For instance, in Australia and New Zealand, prevailing ethical standards dictate that physicians usually make only one **embryo** at a time.[16] On the related issue of **embryo** transfers, which is the process of implanting the **embryos** into the uterus,[17] in Australia and New Zealand over 90% of **embryo** transfers occur only one at a time.[18] Likewise, European Union ("EU") countries set a legal limit on the number of **embryos** transferred in a single cycle.[19] In EU countries, 58% of **embryo** transfers involve just one **embryo**, and 38% involve two; thus, 96% of **embryo** transfers in EU countries involve two or fewer transfers at one time.[20] Such limitations on **embryo** creation and transfer necessarily reduce or eliminate the need for storing **embryos** for extended lengths of time. Italy went one step further, banning cryopreservation of **embryos** except when a bona fide health risk or force majeure prevented the **embryos** from being transferred immediately after their creation.[21] All of these measures protect the lives of the unborn and still allow couples to become parents. Therefore, although certain changes to the IVF industry's current creation and handling of **embryos** in Alabama will result from this decision, to the extent that Justice Cook is predicting that IVF will now end in Alabama, that prediction does not seem to be well-founded.

***16** These regulations adopted by other countries seem much more likely to comport with upholding the sanctity of life than the prevailing practice of creating and transferring at once many **embryos** that have little chance of survival and then throwing **embryos** away after a while. The American states, unfortunately, have not followed the example of other Westernized countries that have regulations that achieve both the protection of life and the promotion of parenthood. Ultimately, however, it is for the Legislature to decide how the IVF industry can help parents have children. The Legislature is free to do so in any way it decides, provided that it comports with the Alabama Constitution, including the Sanctity of Unborn Life Amendment.[22]

III. Conclusion

In application to these cases, the contentions of the defendants and their amicus are not sustainable in light of the Sanctity of Unborn Life Amendment. The People of Alabama have declared the public policy of this State to be that unborn human life is sacred. We believe that each human being, from the moment of conception, is made in the image of God, created by Him to reflect His likeness. It is as if the People of Alabama took what was spoken of the prophet Jeremiah and applied it to every unborn person in this state: "Before I formed you in the womb I knew you, Before you were born I sanctified you." Jeremiah 1:5 (NKJV 1982). All three branches of government are subject to a constitutional mandate to treat each unborn human life with reverence. Carving out an exception for the people in this case, small as they were, would be unacceptable to the People of this State, who have required us to treat every human being in accordance with the fear of a holy God who made them in His image. For these reasons, and for the reasons stated in the main opinion, I concur.

SHAW, Justice (concurring specially).
I concur fully in the main opinion. I write specially to note the following.

I agree with the main opinion that the meaning of the word "child" for purposes of Alabama law is well settled and includes an unborn child. Thus, for purposes of the Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975 ("the Wrongful Death Act"), the term "minor child" includes an unborn child with no distinction between in vitro or in utero.

In prior cases determining whether an unborn child is a "minor child" for purposes of the Wrongful Death Act, this Court has referenced the definition of a "person" found in § 13A-6-1(3), Ala. Code 1975, which in turn applies to certain portions of the

criminal code. The main opinion thoroughly explains why this criminal-law definition does not limit the determination whether an in vitro **embryo** is a "minor child" for purposes of a civil-law action under the Wrongful Death Act.

I do not believe that any purported prior common-law rule requires a different result.

> "The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the Legislature."

§ 1-3-1, Ala. Code 1975 (emphasis added). The language of this Code section is plain: the common law does not apply when it is inconsistent with the Constitution, laws, and institutions of this state. The legislature may always alter the common law, but this Code section does not provide that the common law, if inconsistent with the above, remains in place unless altered by the legislature. As one Justice has explained:

> "This statute does not provide that 'the common law of England shall be the rule of decisions in Alabama unless changed by the legislature.' On the contrary, it provides that the common law of England shall be the rule of decisions in this State, so far as the common law is not inconsistent with the constitution, the laws, and the institutions of Alabama."

***17** Swartz v. United States Steel Corp., 293 Ala. 439, 446-47, 304 So. 2d 881, 887 (1974) (Faulkner, J., concurring specially).

In the context of civil law, the legislature, the constitution, and this Court's decisions have collectively repealed the common law's prohibition on wrongful-death actions, § 6-5-391; protected the rights of the unborn, Ala. Const. 2022, Art. I, § 36.06(b) ("[I]t is the public policy of this state to ensure the protection of the rights of the unborn child ...."); and eliminated the common law's prohibition on seeking a civil remedy for injuries done to the unborn, Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972), and Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012). If, after this, the common law does not allow wrongful-death actions for some unborn children when they are injured -- here, based on their physical location -- that rule must be consistent with the Constitution, laws, and institutions of this state. Whether such rule is in fact consistent, we can respectfully disagree. But if it is inconsistent, then it need not be first altered or repealed by the legislature.

It can scarcely be argued that science is not outdistancing the law in various areas, especially in the context of human reproduction. Creating and sustaining life outside a woman's womb is nothing less than the stuff of miracles. The overriding public policy of this state recognizes and supports the sanctity of unborn life and the rights of unborn children, including the right to life, and requires the protection of the rights of the unborn child "in all manners and measures lawful and appropriate." § 36.06(b). The people of Alabama, apparently recognizing that advancements in reproductive science necessarily come with concomitant responsibilities, have bound all three branches of our state government to this policy, and, in my view, the enactments of the Alabama Legislature are consistent with it.

Stewart, J., concurs.

MENDHEIM, Justice (concurring in the result).

Over the course of time, previous cases from this Court have applied the protection afforded to a "minor child" in subsection (a) of § 6-5-391, Ala. Code 1975, the Wrongful Death of a Minor Act, to human lives at earlier and earlier stages of development. In Stanford v. St. Louis-San Francisco Railway Co., 214 Ala. 611, 108 So. 566 (1926), this Court, construing a predecessor to § 6-5-391(a),[23] held that a "parental injury before the birth is no basis for action in damages by the child or its personal representative." Birmingham Baptist Hosp. v. Branton, 218 Ala. 464, 467, 118 So. 741, 743 (1928) (citing Stanford). However, in Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972), "[t]he Court concluded that the term 'minor child' in the predecessor to § 6-5-391(a) [Title 7, § 119, Ala. Code 1940 (Recomp. 1958),] included an unborn child who was viable at the time of a prenatal injury, who thereafter was born alive, but who later died. 289 Ala. at 55, 265 So. 2d at 596." Mack v. Carmack, 79 So. 3d 597, 601 (Ala. 2011). The Court pushed the boundary back again in Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 758 (1973), in which the Court "concluded that [a] father could maintain an action for the wrongful death of his unborn child even though

the injuries that allegedly caused the death occurred before the fetus became viable." Mack, 79 So. 3d at 604. A year later, in Eich v. Town of Gulf Shores, 293 Ala. 95, 100, 300 So. 2d 354, 358 (1974), the Court held that "the parents of an eight and one-half month old stillborn fetus [were] entitled to maintain an action for the wrongful death of the child." The Court stepped back from those broader applications of protection in Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993), and Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993), concluding that "the Wrongful Death [of a Minor] Act did not permit recovery for the death of a fetus that occurs before the fetus attains viability." Mack, 79 So. 3d at 606. But, several years later in Mack, the Court returned to its understanding of the Wrongful Death of a Minor Act espoused in Wolfe, holding that "the Wrongful Death [of a Minor] Act permits an action for the death of a previable fetus." Mack, 79 So. 3d at 611. In Hamilton v. Scott, 97 So. 3d 728, 735 (Ala. 2012), the Court reaffirmed its conclusion from Mack, stating that "Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child, even when the child dies before reaching viability."

***18** The foregoing history of previous decisions concerning the Wrongful Death of a Minor Act, and the fact that the pertinent language in the Act has not been amended since its enactment in 1872, shows that this Court, rather than the Legislature, has taken the lead in shaping when the protection afforded by the Act may be invoked. See Eich, 293 Ala. at 100, 300 So. 2d at 358 (describing that decision as one in which the Court was "again extending out judicial prerogative as was done in Huskey and Wolfe ...."). Because of that, and because the terms "child" and "minor child" in § 6-5-391(a) are not further defined in the Wrongful Death of a Minor Act, I agree with the main opinion that the Act can be construed to include **frozen embryos** produced through in vitro fertilization ("IVF"). For those reasons, I concur in the result reached today that reverses the trial court's dismissal of the plaintiffs' wrongful-death claims.

However, I have misgivings about the reasoning and some of the comments contained in the main opinion. The main opinion begins its analysis by observing that "[t]he parties to these cases have raised many difficult questions," but it insists throughout that applying the protection of § 6-5-391(a) to **frozen embryos** is not one of those difficulties because "existing black-letter law" dictates our answer to the central question. —— So. 3d at ——. Indeed, the main opinion states that the text of § 6-5-391(a) is "clear" and that there is no ambiguity as to whether its protection applies to **frozen embryos**. —— So. 3d at ——.

> "Too often, a court's conclusion that statutory language is 'plain' is a substitute for careful analysis. At best, such unexplained conclusions are based on a judge's gestalt sense of the best meaning of the words in question. At worst, the bare insistence that statutory language is 'plain' is cover (perhaps subconscious) for judicial policymaking."

Carranza v. United States, 267 P.3d 912, 916 (Utah 2011) (opinion of Lee, J., joined by one other Justice).

In my judgment, the main opinion's view that the legal conclusion is "clear" and "black-letter law" is problematic because when the Wrongful Death of a Minor Act was first enacted in 1872, and for 100 years thereafter, IVF was not even a scientific possibility. Likewise, although it may be true that "the phrase 'minor child' ... in everyday parlance" has long included an "unborn child," the main opinion fails to acknowledge that, at the time the Wrongful Death of a Minor Act was enacted -- and long thereafter -- the term "unborn child" was only understood to refer to a child within its mother's womb.[24] —— So. 3d at ——.

***19** The main opinion's contention that "[t]he central question presented in these consolidated appeals ... is whether the [Wrongful Death of a Minor] Act contains an unwritten exception to th[e] rule" that the Act "allows parents of a deceased child to recover punitive damages for their child's death" is similarly simplistic. —— So. 3d at ——. The defendants have never argued for an "exception" to the Wrongful Death of a Minor Act. The main opinion reaches that conclusion by implication -- simply assuming that the term "minor child" includes **frozen embryos** -- a wholesale adoption of the plaintiffs' argument. See Appellants' brief in appeal no. SC-2022-0515, p. 19 (contending that the "[d]efendants' arguments ... create an exception to existing Alabama law so that not all embryonic lives are treated equally under the law").

The main opinion then goes on in Part A.2. of its analysis to provide reasons why this Court's many pronouncements about "congruence" between Alabama's wrongful-death statutes and its criminal-homicide statutes[25] do not dictate importing the definition of the term "person" in § 13A-6-1(a)(3), Ala. Code 1975, into § 6-5-391(a). The reasoning in that portion of the main opinion also strikes me as strained given the history behind our wrongful-death statutes.

As this Court has observed numerous times, there was no right of action for wrongful death at common law. See, e.g., Ex parte Bio-Med. Applications of Alabama, Inc., 216 So. 3d 420, 422 (Ala. 2016) (" ' "A wrongful death action is purely statutory; no such action existed at common law." ' " (quoting Ex parte Hubbard Props., Inc., 205 So. 3d 1211, 1213 (Ala. 2016), quoting in turn Waters v. Hipp, 600 So. 2d 981, 982 (Ala. 1992))); Giles v. Parker, 230 Ala. 119, 121, 159 So. 826, 827 (1935) ("There is no civil liability, under the common law, as interpreted in this jurisdiction, against one who wrongfully or negligently causes the death of a human being; and hence no right of action exists under the common law therefor. The right of action is purely statutory."); Kennedy v. Davis, 171 Ala. 609, 611-12, 55 So. 104, 104 (1911) ("It has been decided and many times reaffirmed by this court that actions under [the wrongful-death statutes] are purely statutory. There was no such action or right of action at common law."). This was also true for the wrongful death of a minor child. See White v. Ward, 157 Ala. 345, 349, 47 So. 166, 167 (1908) ("There was no right of action at the common law for the death of the child.... The right to recover damages for its death is therefore purely statutory.").

The reasons for the common-law prohibition appear to have been based on two legal concepts.

> "The effect to be given the death of a person connected with a tort rests almost entirely upon statutory foundations. The common-law limitations that eventually led to legislative reform were twofold. First was the rule that personal tort actions die with the person of either the plaintiff or the defendant. This limitation is expressed by the maxim, actio personalis moritur cum persona, which has roots deep in the early history of English law. The second limitation was that the death of a human being was not regarded as giving rise to any cause of action at common law on behalf of a living person who was injured by reason of the death. This latter is of more recent origin as a distinct proposition, although it doubtless rests in part on the same considerations that underlie the other and older maxim of actio personalis moritur cum persona."

Wex S. Malone, The Genesis of Wrongful Death, 17 Stan. L. Rev. 1043, 1044 (1965) (footnotes omitted).[26] Our wrongful-death statutes sought to remedy that erroneous legal thinking. See, e.g., Suell v. Derricott, 161 Ala. 259, 262, 49 So. 895, 897 (1909) ("Statutes like ours were clearly intended to correct what was deemed a defect of the common law, that the right of action based on a tort or injury to the person died with the person."); King v. Henkie, 80 Ala. 505, 509 (1886) ("The purpose of this, and like legislation, was clearly to correct a defect of the common law, by a rule of which it was well settled, that a right of action based on a tort or injury to the person, died with the person injured. Under the maxim, 'Actio personalis moritur cum persona,' the personal representative of a deceased person could maintain no action for loss or damage resulting from his death.").

***20** The close connection between Alabama's wrongful-death statutes and its criminal-homicide statutes was reflected in the first wrongful-death statute, Act No. 62, Ala. Acts 1871-72, p. 83, which was titled "AN ACT To prevent homicides," and their shared purpose has been repeatedly noted in our cases. See, e.g., Stinnett v. Kennedy, 232 So. 3d 202, 215 (Ala. 2016) (noting "the shared purpose of the Wrongful Death Act and the Homicide Act to prevent homicide"); Ex parte Bio-Med. Applications, 216 So. 3d at 424 (" '[The wrongful-death] statute authorizes suit to be brought by the personal representative for a definite legislative purpose -- to prevent homicide.' " (quoting Hatas v. Partin, 278 Ala. 65, 68, 175 So. 2d 759, 761 (1965))); Eich, 293 Ala. at 100, 300 So. 2d at 358 ("[T]he pervading public purpose of our wrongful death statute ... is to prevent homicide through punishment of the culpable party and the determination of damages by reference to the quality of the tortious act...."); Huskey, 289 Ala. at 55, 265 So. 2d at 597 ("One of the purposes of our wrongful death statute is to prevent homicides.") Thus, it seems logical to me for there to be a correlation between the persons protected under Alabama's wrongful-death statutes and the persons protected under Alabama's criminal-homicide statutes.

The main opinion is correct that the protection afforded in a civil law certainly can be broader than its corollary in criminal law, but nothing requires the civil law to be read more broadly, particularly given the absence of legislative action on this subject.[27]

Moreover, I find it interesting that the Human Life Protection Act, § 26-23H-1 et seq., Ala. Code 1975, which was enacted in 2019 -- well after the Brody Act, which amended § 13A-6-1 of our criminal-homicide statutes, (and also after the Sanctity of Unborn Life Amendment, i.e., Art. I, § 36.06, Ala. Const. 2022) -- defines an "unborn child" exactly the same way the Brody

Act defines a "person": "A human being, specifically including an unborn child in utero at any stage of development, regardless of viability." § 26-23H-3(7), Ala. Code 1975. In its amicus curiae brief, the Alabama Medical Association states:

> "[D]uring the debate on the Alabama Senate floor regarding the Human Life Protection Act, Senator Clyde Chambliss, the Bill's sponsor in the Alabama Senate, confirmed that the 'in utero' language in the Act was intentional, since it was not the intent of the Legislature through this Act to impact or prevent the destruction of fertilized in vitro eggs because in those circumstances, the woman is not pregnant. Likewise, Eric Johnston, president of the Alabama Pro-Life Coalition and one of the individuals who helped draft the Human Life Protection bill, stated in an interview with the Washington Post that the Bill would 'absolutely not' impact in vitro fertilization. Mr. Johnston gave this statement in response to the ACLU's misguided suggestion that the Act might affect in vitro fertilization."

***21** Alabama Medical Association's brief, pp. 30-31 (footnotes omitted). I fully realize that such legislative history is not persuasive for purposes of statutory interpretation, but that history should give us pause regarding any kind of expansive interpretation of the Brody Act.

I also take issue with a hypothetical employed by the main opinion to support the decision. Despite asserting at the outset of its analysis that "the Court today need not address" questions such as "the application of the 14th Amendment to the United States Constitution to [IVF] children," —— So. 3d at ——, the main opinion nonetheless proceeds to share -- and implicitly agree with -- a hypothetical posited by the plaintiffs that purports to implicate the Equal Protection Clause of the 14th Amendment.[28] The main opinion asserts that "one latent implication" of the defendants' interpretation of § 6-5-391(a) is that

"even a full-term infant or toddler conceived through IVF and gestated to term in an in vitro environment would not qualify as a 'child' or 'person,' because such a child would both be (1) 'unborn' (having never been delivered from a biological womb) and (2) not 'in utero.' And if such children were not legal 'children' or 'persons,' then their lives would be unprotected by Alabama law."

—— So. 3d at —— (footnote omitted).

First, in mentioning the foregoing hypothetical, the main opinion ignores the fact that it is not now -- or for the foreseeable future -- scientifically possible to develop a child in an artificial womb so that such a scenario could somehow unfold.[29] Second, the main opinion's choice to include that emotionally charged hypothetical undermines its earlier observation that "[a]ll parties to these cases, like all members of this Court, agree that an unborn child is a genetically unique human being whose life began at fertilization and ends at death."[30] —— So. 3d at ——. No one -- not Mobile Infirmary Association, the Center for Reproductive Medicine, the amicus Alabama Medical Association, my dissenting colleagues, or anyone who disagrees with today's Court's decision -- is suggesting that such a child, if he or she could be produced, should not be protected by Alabama law.

***22** Ultimately, as I stated at the outset, we must be guided by the language provided in the Wrongful Death of a Minor Act and the manner in which our cases have interpreted it. Under those guideposts, today's result is correct. However, the decision undoubtedly will come as a shock in some quarters of the State. I urge the Legislature to provide more leadership in this area of the law given the numerous policy issues and serious ethical concerns at stake,[31] and the fact that there is little regulation of the entire IVF industry.[32] Ultimately, it is the Legislature that possesses the constitutional authority and responsibility to be the final arbiter concerning whether a **frozen embryo** is protected by the laws of this State. Without such guidance, I fear that there could be unfortunate consequences stemming from today's decision that no one intends.

SELLERS, Justice (concurring in the result in part and dissenting in part).

***23** These cases are not about when life begins, nuances of statutory construction, or the definition of "minor child" or "person." And, contrary to the main opinion, there is no black-letter law in Alabama, or any other state, to help us.[33] Regrettably, these cases use the specter of destroying human life to craft a narrative involving the protection of unborn children to cynically inflame worries about the sanctity of life under Alabama law.

In reality, these cases concern nothing more than an attempt to design a method of obtaining punitive damages under Alabama's Wrongful Death of a Minor Act, § 6-5-391, Ala. Code 1975, by concluding that **frozen embryos**, negligently destroyed, are entitled to the same protections as a fetus inside a mother's womb. Parsing the Brody Act, Act No. 2006-419, Ala. Acts 2006, codified as § 13A-6-1, Ala. Code 1975 (which is a part of Alabama's criminal-homicide statutes), and employing any sequence of linguistic gymnastics, cannot yield the conclusion that **embryos** developed through in vitro fertilization were intended by the legislature to be included in the definition of "person," see § 13A-6-1(a)(3), much less the definition of "minor child," see § 6-5-391(a). It is clear from the four corners of the Brody Act that the legislative intent was to protect unborn life, regardless of viability, from violence perpetrated against the mother. Previously, to impose criminal sanctions for the murder of an unborn child was impossible. See Act No. 77-607, § 2001(2), Ala. Acts 1977 (amended in 2006 by the Brody Act) (" 'Person,' when referring to the victim of a criminal homicide, means a human being who had been born and was alive at the time of the homicidal act." (emphasis added)). The Brody Act eliminated not only this born-alive requirement but also any viability threshold to create the bright-line rule that, if a woman is pregnant, an **embryo** in utero receives all the protections that a viable life would be afforded under the laws of Alabama. See § 13A-6-1(a)(3). Thus, and in light of Justice Houston's special writings in Gentry v. Gilmore, 613 So. 2d 1241, 1245 (Ala. 1993) (Houston, J., concurring in the result), and Lollar v. Tankersley, 613 So. 2d 1249, 1253 (Ala. 1993) (Houston, J., concurring in the result), which "emphasized the need for congruence between the criminal law and our civil wrongful-death statutes," Mack v. Carmack, 79 So. 3d 597, 611 (Ala. 2011), this Court held "that the Wrongful Death [of a Minor] Act permits an action for the death of a previable fetus." Id.

But interpreting the Brody Act as we are asked to do here is a judgment call. In short, we must determine whether to constrain ourselves to the clear intent of the Act or whether to inform our interpretation using extraneous means to reach a result clearly contrary to anything the Act ever intended. The majority's conclusion that an action may be maintained under the Wrongful Death of a Minor Act for the negligent destruction of an in vitro **embryo** -- an atextual conclusion purportedly reached by utilizing the Brody Act's definition of "person" to inform the Wrongful Death of a Minor Act's definition of "minor child" -- is clearly contrary to the intent of the legislature. To equate an **embryo** stored in a specialized freezer with a fetus inside of a mother is engaging in an exercise of result-oriented, intellectual sophistry, which I am unwilling to entertain.

***24** Furthermore, I am puzzled by the majority and concurring opinions' references to Article I, § 36.06, of the Alabama Constitution of 2022. We have repeatedly stated that " '[a] court has a duty to avoid constitutional questions unless essential to the proper disposition of the case.' " Lowe v. Fulford, 442 So. 2d 29, 33 (Ala. 1983) (quoting trial court's order citing other cases). The majority believes the word "child" is unambiguous, yet it opines in dicta, without any citation to authority, that if the word "child" were ambiguous, § 36.06 acts "as a constitutionally imposed canon of construction, directing courts to construe ambiguous statutes in a way that 'protect[s] ... the rights of the unborn child' equally with the rights of born children." —— So. 3d at ——. Respectfully, § 36.06 neither operates in such a fashion nor commands this Court to override legislative acts it believes "contraven[e] the sanctity of unborn life." —— So. 3d at —— (Parker, C.J., concurring specially). Section 36.06 states, in relevant part, "that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." § 36.06(b). Because all policy determinations are vested in our legislature, this includes those determinations regarding the sanctity of unborn life. Therefore, § 36.06 merely reaffirms that "the judicial branch may not exercise the legislative or executive power." Art. III, § 42(c), Ala. Const. 2022. Accordingly, this Court has no authority to determine whether legislation concerning or relating to unborn life defies § 36.06; that authority lies only with the People of this State, acting through their elected representatives.

Any public-policy ramifications of any decision in these cases are outside the purview of this Court, and they are more appropriately reserved for the legislature. Should the legislature wish to include in vitro **embryos** in the definition of "minor child," it may easily do so. Absent any specific legislative directive, however, we should not read more into a legislative act than the legislature did so itself. Thus, as to the majority opinion's conclusion regarding the Wrongful Death of a Minor Act, I respectfully dissent.

Insofar as the majority opinion affirms the trial court's dismissal of the plaintiffs' negligence and wantonness claims, I concur in the result. I must necessarily disagree with the majority opinion's mootness rationale on account of my dissent as to the majority opinion's analysis and conclusion regarding the Wrongful Death of a Minor Act.

COOK, Justice (dissenting).

I respectfully dissent. The first question that this Court is being asked to decide in these appeals is whether Alabama's Wrongful Death of a Minor Act ("the Wrongful Death Act"), see § 6-5-391, Ala. Code 1975, as passed by our Legislature, provides a civil cause of action for money damages for the loss of **frozen embryos**. This is a question of the meaning of the words in that Act, as it was originally passed and understood in 1872.

My sympathy with the plaintiffs and my deeply held personal views on the sanctity of life cannot change the meaning of words enacted by our elected Legislature in 1872. Even when the facts of a case concern profoundly difficult moral questions, our Court must stay within the bounds of our judicial role.

Limiting our role to interpreting the existing words in a statute and letting the Legislature decide changes is one of the basic teachings of the United States Supreme Court's recent decision in Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022). In that case, the United States Supreme Court overruled Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and returned the hotly disputed issue of abortion to the citizens in each state, so that their elected representatives could pass laws addressing that issue. In concluding that the authority to regulate abortion "must be returned to the people and their elected representatives," the Supreme Court in Dobbs explained that "respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance." 597 U.S. at 292 and 302, 142 S.Ct. 2228. The Supreme Court further explained that it " 'has neither the authority nor the expertise to adjudicate those disputes' " and that " 'courts do not substitute their social and economic beliefs for the judgment of legislative bodies.' " Id. at 289, 142 S.Ct. 2228 (quoting Ferguson v. Skrupa, 372 U.S. 726, 729-30, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963)).

Over the years, our Court has repeatedly said the same thing. Specifically, our Court has made clear that we are "not at liberty to rewrite statutes or to substitute [our] judgment for that of the Legislature." Ex parte Carlton, 867 So. 2d 332, 338 (Ala. 2003). Further, our Court has repeatedly made clear that "public-policy arguments should be directed to the legislature, not to this Court." Ex parte Ankrom, 152 So. 3d 397, 420 (Ala. 2013) (emphasis added).

Statutes Do Not Evolve. The Legislature Amends Them.

***25** On rare occasions, our Court's decisions have included language that departed from the rule that the Legislature -- and not this Court -- updates statutes. For example, in Eich v. Town of Gulf Shores, 293 Ala. 95, 99, 300 So. 2d 354, 357 (1974), this Court wrote that "it is often necessary to breathe life into existing laws less they become stale and shelfworn" "in order that existing law may become useful law to promote the ends of justice." This is both dicta and fundamentally wrong.

It is not our role to expand the reach of a statute and "breathe life" into it by updating or amending it. It is also not our role to consider whether a law has become "stale" or "shelfworn."[34] This is the same error made by those commentators who advocate for a living constitution and argue that the words in our Constitution should evolve over time.[35]

Instead, it is the role of the Legislature to determine whether a law is outdated (for instance, because of new technology) and, thus, requires updating. If our Court does "breathe life" into a law by expanding its reach, we short-circuit the legislative process and violate the Alabama Constitution's separation-of-powers clause. That clause provides that, "[t]o the end that the government of the State of Alabama may be a government of laws and not of individuals, ... the judicial branch may not exercise the legislative or executive power." Ala. Const. 2022, Art. III, § 42(c). Substituting our own meaning "turn[s] this Court into

a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers." DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 276 (Ala. 1998).

Separation of powers is part of our Constitution for a reason -- there are real advantages to the Legislature -- and not this Court -- making such decisions. See Jay Mitchell, Textualism in Alabama, 74 Ala. L. Rev. 1089, 1097 (2023) (explaining that "[t]here is a reason that the people elected legislators to formulate public policy, and there is every reason to think they are better at it and better situated to be accountable for their choices than judges are" (emphasis in original)). In fact, the drafters of the Alabama Constitution felt the separation-of-powers principle was so important that they made it an express clause in our Constitution, whereas the drafters of the Constitution of the United States did not.[36] The facts of these cases certainly illustrate why the Legislature is best suited to weigh competing interests and write comprehensive legislation, after full input from the public and thorough study.

Why I Dissent

***26** I dissent because the main opinion violates this fundamental principle -- that is, that the legislative branch and not the judicial branch updates laws -- by expanding the meaning of the Wrongful Death Act beyond what it meant in 1872 without an amendment by the Legislature. I also dissent because I believe the main opinion overrules our recent Wrongful Death Act caselaw that requires "congruence" between the definition of "person" in Alabama's criminal-homicide statutes and the definition of "minor child" in the Wrongful Death Act. Both the original public meaning and this recent caselaw indicate the same result here -- that the Wrongful Death Act does not address **frozen embryos**.

Moreover, there are other significant reasons to be concerned about the main opinion's holding. No court -- anywhere in the country -- has reached the conclusion the main opinion reaches. And, the main opinion's holding almost certainly ends the creation of **frozen embryos** through in vitro fertilization ("IVF") in Alabama. The plaintiffs themselves explained in oral argument:

> "But today we're here advocating on behalf of plaintiffs who are supporters of in vitro fertilization. It worked for them. They have two beautiful children in each family because of in vitro fertilization. The notion that they would do anything to hinder or impair the right or access to IVF therapy is flat wrong. That's not why we're here."

Supreme Court of Alabama, Supreme Court O/A Mobile Alabama, YouTube 19:14 (Sep. 21, 2023) (at the time of this decision, this oral-argument session could be located at: https://www.youtube.com/watch?v=L08KGhNSDME) (emphasis added). It is not my role to judge whether ending this medical procedure is good or bad -- but it doubtless will have a huge impact on many Alabamians. And it underscores the need to have the Legislature -- not this Court -- address these issues through the legislative process.

In addition to the reasons stated above, I also dissent because the main opinion does not reach the second question presented in these appeals -- that is, whether the trial court prematurely dismissed the plaintiffs' negligence and wantonness claims at the pleading stage. Those claims present an alternative pathway to protect **frozen embryos**, a pathway without many of the problems presented by the Wrongful Death Act claims.

There is no dispute in these cases about when life begins. All parties agree on that issue. I specifically asked the defendants at oral argument: "[s]o, is it your position that ... these were lives?" And they responded: "It is, Justice Cook. I think that the ... **embryo** is a life, but the issue today is whether an **embryo** is a child protected under the [Wrongful Death Act]." Supreme Court of Alabama, Supreme Court O/A Mobile Alabama, YouTube 1:17:49 (Sep. 21, 2023).

The defendants nevertheless present a "catch-22" argument in support of the dismissal of those claims. On the one hand, they allege that the plaintiffs' wrongful-death claims were properly dismissed because their **frozen embryos** are not "minor children" under the Wrongful Death Act. On the other hand, they allege that the trial court properly dismissed the plaintiffs' negligence

and wantonness claims because their **frozen embryos** each represent "a life." I am deeply troubled by this argument and the consequences that could result from adopting this position.

However, as explained below, there is no need for this Court to reach this "catch-22" argument at this time because it is simply too soon to dismiss those claims under Alabama's liberal pleading rules. It is for this reason that I would reverse the trial court's dismissal of the plaintiffs' negligence and wantonness claims.

I. The Plaintiffs' Wrongful-Death Claims

A. The Wrongful Death Act -- A Purely Statutory Claim

***27** This Court has previously observed that wrongful-death actions "are purely statutory," meaning "[t]here was no such action or right of action at common law." Kennedy v. Davis, 171 Ala. 609, 611-12, 55 So. 104, 104 (1911) (emphasis added). The Alabama Legislature, therefore, has the responsibility of declaring who is covered by this private right of action.

The Legislature originally passed the Wrongful Death Act in 1872, and the Act was later codified in the Code of Alabama in 1876. See Ala. Code 1876, § 2899. The Act states, in relevant part, that "[w]hen the death of a minor child is caused by the wrongful act, omission, or negligence of any person, ... the father, or the mother, ... of the minor may commence an action." § 6-5-391(a) (emphasis added).

Unfortunately, the Wrongful Death Act does not define the term "minor child." Although the Act was last amended in 1995, see Ala. Acts 1995, Act No. 95-774, § 1, the phrase "[w]hen the death of a minor child is caused by the wrongful act ... of any person" has remained unchanged from the Act's initial inception in 1872, and no change has ever been made to it bearing on the meaning of the term "minor child."

B. We Should Use the Original Public Meaning of the Wrongful Death Act's Words

With no definition of "minor child" having been provided by the Legislature, this Court must decide how to interpret the meaning of that term as used in the Wrongful Death Act. I believe in originalism, which means that we should apply the original meaning of the words as those words were used in the Act when it was passed in 1872. In other words, I apply the "original public meaning" of the words. As Justice Mitchell has observed, "the meaning of a law is its original public meaning, not its modern meaning." Mitchell, supra, at 1092 (some emphasis added; some emphasis in original); see also Barnett v. Jones, 338 So. 3d 757, 768 (Ala. 2021) (Mitchell, J., concurring specially); Ex parte Pinkard, 373 So. 3d 192, 207 (Ala. 2022) (Mitchell, J., concurring specially); Gulf Shores City Bd. of Educ. v. Mackey, [Ms. 1210353, Dec. 22, 2022] —— So. 3d ——, ——, 2022 WL 17843037 (Ala. 2022) (Mitchell, J., concurring in part and concurring in the result).[37]

One of the leading scholars on this approach has undoubtedly been Justice Antonin Scalia. In Reading Law: The Interpretation of Legal Texts 33 (Thomson/West 2012), Justice Scalia and Bryan A. Garner explain that when a court is required to interpret the words in a statute, it should consider "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." (Emphasis added).[38] See also id. at 78-92 (referring to this as the "fixed-meaning canon" and as the "original public meaning" of a statute); New Prime Inc. v. Oliveira, 586 U.S. ——, ——, 139 S. Ct. 532, 539, 202 L.Ed.2d 536 (2019) (noting that " '[i]t's a "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute." ' Wisconsin Central Ltd. v. United States, 585 U.S. 274, 284, 138 S. Ct. 2067, 2074, 201 L.Ed. 2d 490 (2018) (quoting Perrin v. United States, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L.Ed. 2d 199 (1979)).").[39]

***28** Because "[w]ords change meaning over time, and often in unpredictable ways," Justice Scalia and Garner explain that it is important to give words in statutes the meaning they had when they were adopted to avoid changing what the law is. Scalia & Garner, supra, at 78 (emphasis added). "By anchoring the meaning of a text to the objective indication of its words at a fixed point in time, ... a judges' abilities to 'update' laws as they go along" is constrained. Mitchell, supra, at 1096.

Again, because this Court is in the judicial branch, its role is limited, and applying the "original public meaning" of the words in a statute helps this Court to stay within its constitutional role, which is a fundamental part of democracy. See Scalia & Garner, supra, at 82-83 (recognizing that "[o]riginalism is the only approach to text that is compatible with democracy. When government-adopted texts are given a new meaning, the law is changed; and changing written law, like adopting written law in the first place, is the function of the first two branches of government -- elected legislators and ... elected executive officials and their delegates."). After all, if judges could freely invest old statutory terms with new meanings, this Court would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

1. The Original Public Meaning of "Minor Child" Can Be Found in the Common Law -- "The authorities ... are unanimous."

The common law answers the question whether the term "minor child" as used in the Wrongful Death Act was broad enough in 1872 to reach a **frozen embryo** today. In Alabama, it is a well-settled principle of law that the common law governs unless expressly changed by the statutes passed by our Legislature. Our Court has repeatedly held that " '[a]ll statutes are construed in reference to the principles of the common law; and it is not to be presumed that there is an intention to modify, or to abrogate it, further than may be expressed, or than the case may absolutely require.' " State v. Grant, [Ms. 1210198, Sept. 9, 2022] —— So. 3d ——, ——, 2022 WL 4115310 (Ala. 2022) (quoting Beale v. Posey, 72 Ala. 323, 330 (1882)) (emphasis added); see also Ex parte Christopher, 145 So. 3d 60, 65 (Ala. 2013) (observing that " 'statutes [in derogation or modification of the common law] are presumed not to alter the common law in any way not expressly declared' " (quoting Arnold v. State, 353 So. 2d 524, 526 (Ala. 1977) (emphasis added)).[40]

***29** The Alabama Code also expressly mandates that the common law remains in effect absent actual changes by the Legislature. See § 1-3-1, Ala. Code 1975 ("The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the Legislature." (emphasis added)).

Similarly, Justice Mitchell has previously recognized that "[a] statute that uses a common-law term, without defining it, adopts its common-law meaning." Mitchell, supra, at 1130 (emphasis added). Other authorities agree that we must "presume the legislature retained the common-law meaning." 3A Norman J. Singer and J.D. Shambie Singer, Statutes and Statutory Construction § 69:9 (7th ed. 2010) (quoted approvingly by Mitchell, supra, at 1130).

So, what did the common law indicate in 1872? There is no doubt that the common law did not consider an unborn infant to be a child capable of being killed for the purpose of civil liability or criminal-homicide liability. In fact, for 100 years after the passage of the Wrongful Death Act, our caselaw did not allow a claim for the death of an unborn infant, confirming that the common law in 1872 did not recognize that an unborn infant (much less a **frozen embryo**) was a "minor child" who could be killed.

For example, in 1926, this Court, for the first time, addressed the issue whether the Wrongful Death Act permitted claims for the death of an unborn fetus who died from prenatal injuries. Citing cases from other jurisdictions, this Court in Stanford v. St. Louis-San Francisco Railway Co., 214 Ala. 611, 612, 108 So. 566, 566 (1926), held that the Wrongful Death Act did not permit recovery for injuries during pregnancy that resulted in the death of the fetus.

In support of that holding, our Court wrote:

> " 'The doctrine of the civil law and the ecclesiastical and admiralty courts ... that an unborn child may be regarded as in esse ... is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of opinion that the action will not lie.' "

214 Ala. at 612, 108 So. at 567 (quoting Allaire v. St. Luke's Hosp., 184 Ill. 359, 368, 56 N.E. 638, 640 (1900)) (emphasis added). We emphasized: "The authorities, however, are unanimous in holding that a prenatal injury affords no basis for an action in damages, in favor either of the child or its personal representative." 214 Ala. at 612, 108 So. at 566 (emphasis added).

For many years afterwards, this Court maintained this position. See, e.g., Birmingham Baptist Hosp. v. Branton, 218 Ala. 464, 467, 118 So. 741, 743 (1928) (recognizing that "[t]his court has established a general line of demarcation between the civil rights of the mother and child to be born. It is concurrent with separate existence of the mother and child by the birth; and parental injury before the birth is no basis for action in damages by the child or its personal representative."); Snow v. Allen, 227 Ala. 615, 619, 151 So. 468, 471 (1933) (recognizing that "[s]o long as the child is within the mother's womb, it is a part of the mother, and for any injury to it, while yet unborn, damages would be recoverable by the mother in a proper case").

***30** Thus, the common law in Alabama before 1872, and for 100 years afterward, was clear: " 'The doctrine of the civil law ... that an unborn child may be regarded as in esse ... is a mere legal fiction, which ... has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth.' " Stanford, 214 Ala. at 612, 108 So. at 566 (citation omitted; emphasis added).[41]

2. The Main Opinion's Responses to the Common-Law are Mistaken

The main opinion provides four responses to the position that the common law did not consider an unborn infant to be a minor child capable of being killed for the purpose of civil liability or criminal-homicide liability: (1) that the common-law homicide rule was merely an "evidentiary rule," (2) that a dictionary from the 1800s includes a definition of "child" that did not provide an "exception" for unborn infants, (3) that William Blackstone (among other things) "grouped" the "rights" of unborn children with the "Rights of Persons," and (4) that the defendants' argument seeks an "exception" to the definition of "minor child" for **frozen embryos**. Each of these arguments is mistaken. I will address them one at a time.

First, the main opinion notes that "[i]t is true, as Justice Cook emphasizes, that the common law spared defendants from criminal-homicide liability for killing an unborn child unless the prosecution could prove that the child had been 'born alive' before dying from its injuries." —— So. 3d at —— n.6. Nevertheless, the main opinion goes on to assert that the common-law "born-alive" rule was "an evidentiary rule rather than ... a substantive limitation on personhood." Id.[42]

The main opinion cites no Alabama authority in support of its "evidentiary rule" argument. The only authority cited is a law-review article from 2009, which in turn relies on a second law-review article from 1987.[43] See id. (citing Joanne Pedone, Filling the Void: Model Legislation for Fetal Homicide Crimes, 43 Colum. J. L. & Soc. Probs. 77, 82 (2009), citing in turn Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 563, 586 (1987)).

***31** Regardless, the main opinion is mistaken. Our caselaw makes clear that this common law was a substantive rule of law -- both in the criminal context and in the civil context. Stanford, 214 Ala. at 612, 108 So. at 567 (concluding that a wrongful-death action for an unborn child " 'will not lie' " (citation omitted; emphasis added)); Clarke v. State, 117 Ala. 1, 8, 23 So. 671, 674 (1898) (recognizing that " '[a]n infant in its mother's womb, not being in rerum natura, is not considered as a person who can be killed within the description of murder ....' (quoting 3 Russell on Crimes (6th ed.)) (emphasis added)). The main opinion does not cite or distinguish either of these Alabama cases. Nor would it matter if it was an "evidentiary rule" because even an

evidentiary rule would still indicate the original public meaning of the statute (that is, what a "reasonable reader" at the time of passage understood the law to be). The main opinion also cites no caselaw holding that an "evidentiary rule" (even if one applied here) should be ignored in determining the original public meaning. Further, even if the common law were a mere evidentiary rule (and it was not), it would be an irrebuttable evidentiary rule as clearly shown by the cases and language cited above.

Second, the main opinion argues that the "leading dictionary of that time defined the word 'child' as 'the immediate progeny of parents' and indicated that this term encompassed children in the womb." ___ So. 3d at ____ (citing Noah Webster et al., An American Dictionary of the English Language 198 (1864) (quoting the first listed definition). However, this Court cannot ascertain the meaning of disputed terms merely by "plugging a string of words into a dictionary and running with the first results that come up." Mitchell, supra, at 1091. Instead, "words are given meaning by their context." Scalia & Garner, supra, at 56.

Here, the context indicates that the main opinion is mistaken. The cited dictionary does not "indicate[ ] that this term encompassed children in the womb." Instead, it indicates the opposite. The same first definition of "child" also states: "The term is applied to infants from their birth; but the time when they cease ordinarily to be so called, is not defined by custom." Webster, supra, at 198. (emphasis added).[44] "From their birth" means after they were born.

***32** Further, the language quoted in the text of the main opinion is general in nature ("immediate progeny of parents") and thus fails to answer the question whether a **frozen embryo** is a "minor child" as that term was understood in 1872. This general definition also does not contradict the common law in any way. As explained above, the common law (and Alabama law) is definite, and it does indicate that, in 1872, the public meaning of "minor child" as used in the Wrongful Death Act did not include an unborn infant (or a **frozen embryo**).

In the same vein, the main opinion cites Blackstone's Commentaries and argues (1) that it "expressly grouped the rights of unborn children" with the " 'Rights of Persons,' " (2) "consistently described unborn children as 'infant[s]' or 'child[ren],' " and (3) spoke of "such children as sharing in the same right to life that is 'inherent by nature in every individual.' " ___ So. 3d at ____ (quoting 1 William Blackstone's Commentaries on the Laws of England *125-26). The main opinion's characterization of these principles in Blackstone's Commentaries is mistaken.

First, none of this contradicts the Alabama caselaw cited above. In fact, the snippets quoted by the main opinion do not state, one way or the other, whether an unborn infant could be killed under the common law (whether for civil or criminal purposes). Second, how a list of rights were "grouped" seems insignificant at best, and the main opinion provides no explanation for why this is even relevant, much less important. Third, although the main opinion's assertion that children share the "same right to life" is certainly true, it does not help explain why a **frozen embryo** is a "minor child" as that term was understood in 1872 when the Act was adopted.

Finally, the main opinion incorrectly characterizes the defendants' argument as seeking an exception to the definition of "minor child." The very beginning of the main opinion argues:

> "This Court has long held that unborn children are 'children' for purposes of Alabama's Wrongful Death of a Minor Act .... The central question presented ... is whether the Act contains an unwritten exception to that rule for extrauterine children -- that is, unborn children who are located outside of a biological uterus at the time they are killed."

___ So. 3d at ____ (emphasis added).

In making this assertion, the main opinion assumes the answer to the relevant question -- i.e., whether a "**frozen embryo**" is a "minor child" as that term was understood in 1872 in the Wrongful Death Act -- by immediately labeling **frozen embryos** as "extrauterine children" and deeming them "unborn children." In other words, the main opinion assumes that a **frozen embryo** is a "child" without further context or analysis and does so in the second sentence of the opinion.

The main opinion then asks an irrelevant question -- "whether the Act contains an unwritten exception" for "extrauterine children." —— So. 3d at —— (emphasis added). No party has suggested or requested an "exception" to anything in these appeals. Assuming the answer to the question and then framing this debate as whether an "exception" exists is semantics. It does not provide an answer to the relevant question and does nothing to respond to the common-law rule.

In short, the common-law rule as stated by our Court in Stanford is the original public meaning of the term "minor child" as it was understood in 1872 in the Wrongful Death Act. Stanford, 214 Ala. at 612, 108 So. at 567 (1926) (concluding " 'that an unborn child may be regarded as in esse ... is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth' " (citation omitted)). And, our Court has made clear that " 'statutes [in derogation or modification of the common law] are presumed not to alter the common law in any way not expressly declared.' " Ex parte Christopher, 145 So. 3d at 65 (citation omitted). Thus, any update to the Wrongful Death Act must be done by the Legislature and not this Court.

C. Prior Caselaw Interpreting and Applying the Wrongful Death Act Based on Congruence with Alabama's Criminal-Homicide Statutes and Action by the Legislature

***33** What about this Court's more recent caselaw interpreting the Wrongful Death Act? Although the members of this Court believe in originalism and textualism, we should not ignore our prior caselaw unless we are willing to overrule it. After the cases cited above, the next time we tackled these issues was in 1972 when we decided Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972). In Huskey, for the first time, 100 years after the passage of the Wrongful Death Act, we allowed an action for unborn infant who was viable at the time of a prenatal injury and thereafter was born alive, but who later died, thus partially overruling Stanford.

Why did we partially overrule Stanford in Huskey? One key reason was our Court's recognition that the purpose and reach of the Wrongful Death Act was tied to the State's criminal-homicide statutes:

> "By the criminal law, it is a great crime to kill the child after it is able to stir in the mother's womb, by an injury inflicted upon the person of the mother, and it may be murder if the child is born alive and dies of prenatal injuries. Clarke v. State, 117 Ala. 1, 23 So. 671 (1897). One of the purposes of our wrongful death statute is to prevent homicides. Bell v. Riley Bus Lines, [257 Ala. 120, 57 So. 2d 612 (1952)]. If we continued to follow Stanford, which followed then existing precedent, a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly. This is incongruous."

Huskey, 289 Ala. at 55, 265 So. 2d at 597-98 (second and third emphasis added).

Then, in 1993, our Court made clear that it would not expand recovery under the Wrongful Death Act beyond that which was expressly provided in the Act absent a clear direction from the Legislature. First, in Lollar v. Tankersley, 613 So. 2d 1249, 1252-53 (Ala. 1993), we explained that, "[w]ithout a clearer expression of legislative intent," we would decline to hold that the Wrongful Death Act "creates a cause of action for the wrongful death of a fetus that has never attained viability" and noted that "it appears that no court in the United States has, without a clear legislative directive, recognized a cause of action for the wrongful death of a fetus that has never attained a state of development exceeding that attained in this case." Then, in Gentry v. Gilmore, 613 So. 2d 1241, 1244 (Ala. 1993), we repeated this sentiment and explained:

> "We follow the reasoning of a majority of jurisdictions and hold that our statute provides no cause of action for the wrongful death of a nonviable fetus. In so holding, we point out that, with the exception of Georgia, the Gentrys' position [that a wrongful-death action exists for the death of a nonviable fetus] apparently is not the law in any American jurisdiction where there is no clear legislative direction to include a nonviable fetus within the class of those covered by the wrongful death acts. See Miccolis v. AMICA Mutual Insurance Co., 587 A.2d 67, 71 (R.I. 1991); Gary A. Meadows, Comment, Wrongful Death and the Lost Society of the Unborn, 13 J. Legal Med. 99, 107 (1992); and Sheldon R. Shapiro, Annotation, Right to Maintain Action or to Recover Damages for Death of Unborn Child, 84 A.L.R.3d 411, 453-54, § 5[a] (1978 & Supp. 1992)."

(Emphasis added.)

Using language similar to Huskey, Justice Houston wrote specially in both cases and argued for an approach that he believed would be "consistent with the criminal law." Noting the definition of "person" in Alabama's criminal-homicide statutes at that time, Justice Houston wrote: "There should not be different standards in wrongful death and homicide statutes, given that the avowed public purpose of the wrongful death statute is to prevent homicide and to punish the culpable party and not to compensate for the loss." Gentry, 613 So. 2d at 1245 (Houston, J., concurring in the result); Lollar, 613 So. 2d at 1253 (Houston, J., concurring in the result).

1. The Brody Act and This Court's Reiteration of Congruence Between Alabama's Criminal-Homicide Statutes and the Wrongful Death Act

***34** In 2006, nearly 13 years after Justice Houston's observations in Lollar and Gentry, the Alabama Legislature enacted the "Brody Act," Act No. 2006-419, Ala. Acts 2006, codified as § 13A-6-1, Ala. Code 1975. The Brody Act amended the definition of "person" in Alabama's criminal-homicide statutes to expand who could be deemed a victim of a criminal homicide to include an "unborn child in utero." See § 13A-6-1(a)(3), Ala. Code 1975.

Before that amendment, the definition of "person" in Alabama's criminal-homicide statutes was:

> "[A] human being who had been born and was alive at the time of the homicidal act."

See Act No. 607, § 2001(2), Ala. Acts 1977, formerly codified as § 13A-6-1(2) (emphasis added). After the passage of the Brody Act, however, the definition of "person" in the criminal-homicide statutes became:

> "[A] human being, including an unborn child in utero at any stage of development, regardless of viability."

§ 13A-6-1(a)(3) (emphasis added).

Following the passage of the Brody Act, our Court decided Mack v. Carmack, 79 So. 3d 597 (Ala. 2011), in which we held that a plaintiff could bring a claim under the Wrongful Death Act for the death of a previable in utero fetus. Our holding in Mack rested, in large part, on the Legislature's adoption of the Brody Act. Specifically, we noted that the Brody Act "constitute[d] clear legislative intent to protect even nonviable fetuses from homicidal acts." 79 So. 3d at 610. We also explained that the public purpose of our wrongful-death statutes, including the Wrongful Death Act, is to prevent homicide and that "this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes." 79 So. 3d at 611 (emphasis added).

Thus, we held, after considering "the legislature's amendment of Alabama's homicide statute to include protection for 'an unborn child in utero at any stage of development, regardless of viability,' § 13A-6-1(a)(3)," that the Wrongful Death Act should likewise permit an action for the death of the plaintiff's previable, in utero fetus given that the purpose of the Act is to prevent the death of a child. Id. In so holding, we quoted with approval Justice Houston's special concurrences from Gentry and Lollar regarding the need for congruence between Alabama's wrongful-death statutes and its criminal-homicide statutes given that the purpose of those statutes is to prevent homicide and " 'to punish the culpable party and not to compensate for the loss.' " Id. at 610 (quoting Gentry, 613 So. 2d at 1245 (Houston, J., concurring in the result); and Lollar, 613 So. 2d at 1253 (Houston, J., concurring in the result)).

Five years after this Court's decision in Mack, our Court reached an identical result in Stinnett v. Kennedy, 232 So. 3d 202 (Ala. 2016). In that case, we explained that "borrowing the definition of 'person' from the criminal Homicide Act to inform [us] as to who is protected under the civil Wrongful Death Act made sense." 232 So. 3d at 215 (emphasis added).

In the present appeals, the parties have neither asserted that our holdings or reasoning in either Mack or Stinnett are wrong, nor have they asked us to overrule those decisions. See Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893,

898 (Ala. 2006) (noting absence of a specific request to overrule existing authority and stating that, "[e]ven if we would be amenable to such a request, we are not inclined to abandon precedent without a specific invitation to do so").[45] I therefore see no reason to abandon this precedent in deciding the question at issue in the present appeals.

2. The Main Opinion is Overruling Mack and Stinnett

***35** The main opinion alleges that this Court's decisions in Mack and Stinnett do not "mean that the definition of 'child' in the Wrongful Death of a Minor Act must precisely mirror the definition of 'person' in our criminal-homicide laws." —— So. 3d at ——. Specifically, the main opinion alleges that, because criminal liability is "more severe than civil liability," the "set of conduct that can support a criminal prosecution is almost always narrower than the conduct that can support a civil suit." —— So. 3d at ——. According to the main opinion, an argument to the contrary is "not only illogical, it was rejected in Stinnett itself." —— So. 3d at ——. Based on the foregoing, the main opinion concludes that the definition of "person" in Alabama's criminal-homicide law provides a "floor" for the definition of personhood in wrongful-death actions, not a "ceiling." —— So. 3d at ——.

Contrary to the main opinion's assertion, our Court in Stinnett expressly stated that it was "borrowing the definition of 'person' from the criminal Homicide Act to inform [us] as to who is protected under the civil Wrongful Death Act." 232 So. 3d at 215 (emphasis added). By using the phrase "borrowing the definition," it is difficult to imagine how much clearer our Court could have been that the definitions of the terms "person" and "minor child" were to be interpreted the same. Thus, the main opinion is simply incorrect when it states that Stinnett "did not say that." —— So. 3d at ——.

Additionally, in reaching the above conclusion, the main opinion mistakes statutory definitions for liability standards. It is certainly true that criminal law includes additional defenses (and sometimes includes additional elements) and thus contains a "narrower" standard of liability than civil law, but it is also true that definitions of terms can be the same in the criminal-homicide statutes and the civil wrongful-death statutes.

Stinnett illustrates this. In that case, the plaintiff sued a physician for the wrongful death of her unborn fetus pursuant to the Wrongful Death Act. The defendant, emphasizing the congruence discussion in Mack, argued that an exception to liability for medical personnel in the criminal-homicide statutes also prevented malpractice liability under the Wrongful Death Act. See Stinnett, 232 So. 3d at 214-15 (citing § 13A-6-1(b), Ala. Code 1975, which provides a defense to homicide for a physician providing medical care for a "[m]istake, or unintentional error").

Not surprisingly, our Court disagreed. Relying on Mack, we explained that the liability standard differed between the criminal-homicide statutes and the civil Wrongful Death Act. Therefore, this Court held, the defendant could be liable for medical malpractice even if she were a physician and committed an "unintentional error." We wrote:

> "[Mack's] attempt to harmonize who is a 'person' protected from homicide under both the Homicide Act and Wrongful Death Act, however, was never intended to synchronize civil and criminal liability under those acts, or the defenses to such liability."

232 So. 3d at 215 (emphasis added); —— So. 3d at —— (quoting the same language). Thus, contrary to the main opinion's position, our Court in Stinnett made clear that our holding on liability standards had no impact on our decision to "borrow[ ]" the definition of "person" (that is, the victim) in Alabama's criminal-homicide statutes to determine who a "minor child" was under the Wrongful Death Act.

Moreover, the main opinion's reasoning that the definition of "person" in Alabama's criminal-homicide statutes provides a "floor" for the definition of "child" in wrongful-death actions, not a "ceiling," is also illogical given the changes brought about by the Brody Act.[46] The Legislature made an intentional decision to extend the criminal-homicide statutes beyond the common law when it passed the Brody Act. In sharp contrast, the Legislature has never extended the relevant portion of the Wrongful Death Act, despite the passage of 150 years. Yet, the main opinion now decides that the definition in this unamended civil statute goes further than the definition in the criminal-homicide statutes that the Legislature did extend.

***36** In sum, the main opinion overrules Mack and Stinnett[47] sub silentio by decoupling the definitions in the criminal-homicide statutes and the Wrongful Death Act, by removing the reasoning of those decisions, and by overlooking our other caselaw requiring congruence between the definition of "person" in Alabama's criminal-homicide statutes and the definition of "minor child" in the Wrongful Death Act.[48]

3. The Plaintiffs' Arguments Regarding the Brody Act are Mistaken

Because I would follow our prior precedent that there must be "congruence" between the definition of "person" in Alabama's criminal-homicide statutes and the definition of "minor child" in the Wrongful Death Act, I must consider whether a **frozen embryo** is within the definition of "person" in the criminal-homicide statutes, as amended by the Brody Act -- a question that is hotly debated in the briefs. Because the main opinion holds that the definition in the criminal-homicide statutes is merely a "floor," it does not engage on this question.

***37** As noted above, after the passage of the Brody Act, the definition of "person" in the criminal-homicide statutes became: "[A] human being, including an unborn child in utero at any stage of development, regardless of viability." § 13A-6-1(a)(3) (emphasis added). The primary argument between the parties is over the phrase "including an unborn child in utero." On the one hand, the defendants argue strongly that the phrase "including an unborn child in utero" indicates that the Legislature, by adding this phrase to the definition, implied that "human being" would not otherwise include an unborn child in utero (and therefore would not include a **frozen embryo**, which was not added). On the other hand, the plaintiffs argue just as strongly that this phrase is not intended to be a limiting phrase but, instead, merely provides one example of a "human being," thus implying that "human being" is broad enough to include a **frozen embryo**.

First, this Court has recognized that both the preamble and the title of an act may be used to resolve any ambiguities in the text. See Newton v. City of Tuscaloosa, 251 Ala. 209, 218, 36 So. 2d 487, 494 (1948) (recognizing that "both the preamble and the title of an act may be looked to in order to remove ambiguities and uncertainty in the enacting clause"); City of Bessemer v. McClain, 957 So. 2d 1061, 1075 (Ala. 2006) (noting that our Court "can also look at the title or preamble of the act"); Scalia & Garner, supra, at 33 (recognizing that the textual purpose of an act is "vital" to its context).

The Brody Act provides that it "shall be known as the 'Brody Act,' in memory of the unborn son of Brandy Parker, whose death occurred when she was eight and one-half months pregnant." Act No. 2006-419, § 4. Likewise, the title to the Brody Act provides that it is "[a]n act, [t]o amend [Alabama's homicide code], ... to define person to include an unborn child ... [and] to name the bill 'Brody Act' in memory of the unborn son of Brandy Parker, whose death occurred when she was eight and one-half months pregnant."

Based on the contents of the Brody Act and its title, it seems quite clear to me that the death of Brody Parker -- an unborn, in utero child -- spurred the Legislature to change the definition of a "person" in the criminal-homicide statutes from the common-law meaning to a meaning that now allows a defendant to be charged with murder when he or she causes the death of a "human being" "in utero." In other words, the textual purpose was to expand the definition of "person" to cover victims like Brody Parker who died in utero. Our caselaw makes clear that we must presume that the terms of a statute mean what they were designed to effect, and we are not allowed to enlarge them by construction. See Holmes v. Sanders, 729 So. 32d 314, 316 (Ala. 1999) (explaining that this Court presumes " 'that the legislature did not intend to make any alteration in the law beyond what it declares either expressly or by unmistakable implication' " (quoting Beasley v. MacDonald Eng'g Co., 287 Ala. 189, 197, 249 So. 2d 844, 851 (1971))).[49]

Second, the plaintiffs' proposed statutory construction of the criminal-homicide statutes is contrary to the common law of homicide and is not supported by the history of Alabama's criminal-homicide statutes. In 1852, the Alabama Legislature passed the first criminal-homicide statute, which made clear that only a "human being" could be the victim of a murder. That statute read, in relevant part, that "every homicide perpetrated ... to effect the death of any human being" constituted murder. § 3080,

Ala. Code 1852 (emphasis added). Although every Code section addressing criminal homicide enacted between 1852 and 1977 used the term "human being" to describe the victim of murder and manslaughter, the Legislature never defined the term.

***38** After the passage of the first homicide statute, this Court held that killing an unborn infant in utero did not constitute a murder, citing a common-law treatise. For example, in Clarke v. State, 117 Ala. at 8, 23 So. at 674, this Court wrote that " '[a]n infant in its mother's womb, not being in rerum natura, is not considered as a person who can be killed, within the description of murder ....' " (Quoting 3 Russell on Crimes (6th ed.) (emphasis added).)[50]

Then, in 1977, the Legislature repealed the previous criminal-homicide statutes and replaced them with the new criminal-homicide statutes. In doing so, the Legislature expressly adopted the common-law rule and defined the term "person" as "a human being who had been born and was alive at the time of the homicidal act." Former § 13A-6-1(2). That definition remained unchanged until the adoption of the Brody Act, at which point the Legislature, as explained above, went beyond the common-law rule to expressly declare that a victim of a homicide or assault (that is, a "human being") included an "unborn child in utero."

In short, the common law was clear that an unborn infant was " 'not considered as a person who can be killed.' " Clarke, 117 Ala. at 8, 23 So. at 674 (citation omitted). The statutory law did not change this until the passage of the Brody Act. Thus, the common-law definition remains, except to the extent that it has been expressly changed by the Brody Act to add an "unborn child in utero" to the definition of "person" in Alabama's criminal-homicide statutes. To conclude otherwise would be inconsistent with our caselaw cited above holding that " '[a]ll statutes are construed in reference to the principles of the common law; and it is not to be presumed that there is an intention to modify, or to abrogate it, further than may be expressed, or than the case may absolutely require.' " Grant, —— So. 3d at —— (citing and quoting Beale v. Posey, 72 Ala. at 330).[51]

***39** For all of these reasons, it seems clear to me that a **frozen embryo** does not fit within the statutory definition of "person" as that term is used in Alabama's criminal-homicide statutes and thus cannot be a "minor child" under the Wrongful Death Act.

D. Article I, § 36.06, of the Alabama Constitution of 2022 Has No Impact on the Terms in the Wrongful Death Act from 1872

The main opinion also argues that, even if the word "child" in the Wrongful Death Act were ambiguous, Article I, § 36.06, of the Alabama Constitution of 2022 "operates in this context as a constitutionally imposed canon of construction," which "require[s] courts to resolve the ambiguity in favor of protecting unborn life." —— So. 3d at ——. That section "acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." § 36.06(b) (emphasis added). The Chief Justice also devotes his special concurrence to this argument.

The first problem with this argument is that there is nothing in the text of § 36.06 about resolving ambiguities in statutes (assuming there was one here), and the main opinion cites no authority supporting such a rule of construction. Even if we were to assume such a rule of construction, there is nothing in § 36.06 that tells us how to best protect **frozen embryos**. Specifically, § 36.06 does not indicate (1) whether we should protect **frozen embryos** by updating the words in the Wrongful Death Act or (2) whether we should protect **frozen embryos** via the ordinary common-law route (that is, by allowing the claims of negligence and wantonness to move forward in these actions). Why is one option more constitutionally mandated than another -- especially when one option requires us to discount the original public meaning of the terms in the Wrongful Death Act as it was passed by the Legislature in 1872?

The second problem with this position is timing. The Wrongful Death Act was passed in 1872, whereas § 36.06 was passed in 2018. Section 36.06 cannot retroactively change the meaning of words passed in 1872. The Legislature in 1872 had no idea about a constitutional amendment that would be passed 150 years later. If the Legislature wanted to change the words in the statute, they should have changed the words in the statute.[52]

Although I agree with much of what Chief Justice Parker so eloquently states in his special concurrence regarding the "sanctity of unborn life," —— So. 3d at —— (Parker, C.J., concurring specially), I do not agree with his discussion of the "Effect of Constitutional Policy." —— So. 3d at —— (Parker, C.J., concurring specially). In particular, I believe he is mistaken when he asserts that the People of Alabama "explicitly" told "all three branches of government what they ought to do" in § 36.06. —— So. 3d at —— (Parker, C.J., concurring specially). The question for these appeals is whether Alabama law provides a private cause of action, for money damages, for the loss of a **frozen embryo**. There is no language in this constitutional amendment mentioning private causes of action, or money damages, or **frozen embryos**, or IVF. Compare Dobbs, 597 U.S. at 237, 142 S.Ct. 2228 (noting that a right to abortion "is not mentioned anywhere in the Constitution").

***40** The third difficulty with this argument is that it does not rebut any of my conclusions discussed above, including those premised on the common law, the criminal-homicide statutes, and our prior caselaw. It is for all of these reasons that I find this argument unpersuasive.

E. The Suggestion that the Common Law Has Been "Collectively Repealed" Is Mistaken

Justice Shaw argues that it is "well settled" that the meaning of the term "minor child" "includes an unborn child with no distinction between in vitro or in utero." —— So. 3d at —— (Shaw, J., concurring specially) (emphasis added). Other than simply referring to the main opinion, Justice Shaw cites no legal authority that this lack of any distinction is "well settled." Regardless, he is mistaken for all the reasons explained above.

As to his assertion that "the legislature, the constitution, and this Court's decisions have collectively repealed the common law's prohibition on ... seeking a civil remedy for injuries done to the unborn," —— So. 3d at —— (Shaw, J., concurring specially), Justice Shaw provides no analysis on this point either and, instead, simply provides a string citation to (1) the Wrongful Death Act itself, (2) § 36.06(b) (analyzed in full earlier), and (3) two cases that support my position (as explained earlier). Id. at ——. Regardless, it is well settled that the Legislature -- not this Court -- "repeal[s]" statutes.

Further, the question in these appeals is not whether there is a common-law "prohibition on seeking a civil remedy for injuries done to the unborn" (as Justice Shaw frames the issue). —— So. 3d at —— (Shaw, J., concurring specially) (emphasis added). Instead, the question is whether the common law can help this Court determine if a **frozen embryo** is within the meaning of the term "minor child" in the Wrongful Death Act.

Justice Shaw appears to contend that the common law has a narrower role in providing meaning for words used in Alabama statutes than I have explained above. Relying on a special concurrence to a 1974 plurality opinion from this Court and § 1-3-1, Ala. Code 1975, he contends that Alabama statutory law " 'does not provide' " that the " ' "common law of England shall be the rule of decisions in Alabama unless changed by the legislature." ' " —— So. 3d at —— (Shaw, J., concurring specially) (quoting Swartz v. United States Steel Corp., 293 Ala. 439, 446, 304 So. 2d 881, 887 (1974) (Faulkner, J., concurring specially)) (emphasis added). He argues " '[o]n the contrary,' " Alabama law merely provides that the common law applies so long as it is " '[n]ot inconsistent with the constitution, the laws, and the institutions of Alabama.' " Id. (some emphasis omitted); id. at —— ("But if it is inconsistent, then it need not be first altered or repealed by the legislature.").

I fail to see a distinction between these standards and what our Court has repeatedly (and very recently) broadly stated: " 'All statutes are construed in reference to the principles of the common law,' " Grant, —— So. 3d at ——, and " 'statutes [in derogation or modification of the common law] are presumed not to alter the common law in any way not expressly declared,' " Ex parte Christopher, 145 So. 3d at 65 (citation omitted; emphasis added); see also 3A Norman J. Singer and J.D. Shambie Singer, Statutes and Statutory Construction § 69:9 (explaining that we "presume the legislature retained the common-law meaning").

***41** Justice Shaw does not cite or distinguish any of this authority. More fundamentally, Justice Shaw does not explain how using the common-law understanding of the meaning of the term "child" to determine whether a **frozen embryo** is a "minor child" under the Wrongful Death Act is "inconsistent" with " 'the constitution, the laws, and the institutions of Alabama.' " ——

So. 3d at —— (Shaw, J., concurring specially) (emphasis and citation omitted). As explained thoroughly above, any changes that have been made in this area of the law have been made incrementally by the Legislature over time and have only gone so far as to encompass unborn, in utero children, as reflected in the holding and language discussed above in Stinnett, 232 So. 3d at 215 (which postdates the two cases cited by Justice Shaw).[53]

Thus, unless and until the Legislature updates Alabama law in such a way that demonstrates that a "**frozen embryo**" is a "minor child," this Court remains bound by the original public meaning of that term as it was understood in 1872 when the Legislature passed the Wrongful Death Act.

F. Not a Single State Agrees with the Main Opinion

Not a single state has held that a wrongful-death action (or a criminal-homicide action) can be brought for the destruction of a **frozen embryo**. In fact, a number of jurisdictions have rejected such causes of action. See, e.g., Penniman v. University Hosps. Health Sys., Inc., 130 N.E.3d 333, 339 (Ohio Ct. App. 2019) (holding that patients could not bring wrongful-death action against hospital based on destruction of **frozen embryos** because the **embryos** had no statutory rights); Jeter v. Mayo Clinic Arizona, 211 Ariz. 386, 400, 121 P.3d 1256, 1270 (Ct. App. 2005) (holding that cryopreserved, three-day-old, eight-cell pre-**embryo** was not a "person" for purposes of recovery under wrongful-death statute); and Davis v. Davis, 842 S.W.2d 588, 594 (Tenn. 1992) (holding that under Tennessee law pre-**embryos** could not be considered "persons").

It is certainly true that this Court is not bound by the results in other states; however, when we are the sole outlier, it should cause us to carefully reexamine our conclusions about expanding the reach of a statute passed in 1872 and our understanding of the common law.

G. The Consequences of This Decision and Why That is Relevant

The main opinion's holding will mean that the creation of **frozen embryos** will end in Alabama. No rational medical provider would continue to provide services for creating and maintaining **frozen embryos** knowing that they must continue to maintain such **frozen embryos** forever or risk the penalty of a Wrongful Death Act claim for punitive damages.[54]

There is no doubt that there are many Alabama citizens praying to be parents who will no longer have that opportunity. And, there is no doubt that there will be fewer babies born. On the other hand, there are powerful moral and policy arguments supporting the notion that ending the creation, use, and destruction of **frozen embryos** is a good thing and that IVF technology has the potential for grave misuse.

***42** I am empathetic to both sides of this debate; however, it is not my role to take a position one way or another on this issue. Even so, ending the creation of **frozen embryos** will undoubtedly cause significant consequences that will affect the future lives of thousands of Alabama citizens for years to come and the babies who will not be born. The solemn significance of these consequences (as well as the need for comprehensive regulation) further illustrates why this question is an issue that should be addressed by the elected representatives of the people of Alabama in the Legislature, not this Court. I thus urge the Legislature to promptly consider these issues to provide certainty to these Alabama parents-to-be and to the medical professionals who are attempting to provide services to them.[55]

The Chief Justice's special concurrence does not dispute that this will lead to fewer newborn babies. However, Chief Justice Parker insists that the IVF process may still survive in Alabama in some other form (for instance, he suggests: "one **embryo** at a time") because certain other countries have more regulations on their IVF processes. —— So. 3d at —— (Parker, C.J., concurring specially); id. at —— (stating that he fails to see that "IVF will now end"). In fact, he spends several pages describing the regulations that currently exist in other countries and suggests that the Alabama Legislature may wish to consider those

regulations. The Alabama Medical Association strongly disagrees with the suggestion that IVF in some other, reduced, form is practical, safe, or medically sound and has filed two amicus briefs exhaustively explaining these issues.

***43** It is not the place or time to decide whether the position of the Chief Justice or the position of the Alabama Medical Association is correct, moral, or ethical. It is not the place because these are questions for the Legislature and not this Court. And, even if this Court were the correct forum, it would not be the time because these appeals are at the motion-to-dismiss stage and there is no factual record at this point. Therefore, no party has had the opportunity to investigate and respond to the assertions by the Chief Justice or the Alabama Medical Association.

However, as to the Chief Justice's suggestion that the Legislature consider these issues immediately (including his suggestion that they consider comprehensive regulation), I strongly agree.

II. The Plaintiffs' Negligence and Wantonness Claims

Finally, the main opinion does not reach the plaintiffs' negligence and wantonness claims because they are pleaded in the alternative and, instead, holds that those claims are now "moot." —— So. 3d at ——. Because I would affirm the dismissal of the plaintiffs' wrongful-death claims, I must reach this issue. For the reasons stated below, I would reverse the trial court's dismissal of those claims.

The defendants are making a "catch-22" argument. Cline v. Ashland, Inc., 970 So. 2d 755, 772 n.6 (Ala. 2007) (Harwood, J., dissenting) (" 'Catch-22: a frustrating situation in which one is trapped by contradictory regulations or conditions.' Random House Webster's Unabridged Dictionary (2d ed. 2001)."). On the one hand, the defendants claim that the **frozen embryos** are not a "minor child." On the other hand, they claim that because the **frozen embryos** were "lives," no common-law claim (such as claims of negligence or wantonness) is available because no "damages" are recoverable.

I am concerned that such a rule might allow the destruction of life with no consequence, even for someone who commits an intentionally wrongful act. As explained by the plaintiffs, IVF is used by many parents-to-be in dire circumstances (for instance, because of reproductive issues caused by cancer, age, or infertility). Their **frozen embryos** are undeniably precious. Thus, this argument has the potential to be both unjust and to incentivize bad conduct. See Huskey, 289 Ala. at 54, 265 So. 2d at 597 (noting that not allowing a recovery "would give protection to an alleged tort-feasor").

However, I need not reach the question of exactly how our Court should handle this situation because it is too early in these cases. We are only at the pleading stage. The plaintiffs argue, under this Court's prior decision in Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 642 (Ala. 1985), that the trial court's dismissal of their common-law tort claims in response to a Rule 12(b)(6), Ala. R. Civ. P., motion was improper. Under Raley, they argue, once a pleader has set out a cause of action, the failure of the complaint to allege requisite elements of relief (that is, damages) is not usually a ground for a motion to dismiss for failure to state cause of action but, rather, must be challenged by a motion to strike, by objection to evidence, or by requested charges. Accordingly, they contend that the trial court's dismissal of those claims is due to be reversed.

"Alabama is a 'notice pleading' state." Surrency v. Harbison, 489 So. 2d 1097, 1104 (Ala. 1986) (citing Simpson v. Jones, 460 So. 2d 1282 (Ala.1984)). Rule 8(a), Ala. R. Civ. P., provides:

> "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded."

***44** "The primary purpose of notice pleading is to provide defendants adequate notice of the claims against them." Cathedral of Faith Baptist Church, Inc. v. Moulton, 373 So. 3d 816, 819 (Ala. 2022) (citing Adkison v. Thompson, 650 So. 2d 859 (Ala. 1994)). " '[P]leadings are to be liberally construed in favor of the pleader.' " Id. (quoting Adkison, 650 So. 2d at 862). As relevant here,

> " 'the dismissal of a complaint is not proper if the pleading contains "even a generalized statement of facts which will support a claim for relief under [Rule 8, Ala. R. Civ. P.]" (Dunson v. Friedlander Realty, 369 So. 2d 792, 796 (Ala. 1979)), because "[t]he purpose of the Alabama Rules of Civil Procedure is to effect justice upon the merits of the claim and to renounce the technicality of procedure." Crawford v. Crawford, 349 So. 2d 65, 66 (Ala. Civ. App. 1977).' "

Id. (quoting Simpson, 460 So. 2d at 1285).

In their amended complaints, the plaintiffs alleged that the defendants' negligent and wanton conduct in failing to secure their respective facilities "led to and/or caused the destruction of the plaintiffs' **embryo[s]**." As a result of that allegedly negligent and wanton conduct, the plaintiffs "demand[ed] judgment for compensatory damages, including but not limited to, [the] value of embryonic human beings ... and for the severe mental anguish ...." (meaning that they are seeking any valid compensatory damages). (Emphasis added).

The defendants do not attempt to address this Court's prior decision in Raley, supra. They also do not ask that we: (1) revisit the pleading standard under Alabama law or (2) reconsider our decision in Raley. They also do not point to any caselaw in which we have affirmed a trial court's dismissal at the pleading stage based upon an argument that damages had not been properly pleaded. Based on Raley, supra, I would reverse the trial court's dismissal of the plaintiffs' negligence and wantonness claims.

All Citations

--- So.3d ----, 2024 WL 656591

Footnotes

1 These consolidated appeals were originally assigned to another Justice on this Court; they were reassigned to Justice Mitchell on December 15, 2023.

2 Until recently, there had been a longstanding ethical norm against artificially gestating human **embryos** past 14 days of development. Henry T. Greely, The 14-Day **Embryo** Rule: A Modest Proposal, 22 Hous. J. Health L. & Pol'y 147 (2022). But that norm is wavering, and there is currently nothing stopping "researchers from allowing ex vivo [that is, extrauterine] human **embryos** to develop for eight or nine weeks post-fertilization .... Or to viability .... Or, for that matter, to 38 weeks post-fertilization and full term." Id. at 154-55; see also Kirstin R.W. Matthews & Daniel Morali, National Human **Embryo** and Embryoid Research Policies: A Survey of 22 Top Research-intensive Countries, 15 Regenerative Med. 1905 (2020) ("While the USA was the first to propose the 14-day limit, the limit was never passed as a federal law."). There are, of course, practical limitations on developing extrauterine **embryos** to term, but those limitations are shrinking each year due to "technological advances." See Matthews & Morali, 15 Regenerative Med. at 1905.

3 In his dissenting opinion, Justice Cook appears to concede that the life of a fully developed child who was conceived and gestated in vitro would not be protected under his and the defendants' reading of the Wrongful Death of a Minor Act. See —— So. 3d at —— n.55 (arguing that "the Legislature" would have to intervene to protect the lives of any children created with these "future technologies"). Justice Cook does not, however, discuss the constitutional implications of that position.

4 Justice Cook raises several novel arguments, none of which were briefed or mentioned by the parties, in support of his view that "the public meaning of 'minor child' as used in the Wrongful Death [of a Minor] Act did not include an unborn infant." —— So. 3d at —— (Cook, J., dissenting). If Justice Cook were correct on that point, then it would mean that Mack erred by interpreting the Act to protect unborn children. For the reasons given in this section of the opinion, we are not persuaded that the unborn were excluded from the original meaning of the term "child." But even if Justice Cook were correct on that point, the Court would still apply Mack's definition because, as Justice Cook himself acknowledges, no party has challenged the Mack line of cases. See id. at —— (Cook, J., dissenting) (emphasizing that this Court does not overrule precedent unless asked to do so by the parties and explaining that "the

parties [here] have neither asserted that the holdings or reasoning in either Mack or Stinnett [v. Kennedy, 232 So. 3d 202 (Ala. 2016),] are wrong, nor have they asked us to overrule those decisions"). We are perplexed by Justice Cook's insistence that we have not given Mack due deference when the bulk of his dissent is animated by the view that Mack was wrongly decided and that, contrary to its holding, unborn children are not "children" under the Act after all.

5 As Justice Cook points out, this entry goes on to explain that the term "child" is "applied to infants from their birth; but the time when they cease ordinarily to be so called, is not defined by custom." —— So. 3d at —— (Cook, J., dissenting). Justice Cook believes that this language indicates that infants prior to birth were not considered "children." We disagree. The language quoted by Justice Cook contrasts newborns with older children in order to make the point that there is no clear-cut time at which a young person transitions from childhood to adulthood; it does not indicate that infants were considered something other than children prior to their birth, as the definition elsewhere makes clear when it describes a pregnant woman as being "with child." Another definition on that same page further drives home the point that unborn children are "children" when it describes "childbearing" as the act of "bearing children" in the womb.

6 It is true, as Justice Cook emphasizes, that the common law spared defendants from criminal-homicide liability for killing an unborn child unless the prosecution could prove that the child had been "born alive" before dying from its injuries. But the criminal law has always been "out of step with the treatment of prenatal life in other areas of law," in that it generally prioritizes lenity towards the accused over the otherwise applicable " 'civil rights' " of unborn children. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 247, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022) (citation omitted). Accordingly, the born-alive safe harbor appears to have operated primarily as an evidentiary rule rather than as a substantive limitation on personhood. Joanne Pedone, Filling the Void: Model Legislation for Fetal Homicide Crimes, 43 Colum. J. L. & Soc. Probs. 77, 82 (2009) (explaining that the function of the born-alive rule was "to make sure the government established causation before obtaining a homicide conviction," during an era in which " 'the state of medical science' " was primitive and in which proving causation for prenatal injuries was difficult (quoting Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 563, 586 (1987))). Like the so-called "quickening rule," the born-alive rule ensured that there was " 'evidence of life,' " but did not provide a definition of life, and did not mean that unborn children were considered to be something other than living human beings. Dobbs, 597 U.S. at 246, 142 S.Ct. 2228 (citation omitted); see also Forsythe, supra, at 586 & n.105.

7 Justice Cook argues that § 36.06 should not inform our analysis because, he contends, that provision "cannot retroactively change the meaning of words passed in 1872." —— So. 3d at —— (Cook, J., dissenting). But as part of our Constitution, § 36.06 represents "the supreme law of the state," meaning that all statutes "must yield" to it, whether or not they were enacted prior to its adoption. Alexander v. State ex rel. Carver, 274 Ala. 441, 446, 150 So. 2d 204, 208 (1963). Further, the definition of "child" that we apply here is in keeping with the definition that was established by this Court's precedents at the time § 36.06 was adopted. See Mack, 79 So. 3d at 611 ("[W]e hold that the Wrongful Death Act permits an action for the death of a previable fetus."); Hamilton, 97 So. 3d at 735 ("As set forth in Mack and as applicable in this case, Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child."). It is Justice Cook's opinion, not this Court's, that seeks to set aside that meaning in favor of the view that the term "child," as originally understood, did not encompass "an unborn infant." See —— So. 3d at —— (Cook, J., dissenting).

8 The plaintiffs argue that both premises are faulty, but since we agree that the first is wrong, we have no need to reach the second.

9 This reality also helps to illustrate why it is wrong to assume that the prospect of civil liability for the mishandling of **embryos** necessarily raises the spectre of criminal liability for the same conduct.

10 The defendants also suggest that, if extrauterine children are accorded the same protections under the Wrongful Death of a Minor Act as unborn children in utero, then providers could be held liable for routine treatment of ectopic pregnancies -- that is, pregnancies in which an **embryo** has implanted in an organ other than the uterus, such as the fallopian tubes.

The defendants' concerns are misguided. As the parties acknowledge, ectopic pregnancies almost invariably involve a fatal medical condition: if left in place, the ectopic **embryo** will either die from malnourishment or else grow to the point where it kills the mother -- in turn causing the **embryo's** own death. The parties agree that there is currently no way to treat an ectopic implantation without simultaneously causing the death of the unborn child, no matter how desperately the surgeon and the parents wish to preserve the child's life. In light of that tragic reality, we do not see how any hypothetical plaintiffs who attempt to sue over the consensual removal of an ectopic pregnancy could establish the core elements of a wrongful-death claim, including breach of duty and causation.

11 Accord the philosophy of the United States of America as expressed in the Declaration of Independence -- "endowed by their Creator with certain unalienable Rights, that among these are Life ...." The Declaration of Independence para. 2 (U.S. 1776).

12 Blackstone went on to state that life "begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 William Blackstone, Commentaries on the Laws of England *125. Similarly, Alabama law has recognized that human life begins at conception. See Ex parte Hicks, 153 So. 3d 53, 72 (Ala. 2014); Ex parte Ankrom, 152 So. 3d 397 (Ala. 2013); Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012); Mack v. Carmack, 79 So. 3d 597 (Ala. 2011); § 26-22-2(8), Ala. Code 1975 (defining an "unborn child" as "[a]n individual organism of the species Homo sapiens from fertilization until live birth"); § 26-23A-3(10), Ala. Code 1975 (defining an "unborn child" as "[t]he offspring of any human person from conception until birth").

13 It is worth noting that the Manhattan Declaration was signed by "Orthodox, Catholic, and Evangelical Christians" who "joined together across historic lines of ecclesial differences" to speak together on certain issues, one of which was the sanctity of life. Id. Despite major theological disagreements, signers from all three branches of Christianity were able to agree on the sanctity of life.

14 Petrus Van Mastricht (1630-1706) was a Dutch Reformed theologian and professor at the University of Utrecht. He was a favorite of Jonathan Edwards, a leading minister in the First Great Awakening and later President of Princeton University. Edwards opined that, "for divinity in General, doctrine, Practice & Controversie; or as an [sic] universal system of divinity, [Van Mastrict's Theoretical-Practical Theology] is much better than ... any other Book in the world, excepting the Bible." Jonathan Edwards & Stanley T. Williams, Six Letters of Jonathan Edwards to Joseph Bellamy, 1 New Eng. Q. 226, 230 (footnotes omitted) (reprinting Edwards's letter to Bellamy dated January 15, 1747).

15 Kenneth Graham, Confrontation Stories: Raleigh on the Mayflower, 3 Ohio St. J. Crim. L. 209, 213-14 (2005).

16 Code of Practice for Assisted Reproductive Technology Units § 3.3, p. 24, Fertility Society of Australia and New Zealand, Reproductive Technology Accreditation Committee (2021) (at the time of this decision, this document could be located at: https://www.fertilitysociety.com.au/wp-content/uploads/20211124-RTAC-ANZ-COP.pdf.).

17 According to the contract that the LePages signed, the number of **embryos** transferred to the mother could range from 1-5. LePage Contract at 9. It appears that the objective of transferring multiple **embryos** is to increase the chances of pregnancy. Id. at 8. At least two issues arise from this practice. First, it results in the mother becoming pregnant with multiple babies 30% of the time, which can cause health problems for the mother and babies. See id. at 17. Second, less than half of **embryo** transfers result in live births, which raises the question whether transferring multiple **embryos** at once risks the deaths of these little people. See Jennifer Choe & Anthony L. Shanks, In Vitro Fertilization, NIH National Library of Medicine (last updated Sep. 4, 2023), (at the time of this decision, this document could be located at: https://www.ncbi.nlm.nih.gov/books/NBK562266.

18 See Choe & Shanks, supra, at n.17; Christine Wyns, Number of **Frozen** Treatment Cycles Continues to Rise Throughout the World, European Society of Human Reproduction and Embryology (June 30, 2021) (at the time of this decision, this document could be located at: https://www.focusonreproduction.eu/article/ESHRE-News-ESHRE-2021-**freeze**-all) (reporting that "Australia/New Zealand leads the way" in the "number of single **embryo** transfers" in "more than 90% of cycles").

19 Regulation and Legislation in Assisted Reproduction, European Society of Human Reproduction and Embryology (Jan. 2017) (at the time of this decision, this document could be located at: https://tinyurl.com/299cvcbf). Specifically, Austria, Belgium, and Malta have allowed only one transfer at a time; the United Kingdom, France, and Sweden have allowed no more than two; and Germany has allowed only three, although a maximum of two is recommended. Id.; **Embryo** Protection Act, Chapter 524, § 6, of the Laws of Malta; Susan Mayor, UK Authority Sets Limits on Number of **Embryos** Transferred, 328 BMJ 65, 65 (2004). Some of these laws may have changed over time, but they illustrate that other Westernized countries have, at some point, adopted these positions.

20 More Women Are Using Single **Embryos** During Fertility Treatment, European Society of Human Reproduction and Embryology (June 27, 2023) (at the time of this decision, this document could be located at: https://www.eshre.eu/ESHRE2023/Media/2023-Press-releases/EIM).

21 See Legge 19 Feb. 2004, no. 40 (art. 14, para. 3), in G.U. Feb. 24, 2004, no. 45 (It.).

22 The Legislature should also take note of § 36.06 if it considers other ethical issues related to reproduction if they arise.

23 Section 5695, Ala. Code 1923.

24 See, e.g., Wolfe, 291 Ala. at 331, 280 So. 2d at 761 (observing that "the fetus or **embryo** is not a part of the mother, but rather has a separate existence within the body of the mother" (emphasis added)); Clarke v. State, 117 Ala. 1, 8, 23 So. 671, 674 (1898) (" 'When a child, having been born alive, afterwards died by reason of any potion or bruises it received in the womb, it seems always to have been the better opinion that it was murder in such as administered or gave them.' " (quoting 3 Russell on Crimes 6 (6th ed.))). Cf. Ex parte Ankrom, 152 So. 3d 397, 416 (Ala. 2013) (observing, in the course of construing the term "child" in the chemical-endangerment statute, that "[c]learly, for an unborn child, the mother's womb is an essential part of its physical circumstances"). Indeed, even with regard to IVF, a mother's womb is obviously an indispensable part of pregnancy. See Maher v. Vaughn, Silverberg & Assocs., LLP, 95 F. Supp. 3d 999, 1002 n.1 (W.D. Tex. 2015) (describing IVF as "a multi-step medical procedure," and listing the final steps of that process to be "the grown **embryos** are transferred into the patient's uterus" and then "the patient takes supplemental hormones for the ensuing nine to eleven days, and if an **embryo** implants in the lining of the patient's uterus and grows, a pregnancy can result").

25 See, e.g., Mack, 79 So. 3d at 611 (observing that "this Court repeatedly has emphasized the need for congruence between the criminal law and our civil wrongful-death statutes").

26 See also Malone, 17 Stan. L. Rev. at 1055 (explaining that "[t]he probable origin of the rule denying a cause of action for wrongful death was the doctrine, since discarded, that when a cause of action disclosed the commission of a felony the civil action was merged into the criminal wrong"). Restatement (Second) of Torts § 925, cmt. a. (Am. Law Inst. 1979), also provides a nice summary of the genesis of wrongful-death statutes.

27 The main opinion asserts that Art. I, § 36.06(b) of the Alabama Constitution of 2022, in stating that "it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate," "operates in this context as a constitutionally imposed canon of construction, directing courts to construe ambiguous statutes in a way that 'protect[s] ... the rights of the unborn child' equally with the rights of born children, whenever such a construction is 'lawful and appropriate.' " ___ So. 3d at ___. The main opinion offers no authority for taking § 36.06 as a canon of legal construction, and I am not sure what an "appropriate" construction of the law means.

More generally, it is unclear to me why a constitutional amendment that was adopted in 2018 is somehow so central to deciding the specific meaning of a statute that has substantively remained unchanged since 1872. In any event, " '[t]o declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative.' " Lindsay v. United States Sav. & Loan Ass'n, 120 Ala. 156, 168, 24 So. 171, 174 (1898) (quoting Thomas Cooley, Constitutional Limitations 114).

28 It is, perhaps, telling that the plaintiffs and the main opinion chose to insert a hypothetical federal equal-protection issue given that there is no express equal-protection clause in the Alabama Constitution, a fact this Court has noted on several occasions. See, e.g., Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077, 1104 (Ala. 2007) (observing that " 'this Court has acknowledged that the Alabama Constitution contains no equal-protection clause ....' " (quoting Mobile Infirmary Med. Ctr. v. Hodgen, 884 So. 2d 801, 813 (Ala. 2003), and citing Ex parte Melof, 735 So. 2d 1172 (Ala. 1999))).

29 Perhaps in anticipation of that objection, the main opinion inserts a footnote that selectively quotes from a couple of journal articles to make it seem as if the time when artificial wombs for the earliest stages of human life are a reality is just around the corner. See ___ So. 3d at ___ n.2. That is simply untrue. See, e.g., Jen Christensen, FDA Advisers Discuss Future of 'Artificial Womb' for Human Infants, CNN, Sept. 19, 2023 (at the time of this decision, this article could be located at: https://www.cnn.com/2023/09/19/health/artificial-womb-human-trial-fda/index.html) (reporting that "[a] handful of scientists have been experimenting with animals and artificial wombs," but that "no such device has been tested in humans," and that, in any event, "[a]n artificial womb is not designed to replace a pregnant person; it could not be used from conception until birth. Rather, it could be used to help a small number of infants born before 28 weeks of pregnancy, which is considered extreme prematurity."); Stephen Wilkinson et al., Artificial Wombs Could Someday be a Reality, The Conversation, Dec. 1, 2023 (at the time of this decision, this article could be located at: https://theconversation.com/artificial-wombs-could-someday-be-a-reality-heres-how-they-may-change-our-notions-of-parenthood-217490) (observing that even an artificial womb for premature babies "may be many decades away" but that "artificial womb technologies could eventually lead to 'full ectogenesis' -- growing a foetus from conception to 'birth' wholly outside the human body" (emphasis added)).

30 I note that although I certainly agree with the above-quoted statement from the main opinion, even that observation is not as simple as it appears because of the terms involved.

> "Notwithstanding various legislative pronouncements, from a medical and scientific perspective, fertilization is currently considered to be a chaotic and multi-step process, whereas 'conception' has variously been described as the time frame between fertilization and implantation in a woman's uterus, or the process of implantation. Precisely how long an in vitro growing cell mass is considered an **embryo** versus a pre-**embryo**, or whether the latter term is a legitimate distinction has long been the subject of debate among scientists as well as legal and ethical scholars."

Susan L. Crockin & Gary A. Debele, Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys, 27 J. Am. Acad. Matrim. Law. 289, 299 (2015). See also McQueen v. Gadberry, 507 S.W.3d 127, 134 n.4 (Mo. Ct. App. 2016) (observing that " ' "Pre-**embryo**" is a medically accurate term for a zygote or fertilized egg that has not been implanted in a uterus. It refers to the approximately 14-day period of development from fertilization to the time when the **embryo** implants in the uterine wall and the "primitive streak," the precursor to the nervous system, appears. An **embryo** proper develops only after implantation. The term "**frozen embryos**" is a term of art denoting cryogenically preserved pre-**embryos**.' " (quoting Elizabeth A. Trainor, Annotation, Right of Husband, Wife, or Other Party to Custody of **Frozen Embryo**, Pre-**embryo**, or Pre-zygote in Event of Divorce, Death, or Other Circumstances, 87 A.L.R. 5th 253, 260 (2001))).

31 See, e.g., Yehezkel Margalit, From (Moral) Status (of the **Frozen Embryo**) to (Relational) Contract and Back Again to (Relational Moral) Status, 20 Ind. Health L. Rev. 257, 257 (2023) ("The existing hundreds of thousands of unused **frozen embryos**, coupled with the skyrocketing rate of divorce, raise numerous moral, legal, social, and religious dilemmas. Among the most daunting problems are the moral and legal status of the **frozen embryo**; what should its fate be in the event of conflicts between the progenitors?; and whether contractual regulation of **frozen embryos** is valid and enforceable."); Caroline A. Harman, Defining the Third Way -- the Special-Respect Legal Status of **Frozen Embryos**, 26 Geo. Mason L. Rev. 515, 516 (2018) (observing that, "[u]nfortunately, American courts have not kept pace with the advancements happening in the field of ART [assisted reproductive technology]" and that, "[m]ost often, **frozen embryo** cases come to the courts during divorce suits between progenitors. Due to the personal nature of ART, however, progenitors are less likely to seek legal recourse when **frozen embryos** are negligently destroyed and the harm caused by the clinic is shielded from the public eye. While suits regarding negligent destruction of **frozen embryos** and suits when progenitors stop paying storage fees are less common, they are not without their legal and societal implications. When couples do turn to the judicial system, the courts are often ill-equipped to answer such legal questions in a manner that also considers the unique nature of ART and the accompanying emotions of the progenitors." (footnotes omitted)); Shirley Darby Howell, The **Frozen Embryo**: Scholarly Theories, Case Law, and Proposed State Regulation, 14 DePaul J. Health Care L. 407, 407 (2013) (explaining that "[u]sing IVF to assist individuals and couples having trouble procreating would be seemingly positive, but the procedure has resulted in serious unintended consequences that continue to trouble theologians, physicians, and the courts. The ongoing legal debate focuses on two principal questions: (1) whether a **frozen embryo** should be regarded as a person, property, or something else and, (2) how to best resolve disputes between gamete donors concerning disposition of surplus **frozen embryos**."); Maggie Davis, Indefinite **Freeze**?: The Obligations A Cryopreservation Bank Has to Abandoned **Frozen Embryos** in the Wake of the Maryland Stem Cell Research Act of 2006, 15 J. Health Care L. & Pol'y 379, 396-97 (2012) (asserting that "[c]ryopreservation is a scarce good, and is incredibly costly. For instance, one California cryopreservation bank charged clients $375 a year, prepaid, to store **embryos**. After many years, this can become incredibly burdensome on the progenitors. When the fees become too burdensome, there is a higher chance for couples to stop paying their fees, and eventually fall out of contact with the clinic. As **embryos** are abandoned, and storage fees are not paid, cryopreservation banks will likely need to raise the costs of the fees to other customers in order to compensate." (footnotes omitted)); Beth E. Roxland & Arthur Caplan, Should Unclaimed **Frozen Embryos** Be Considered Abandoned Property and Donated to Stem Cell Research?, 21 B.U. J. Sci. & Tech. L. 108, 109 (2015) (" 'As science races ahead, it leaves in its trail mind-numbing ethical and legal questions.' " (quoting Kass v. Kass, 91 N.Y. 2d 554, 562, 696 N.E.2d 174, 178, 673 N.Y.S. 2d 350, 354 (1998) (citing John A. Robertson, Children of Choice: Freedom and The New Reproductive Technologies (1994))).

32 See, e.g., Valerie A. Mock, Getting the Cold Shoulder: Determining the Legal Status of Abandoned IVF **Embryos** and the Subsequent Unfair Obligations of IVF Clinics in North Carolina, 52 Wake Forest L. Rev. 241, 257 (2017) (observing that "IVF centers are largely a self-regulated industry, meaning that for better or for worse, they receive little governmental oversight. There are no federal regulations for the disposition of abandoned **embryos**, and very few states have addressed it legislatively." (footnotes omitted)); Roxland & Caplan, 21 B.U. J. Sci. & Tech. L. at 115 (noting that "[n]o federal statutory law or regulation generally governs the classification of **frozen embryos**. In fact, only three states have enacted legislation concerning the disposition of **frozen embryos** more generally: Louisiana, Florida, and New Hampshire." (footnotes omitted)).

33 Otherwise, the duration of oral argument would not have approached two hours.

34 See Craft v. McCoy, 312 So. 3d 32, 37 (Ala. 2020) (recognizing that " ' " ' " 'when determining legislative intent from the language used in a statute, a court may explain the language, but it may not detract from or add to the statute' " ' " ' ") (citations omitted)); and Ex parte Coleman, 145 So. 3d 751, 758 (Ala. 2013) (recognizing that " '[t]he judiciary will not add that which the Legislature chose to omit' " (quoting Ex parte Jackson, 614 So. 2d 405, 407 (Ala. 1993))).

35 See generally Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 403-10 (Thomson/West 2012); Joe Carter, Justice Scalia Explains Why the "Living Constitution" is a Threat to America, Action Inst. (May 14, 2018) (at the time of this decision, this article could be located at: https://rlo.acton.org/archives/101616-justice-scalia-explains-why-the-living-constitution-is-a-threat-to-america.html).

36 Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham, 912 So. 2d 204, 212 (Ala. 2005) (explaining that "[t]he Constitution of Alabama expressly adopts the doctrine of separation of powers that is only implicit in the Constitution of the United States").

37 See also Mitchell, supra, at 1103 (explaining that "[w]hen judges say words should be given their 'ordinary' meaning, we do not mean that each word in a text always takes its literal meaning or its most statistically common meaning. We mean instead that words must be given the meaning that an ordinary reasonable person would ascribe to them after reading them in context.").

38 As Justice Mitchell notes in Textualism in Alabama, supra, "[o]ur court, along with the U.S. Supreme Court and courts within the United States Court of Appeals for the Eleventh Circuit, has cited Reading Law numerous times." 74 Ala. L. Rev. at 1107.

39 Consistent with applying original public meaning, this Court has explained that " '[t]he court knows nothing of the intention of an act, except from the words in which it is expressed, applied to the facts existing at the time, the meaning of the law being the law itself.' " Maxwell v. State, 89 Ala. 150, 161, 7 So. 824, 827 (1890) (citation omitted).

40 See also Holmes v. Sanders, 729 So. 2d 314, 316 (Ala. 1999) (" '[T]he common law is the base upon which all of the laws of this State have been constructed, and when our courts are called upon to construe a statute, ... they must read the statute in light of the common law.' ") (citation omitted); Ivey v. Wiggins, 276 Ala. 106, 108, 159 So. 2d 618, 619 (1964) (recognizing that "[l]egislative enactments in modification of the common law should be clear and such as to prevent reasonable doubt as to the legislative intent and of the limits of such change"). Further "statutes being in derogation of the common law, must be strictly construed, and cannot be extended in their operation and effect by doubtful implication." Mobile Battle House, Inc. v. Wolf, 271 Ala. 632, 639, 126 So. 2d 486, 493 (1961) (emphasis added).

41 Again, we must follow the original public meaning of the statute, even if we might believe that the meaning is ill-informed, unwise, or outdated. If a meaning of a statute is, in fact, ill-informed, unwise, or outdated, the Legislature -- not this Court -- must amend or update that statute.

42 The main opinion also asserts that we can ignore the common-law criminal-law rule that it admits existed, because the criminal law has always been " 'out of step with the treatment of prenatal life in other areas of law.' " —— So. 3d at —— n.6 (quoting Dobbs, 597 U.S. at 247, 142 S.Ct. 2228). It does not cite any Alabama law for this assertion.

Regardless, this assertion is directly contrary to our Court's repeated holdings that there should be "congruence" between the Wrongful Death Act and Alabama's criminal-homicide statutes (as discussed more fully below). See Mack, 79 So. 3d at 611. Even if it were not, this argument is nevertheless irrelevant given that the common-law rule in the civil-law context in Alabama was the same rule as the criminal-law rule. See, e.g., Stanford, 214 Ala. at 612, 108 So. at 566.

Further, Dobbs did not say that the criminal law could be ignored in determining the meaning of the common law. Instead, the main opinion's quote from Dobbs merely concerned a debate over the "basis" for a different common-law rule (the quickening rule) -- an issue that the Dobbs Court did not even decide. 597 U.S. at 247, 142 S.Ct. 2228.

43 Although the main opinion cites to Dobbs in an apparent effort to support these two law-review articles, Dobbs did not hold, or even suggest, that this common-law rule was merely an evidentiary rule and not a substantive rule of law. Instead, as noted above, the page in Dobbs cited by the main opinion contains a discussion of a debate over the possible "basis" for the "quickening rule." Dobbs, 597 U.S. at 247, 142 S.Ct. 2228. Moreover, Dobbs concluded that even the debate over the "basis" of the "quickening rule" was "of little importance." Id. In the present appeals, the "basis" for the common-law rule that an unborn infant could not be killed is not at

issue. Even if we were to assume that the "basis" for this common-law rule was unwise, it was still the rule in effect at the time the Wrongful Death Act was passed and therefore is part of the original public meaning of that Act unless the Legislature amends it.

44 The main opinion argues in a footnote that the language in the first definition of "child" merely "contrasts newborns with older children in order to make the point that there is no clear-cut time at which a young person transitions from childhood to adulthood." —— So. 3d at —— n.5. But this is not the plain meaning of the language in the definition of "child": "[t]he term is applied to infants from their birth." Webster, supra, at 198. And, our Court is not in a position to speculate about what the subjective intent of the author of an 1864 dictionary might have been -- that is, whether this plain language was included merely "in order to make the point." See Scalia & Garner, supra, at 30 ("Subjective intent is beside the point.... Objective meaning is what we are after ....").

In that same footnote (and in a parenthetical in the text of the main opinion), the main opinion also quotes the last line of the definition in this dictionary (line 41 -- under the seventh definition). —— So. 3d at —— n.5. However, this quotation is simply an illustration. Webster, supra, at 198 ("To be with child, to be pregnant"). Again, this illustration does not contradict the common law or Alabama law of the time. In fact, to the extent that this illustration could mean anything in these appeals, it would tend to show that a **frozen embryo** outside of a mother would not have been part of the public meaning of "minor child" in 1872 because there would be no mother who was "pregnant."

Finally, the main opinion argues that the definition of a different word --"childbearing" -- "drives home the point" when it "describes 'childbearing' as the act of 'bearing children' in the womb." Id. However, the definition is far less clear. Instead it states that "childbearing" is "[t]he act of producing or bringing forth children; parturition."

45 See also Alabama Dep't of Revenue v. Greenetrack, Inc., 369 So. 3d 640 (Ala. 2022) (declining to overrule precedent when the parties did not expressly ask this Court to do so).

46 When construing a criminal statute in a civil action, the Rule of Lenity should be applied because it would be "inconceivable" to give "the language defining the violation ... one meaning (a narrow one) for the penal sanctions and a different meaning (a more expansive one) for the private compensatory action." Scalia & Garner, supra, at 297.

47 The year after this Court decided Mack, supra, it was once again called upon to address the reach of the Wrongful Death Act in Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012). The main opinion quotes Hamilton for the proposition that a wrongful-death-act claim can be brought for " 'any unborn child.' " —— So. 3d at —— (quoting Hamilton, 97 So. 3d at 735). This quote is correct, but it does not answer the relevant question in these cases -- that is, whether a **frozen embryo** is a "minor child" as that term was used in 1872 in the Wrongful Death Act. Further, Hamilton did not change the holding in Mack and instead expressly stated that "Mack is now controlling precedent .... Therefore, we will apply Mack in deciding this appeal." Hamilton, 97 So. 3d at 735. Moreover, to the extent that there is any confusion about whether the homicide statutes' definition of "person" has been "borrow[ed]" (and thus is both a "floor" and a "ceiling" for the scope of the term "minor child" in the Wrongful Death Act), Stinnett governs because it was decided after Hamilton.

48 The main opinion argues that the "bulk of [my] dissent is animated by the view that Mack was wrongfully decided and that, contrary to its holding, unborn children are not 'children' under the Act after all." —— So. 3d at —— n.4. This is inaccurate. The opinions in these cases are settled law, and I have not questioned them or their reasoning. Moreover, as explained above, Mack arose after the Legislature made an express change to the criminal-homicide statutes that broadened the definition of "person" beyond the common law for the first time. So that there is no doubt, the law in Alabama is clear (since the Legislature amended the criminal-homicide statutes) that killing an "unborn child in utero" is both a homicide and actionable under the Wrongful Death Act -- and I agree with this law.

Here, we are called upon to decide a question that this Court has not decided before -- whether a **frozen embryo** is a "minor child" under the Wrongful Death Act. There are two possible approaches to this: (1) follow the holding of Mack and Stinnett (that is, use the homicide definition of "person" adopted by the Legislature in the criminal-homicide statutes) or (2) independently determine the meaning of that term by following the original public meaning of that term. As explained above, the result is the same under either approach. The main opinion must choose one way or the other. Either Mack and Stinnett were correct and the main opinion is bound by the criminal-homicide statutes' definition for "person," or the main opinion is bound by the original public meaning of the term "minor child."

49 See also Cook v. Meyer Bros., 73 Ala. 580, 583 (1883) (noting the "presumption ... that the language ... of the statute import[s] the alteration or change it was designed to effect, and [its] operation will not be enlarged by construction ....").

50 The authority cited in Clarke was a leading criminal-law treatise originally written about the common law by an English Justice named William Oldnall Russell. Although this Court cited the sixth edition (published in 1896), the earlier editions contained the same quote, dating back to at least 1826. See, e.g., William Oldnall Russell, A Treatise on Crimes and Indictable Misdemeanors at 424 (2d ed. 1826). In other words, this Court in Clarke correctly stated and followed the content of the common law.

51 I note briefly that, were we to adopt the plaintiffs' proposed construction of the definition of "person" in the criminal-homicide statutes, we risk criminalizing the IVF process. Under the Rule of Lenity, " 'criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants.' " Ex parte Bertram, 884 So. 2d 889, 891 (Ala. 2003) (quoting Clements v. State, 370 So. 2d 723, 725 (Ala. 1979), overruled on other grounds by Beck v. State, 396 So. 2d 645 (Ala. 1980)). Thus, if there were any reasonable doubts as to the statutory construction of the criminal-homicide statutes, this Court would apply the Rule of Lenity and strictly construe the definition of "person" in favor of those persons sought to be subjected to their operation -- for instance, in a future case, perhaps fertility-clinic workers. This is yet another reason why the plaintiffs' interpretation of the criminal-homicide statutes is mistaken.

52 It is of course true, as the main opinion notes, that the Constitution is the " 'supreme law of the state' " and that all statues " 'must yield' " to it. —— So. 3d at —— n.7. However, the main opinion fails to explain why the original public meaning of the term "minor child" in the Wrongful Death Act violates -- that is, does not "yield" to -- § 36.06. Although the main opinion contends that the definition of "child" that it applies here is "in keeping with the definition that was established by this Court's precedents at the time § 36.06 was adopted," id. (emphasis omitted), I fail to see how that could be true given that, as explained in detail above, the main opinion is overruling Mack and Stinnett.

53 Like the main opinion, Justice Shaw argues that the definition of "person" in the criminal-homicide statutes "does not limit the determination whether an in vitro **embryo** is a 'minor child' for purposes of a civil-law action under the Wrongful Death Act." —— So. 3d at —— (Shaw, J., concurring specially). But, he cites no legal authority other than referring to the main opinion, and therefore he is mistaken for all the reasons explained above.

54 The main opinion notes, but does not reach, the defendants' possible defenses based upon contracts between the IVF provider and the plaintiffs. Like the main opinion, I do not reach the possible defenses. However, no medical provider would depend upon the contract argument to continue creating and maintaining **frozen embryos** in the future, given this significant legal uncertainty and the potential to incur a significant punitive damage penalty.

55 As to the consequences of a contrary ruling, the main opinion discusses, but does not rely upon, a "parade of horribles" that the plaintiffs claim might result from a ruling that the term "minor child" in the Wrongful Death Act does not include **frozen embryos**. The plaintiffs are mistaken. These cases have no connection to partial-birth abortions, and Alabama's law on partial-birth abortions would not be impacted by a ruling in favor of the defendants in these civil wrongful-death cases. See § 26-23-3, Ala. Code 1975. There are also no facts in the record to support any such argument, and there is no doubt the Wrongful Death Act could reach a partial-birth abortion situation as appropriate.

As to the plaintiffs' second argument (regarding a possible future case involving a yet to be invented artificial womb), the answer to this futuristic hypothetical is simple. These cases are about the facts today and are based upon a statute that has not changed in its relevant terms since 1872. Should the facts change, the Legislature can address future technologies and can do so far better than this Court.

The main opinion alleges that I have conceded that the Wrongful Death Act would not cover such a hypothetical. It is mistaken. I have made no such concession. We decide cases on the facts that are before us -- not hypotheticals. The main opinion also alleges that I have failed to discuss the "constitutional implications" of this hypothetical. —— So. 3d at —— n.3. Again, the reason is simple -- it is a hypothetical and we do not reach arguments or facts that are not before us, certainly not hypotheticals about technology that does not even exist. This Court would be in a position to address the alleged "constitutional implications" only if the following circumstances existed: (1) such an artificial womb existed, (2) it was actually used someday in the future, (3) a developing unborn infant was killed in an artificial womb, (4) the Wrongful Death Act had not been modified by the Legislature, (5) and we concluded that this created an Equal Protection Clause conflict. No such circumstances exist in the present appeals; I therefore see no need to address these hypothetical scenarios. See, generally, Ex parte Ankrom, 152 So. 3d 397, 431 (Ala. 2013) (Shaw, J., concurring in

part and concurring in the result) ("Some of the arguments made ... are premised on hypothetical situations, different from the facts before us, in which the Code section might be either unconstitutional as applied or seemingly unwise in its application. It goes without saying that we cannot strike down the application of the Code section ... merely because the Code section might be unconstitutionally applied in some other context." (footnotes omitted)).

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193 S.W.3d 40
Court of Appeals of Texas,
Houston (1st Dist.).

Randy M. ROMAN, Appellant,

v.

Augusta N. ROMAN, Appellee.

No. 01–04–00541–CV.
|
Feb. 9, 2006.
|
Rehearing Overruled May 18, 2006.

Synopsis

Background: Husband filed for divorce, and husband and wife reached final, binding mediation agreement as to the division of marital property, with the exception of three frozen embryos. The 310th District Court, Harris County, Lisa Millard, J., ordered that wife take possession of the embryos as part of a just and right division of community property. Husband appealed.

Holdings: On issues of first impression, the Court of Appeals, Evelyn V. Keyes, J., held that:

parties may voluntarily decide the disposition of a frozen embryo in advance of cryopreservation;

embryo agreement between former husband and wife which provided that frozen embryos were to be discarded in the event of divorce was valid and enforceable.

Reversed and remanded.

Attorneys and Law Firms

***41** Gregory B. Enos, The Enos Law Firm, P.C., Webster, TX, for Appellant.

Rebecca Lynn Reitz, John F. Gay, Gay & Reitz, P.C., Houston, TX, for Appellee.

Heather Morlang, Michelle Marie Samadany–Farme, Kacal, Adams & Law, Houston, TX, for Other.

Panel consists of Justices TAFT, KEYES, and HANKS.

OPINION

EVELYN V. KEYES, Justice.

In a case of first impression in Texas, appellant, Randy M. Roman, appeals the judgment of the trial court that awarded three frozen embryos[1] to appellee, Augusta ***42** N. Roman, in the couple's final decree of divorce. In five issues, Randy argues that the trial court (1) failed to declare the rights of the parties pursuant to a contract; (2) erred in awarding the three frozen embryos to Augusta; (3) erred in failing to make findings of fact and conclusions of law concerning constitutional issues; (4) violated his constitutional rights by awarding the frozen embryos to Augusta; and (5) erred in awarding frozen embryos to Augusta when Randy had withdrawn his consent.

1 Although "preembryo" is a medically accurate term for a zygote, or fertilized egg, that has not been implanted in a uterus, we will use the term embryo for linguistic convenience. *See* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction,* 59 S. Cal. L.Rev. 939, 952 n. 45 (1986). Frozen embryos is "the term of art denoting cryogenically-preserved preembyos." Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?,* 27 Conn. L.Rev. 1377 n. 4 (1995).

We reverse and remand the cause.

Background

Augusta and Randy married on July 5, 1997. After a few years of marriage, the parties began trying to have children. When the traditional avenues of childbirth proved unsuccessful, the parties tried artificial insemination. Several attempts at artificial insemination likewise proved unsuccessful.

In August 2001, the parties met with Dr. Vicki Schnell, the Medical Director at the Center for Reproductive Medicine (the "Center"). Augusta had laparoscopic surgery and three more attempts at artificial insemination, but was still unsuccessful at getting pregnant.

Dr. Schnell then recommended that the parties try in vitro fertilization ("IVF"). The process of IVF "involves the aspiration of ova or oocytes from the follicles of a woman's ovaries and fertilization of these ova in a laboratory procedure using the husband's or donor's sperm. The resulting [embryos] are transferred to the uterus of the potential mother, whereupon a viable pregnancy may occur. Because the IVF procedure frequently produces more [embryos] than safely may be transferred at one time, the extra [embryos] may be frozen for future use through a process called cryopreservation." *In the Interest of O.G.M.,* 988 S.W.2d 473, 474 (Tex.App.-Houston [1st Dist.] 1999, pet. dism'd).

On March 27, 2002, the parties signed a number of documents at the Center, including one entitled "Informed Consent for Cryopreservation of Embryos" ("embryo agreement"). In this document, the parties authorized the storage of the embryos in a frozen state until the Center determined that appropriate conditions existed for transfer of the embryos to the woman's uterus and both husband and wife agreed to the transfer. In addition, the parties chose to discard the embryos in case of divorce. The document also contained a provision that allowed the parties to withdraw their consent to the disposition of the embryos and to discontinue their participation in the program.

On April 17, 2002, thirteen eggs were extracted from Augusta. Six of these eggs were successfully fertilized with Randy's sperm, resulting in six embryos. Of the six embryos that were fertilized, only three reached a stage of development to warrant the cryopreservation process. Dr. Schnell scheduled Augusta's implantation for April 20. On the night before the implantation, Randy expressed feelings to Augusta that led him to withdraw his consent to the implantation scheduled for the next day. The next day, the parties told Dr. Schnell that Augusta would not undergo the implantation procedure. A month after they decided to wait, the parties signed an agreement to unfreeze three embryos and implant them. The agreement was contingent ***43** on the parties' obtaining approval from a counselor. That agreement never took effect because Randy and Augusta did not progress through counseling.

On December 10, 2002, Randy filed for divorce and Augusta filed a counterclaim for divorce that included claims for fraud and intentional infliction of emotional distress.[2] The parties reached a final binding agreement during mediation as to the division of the marital property, except for the frozen embryos. At trial, Randy asked the trial court to uphold their written agreement, which specified that the embryos be discarded. Augusta wanted the opportunity to have the embryos implanted so that she could have a biological child.[3] If any children were born from the embryos, Augusta stated that Randy would not have parental rights or responsibilities. The day after the trial ended, the trial court ordered that Augusta take possession of the remaining three embryos. After the trial court awarded the embryos to Augusta, Randy complied with section 160.706(a) of the Texas Family Code, which allows him to seek parental rights to any child born from the embryos. *See* Tex. Fam.Code Ann. § 160.706(a) (Vernon 2002).

2 In its modified decree of divorce, the trial court entered a take-nothing judgment on Augusta's fraud and intentional infliction of emotional distress causes of action. Augusta does not appeal the trial court's findings on these issues.

3 Dr. Schnell testified that Augusta has a 10% chance of becoming pregnant if the embryos are transferred to her.

On March 29, 2004, Randy filed a motion for new trial and a request for findings of fact and conclusions of law regarding the award of the frozen embryos to Augusta.[4] The trial court signed its first set of findings on April 26, 2004. The trial court's pertinent findings of fact provide as follows:

4 Randy asserts that he inadvertently submitted this set of findings of fact and conclusions of law. In two of his issues on appeal (the first and third), Randy asks us to abate the appeal to have the trial court make additional findings of fact and conclusions of law.

1. Three embryos, now frozen, were created during the marriage using the sperm of Randy Roman and the eggs of Augusta Roman.

2. The parties signed a mediation agreement addressing all issues involving the division of community property except for the three frozen embryos.

3. The three frozen embryos are community property.

The trial court's conclusions of law state:

1. The division of the community property agreed to by Petitioner and Respondent in their mediation agreement and the award to Respondent of the three frozen embryos as set forth in the Modified Final Decree of Divorce is just and right and a fair and equitable division of the community property.

On May 13, 2004, the trial court signed a second and more thorough set of findings submitted by Augusta. The record reflects that Randy never filed a request for additional findings.[5]

5 Randy asserts that he never knew that the trial court signed the first or second set of findings.

The trial court's second set of findings of fact state, in relevant part the following:

13. The Court considered all evidence and testimony in balancing the constitutional rights of both parties in making the award of the three (3) frozen embryos to AUGUSTA N. ROMAN.

14. The Court considered all evidence and testimony regarding documents ***44** the parties signed with the Center of Reproductive Medicine....

The second set of conclusions of law states,

7. The award of three (3) embryos to [Augusta] is part of a just and right division of the community estate having due regard for the constitutional rights of each party.

8. The order for the Center of Reproductive Medicine to surrender the three (3) frozen embryos to [Augusta] is necessary to effect a just and right division of the community estate.

Analysis

In this case of first impression in Texas, we consider the merits of the trial court's award of frozen embryos to Augusta as part of a "just and right" division of community property in light of the parties' prior written agreement to discard the embryos. We answer the issue with which we are presented as narrowly as possible in anticipation that the issue will ultimately be resolved by the Texas Legislature.[6]

6 At least three states have enacted legislation addressing frozen embryos. *See, e.g.,* Fla. Stat. Ann.. § 742.17 (couples must execute written agreement providing for disposition in event of death, divorce or other unforeseen circumstances); N.H.Rev.Stat. Ann. §§ 168–B:13–168–B:15, 168–B:18 (couples must undergo medical examinations and counseling; 14–day limit for maintenance of *ex utero* pre-zygotes); La.Rev.Stat. Ann. §§ 9:121–9:133 (pre-zygote considered "juridical person" that must be implanted); *see also* Tex. Fam.Code Ann. §§ 160.102(2) (defining assisted reproduction), 160.706 (entitled "Effect of Dissolution of Marriage") (Vernon 2002), § 160.754(e) (Vernon Supp.2005) (stating that parties to gestational agreement must enter into agreement before the 14th day preceding the transfer of embryos).

Award of Embryos

In his second issue on appeal, Randy argues that the trial court erred when it awarded the three frozen embryos to Augusta because the award violated the parties' embryo agreement. Randy contends that the agreement clearly provided for disposal of the frozen embryos in the case of divorce and that the trial court erred by not enforcing the agreement. Randy points to the following specific provisions in the embryo agreement:

2. We consent and authorize the embryo(s) to be stored in a frozen state until Dr. Schnell and the IVF Laboratory determine that appropriate conditions exist for transfer of the embryo(s) to the wife's uterus and both husband and wife agree to the transfer.

* * *

10. If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken:

The frozen embryo(s) shall be ... Discarded.

Randy argues that these provisions of the embryo agreement allow transfer of the embryos only if both parties agree and that the trial court erred by not enforcing the agreement and ordering the embryos destroyed.[7] Randy also argues that no ***45** evidence or insufficient evidence supports a finding that the embryo agreement was not enforceable or invalid. Although no Texas case has ruled on whether these types of agreements are enforceable, Randy contends that other jurisdictions have held that similar agreements are enforceable.

7 We note that the parties also agreed in the embryo agreement that the frozen embryos would be their "joint property." Section seven of the agreement states,

7. We understand that legal principles and requirements regarding IVF and embryo freezing have not been firmly established. There is presently no state legislation dealing specifically with these issues. We have been advised that each embryo resulting from the fertilization of the wife's oocytes by the husband's sperm shall be the joint property of both partners based on currently accepted principles regarding legal ownership of human sperm and oocytes. We are aware that these regulations may change at any time.

> This section acknowledges that Texas laws regarding legal ownership of frozen embryos could change and that this area of the law continues to develop. Because it is not necessary to the disposition of this appeal, we do not address the parties' characterization of the frozen embryos as "joint property."

Augusta does not dispute that she signed and initialed the embryo agreement. She does dispute, however, the agreement's validity and the interpretation of the agreement. Specifically, Augusta argues that the trial court could have chosen not to enforce the agreement because other state supreme courts have found agreements similar to the one at issue here invalid. Because this issue has not been decided by any court in Texas, we will review the scant case law on the issue.

Prior cases involving frozen embryos

All but one of the cases surveyed involved an oral or written agreement regarding disposition of frozen embryos. In *Davis v. Davis,* the earliest case, the husband and wife did not have an agreement for the disposition of the embryos. 842 S.W.2d 588, 589 (Tenn.1992), *cert. denied sub nom, Stowe v. Davis,* 507 U.S. 911, 113 S.Ct. 1259, 122 L.Ed.2d 657 (1993). The trial court awarded custody of the frozen embryos to the wife, but the court of appeals reversed on the ground that the husband had a constitutional right not to beget a child. *Id.* at 589. In affirming the judgment of the court of appeals, the Supreme Court of Tennessee ultimately chose to weigh the interests of each party and concluded that the husband's interest in avoiding parenthood was more significant than the wife's interest in donating the embryos to another couple for implantation. *Id.* at 604.

Although the parties did not have an agreement concerning disposition of the frozen embryos, the court discussed the enforceability of a contract in this situation. The court stated, "an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors." *Id.* at 597. The court further stated that,

> [W]e recognize that life is not static, and that human emotions run particularly high when a married couple is attempting to overcome infertility problems. It follows that the parties' initial 'informed consent' to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds. Providing that the initial agreements may later be modified *by agreement* will, we think, protect the parties against some of the risks they face in this regard. But, in the absence of such agreed modification, we conclude that their prior agreements should be considered binding.

Id. at 597 (emphasis in original).

In *Kass v. Kass,* prior to implantation, the parties signed a consent form which stated that the frozen embryos would not be released from storage without the written consent of both parties. 91 N.Y.2d 554, 673 N.Y.S.2d 350, 696 N.E.2d 174, 176 (1998). Another part of the consent agreement ***46** provided that if the parties could not reach a mutual decision on the frozen embryos, the embryos would be donated to research. *Id.* at 177. Before filing suit, the wife decided that she opposed the destruction of the embryos. *Id.* The trial court awarded custody of the embryos to the wife and directed her to implant them within a medically reasonable time. *Id.* The appellate division reversed. It unanimously agreed that the consent agreement regarding the disposition of unused fertilized eggs should control. *Id.* A two-justice plurality found that the parties' consent agreement indicated their desire to donate the embryos for research purposes if they could not both consent to the embryos' disposition. *Id.*

The highest court of New York affirmed the lower court's holding that the parties' consent agreement should control. The court noted that the parties had expressed their intent that if they could not agree on the embryos' disposition, they would be donated for research purposes. *Id.* at 178. It stated, "[P]arties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions." *Id.* at 180. The court further stated,

> Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a

> quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF programs.
>
> *Id.*

A New Jersey appellate court, by contrast, rejected an alleged oral agreement to procreate as against public policy. *See J.B. v. M.B.,* 331 N.J.Super. 223, 751 A.2d 613, 615 (2000). In *J.B. v. M.B.,* the husband wanted to preserve the frozen embryos for his use or that of an infertile couple. 751 A.2d at 615. The wife wanted the frozen embryos destroyed, and she did not want her former husband to retain them for his own use or to donate them to anyone else. *Id.* at 616. The trial court ruled in favor of the wife, who wanted the embryos destroyed, because the family unit was no longer intact. *Id.*

The appellate court balanced the wife's right not to become a parent with the husband's right to procreate using the embryos under the Fourteenth Amendment and concluded that the husband's right would not be impaired if the embryos were destroyed because he still would be able to father children. *Id.* at 618–19. Thus, even if the Fourteenth Amendment applied, the court rejected the husband's argument that his constitutional rights would be violated if the embryos were destroyed. *Id.* at 619. The appellate court further held that a contract to procreate is contrary to New Jersey public policy and is unenforceable. *Id.* The court thus affirmed the trial court's order that the frozen embryos be destroyed. *Id.* at 620.

The Supreme Court of New Jersey affirmed, but modified the court of appeals' holding, recognizing "that persuasive reasons exist for enforcing preembryo disposition agreements." *J.B. v. M.B.,* 170 N.J. 9, 783 A.2d 707, 719 (2001). The supreme court held that the parties' consent agreement did not "manifest a clear intent by [the parties] regarding disposition of the preembryos in the event of a dissolution of their marriage." *Id.* at 713 (internal quotations omitted). In reaching its ultimate holding, the court considered the constitutional rights of the parties and stated that, "[w]e will not force [the wife] to become a ***47** biological parent against her will." *Id.* at 717. The court held that it will "enforce agreements entered into at the time in vitro fertilization [has] begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos." *Id.* at 719. If the parties disagree about disposition because one party has reconsidered their decision, the court stated, "the interests of both parties must be evaluated."[8] *Id.*

8 The court also stated, "We express no opinion in respect of a case in which a party who has become infertile seeks use of stored preembryos against the wishes of his or her partner, noting only that the possibility of adoption also may be a consideration, among others, in the court's assessment." 783 A.2d at 720.

In *A.Z. v. B.Z.,* before the eggs were retrieved from the wife, the parties signed consent forms. 431 Mass. 150, 725 N.E.2d 1051, 1053–54 (2000). The wife filled out the form, which stated that if they "[s]hould become separated, [they] both agree[d] to have the embryo(s) ... return[ed] to [the] wife for implant." *Id.* at 1054. The court noted that the husband always signed a blank consent form. *Id.* After the husband signed the consent form, the wife would fill in the disposition and sign the form herself. *Id.*

The trial court permanently enjoined the wife from utilizing the frozen embryos held in cryopreservation. The supreme judicial court stated that "in view of the purpose of the form (drafted by and to give assistance to the clinic) and the circumstances of execution, we are dubious at best that it represents the intent of the husband and the wife regarding disposition of the preembryos in the case of a dispute between them." *Id.* at 1056.

Specifically, the court stated that neither the form nor the record indicated that the parties intended the form to be a binding agreement. *Id.* Instead, the court interpreted the form only to "define the donors' relationship as a unit with the clinic." *Id.* In reaching its decision, the court also noted that the consent form did not contain a duration provision and that it could not assume that the donors intended their consent form to govern a disposition of frozen preembryos four years after it was executed. *Id.* at 1056–57.

The court also looked to the donors' conduct in connection with the execution of the consent forms and determined that their conduct created doubt that the consent form represented the intentions of both donors. *Id.* at 1057. Because the husband signed

a blank form and the wife later filled in her choice regarding disposition of the frozen embryos, the court concluded that the consent form did not represent the true intentions of the husband. *Id.*

In *Litowitz v. Litowitz,* the husband and wife contracted with an egg donor and an IVF clinic. *See* 146 Wash.2d 514, 48 P.3d 261, 263 (2002), *cert. denied,* 537 U.S. 1191, 123 S.Ct. 1271, 154 L.Ed.2d 1025 (2003). After the husband's sperm fertilized three of the donor's eggs, the eggs were implanted, resulting in the birth of a child. Before the birth, however, the parties separated, and sued for divorce. At trial, the wife asked to be awarded the remaining embryos to implant in a surrogate. The trial court awarded the embryos to the husband, who wanted to donate them to an out-of-state couple. The appeals court, in reviewing the egg donor contract, noted that it did not provide what would be done with the embryos if the parties could not agree or if they dissolved their marriage. The court concluded that the husband's right not to procreate compelled an award of the embryos to him. *Id.* at 265. The Supreme Court of Washington reversed, ***48** holding the parties to their preembryo cryopreservation contract, which provided that the remaining embryos would be thawed out, but not allowed to undergo further development, and that they would be disposed of after they had been maintained in cryopreservation for five years. *Id.* at 271.

The most recent case to consider the issue, *In re Marriage of Witten,* 672 N.W.2d 768, 771–72 (Iowa 2003), likewise focused on the embryo agreement. In *Witten,* the parties signed an embryo storage agreement with the IVF clinic prior to undergoing the IVF process. *Id.* at 772. The consent form provided that frozen embryos would be released only with the approval of both the husband and the wife. *Id.* The trial court concluded that the embryo storage agreement governed the dispute over the frozen embryos. *Id.* at 773. The parties were thus enjoined from taking any actions with the embryos unless both parties consented. *Id.*

The Iowa Supreme Court noted that the embryo agreement did not specifically address what would happen to the embryos upon divorce. *Id.* The court reviewed the three approaches that courts have used in resolving these types of disputes[9] and adopted the contemporaneous mutual consent model. *Id.* at 783. In adopting this model, the court found that it would be against Iowa public policy "to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos."[10] *Id.* at 781. Nevertheless, the court recognized that an embryo agreement between embryo donor and fertility clinics "serves an important purpose ... ensuring that all parties understand their respective rights and obligations." *Id.* Given these different considerations, the court stated, "[W]e reject the contractual approach and hold that agreements entered into at the time in vitro fertilization is commenced are enforceable and binding on the parties, 'subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo,' " providing that any change of intention is communicated in writing to all parties. *Id.* at 782–83 (quoting *J.B.,* 783 A.2d at 719). Because the agreement did not address disposition of the embryos upon divorce and neither party could agree on the embryos' disposition, the court enjoined both parties from utilizing the embryos without the other's written consent. *Id.* at 783.

9 The Iowa court stated that courts have used the following approaches to determine the disposition of frozen embryos: (1) a best interest test, (2) a contractual approach, and (3) a contemporaneous mutual consent model.

10 The court concluded that embryos are "fundamentally distinct from the chattels, real estate, and money that are the subjects of antenuptial agreements." *Id.* at 781.

We are mindful of the cases that have addressed this issue and particularly what we see as an emerging majority view that written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable so long as the parties have the opportunity to withdraw their consent to the terms of the agreement. Because we are not bound by state law from other jurisdictions, however, we will also review our own statutes to determine the public policy of this State in the context of embryo agreements.

Public Policy of Texas

Currently, the State of Texas has laws regarding children of assisted reproduction and gestational agreements, both contained ***49** within the Uniform Parentage Act.[11] *See* Tex. Fam.Code Ann. § 160.701–.707 (Vernon 2002), §§ 160.751–.763 (Vernon

Supp.2005). Assisted reproduction means a method of causing pregnancy other than sexual intercourse, including IVF and transfer of embryos. *Id.* § 160.102(2)(D) (Vernon 2002). The statute requires that both husband and wife consent to assisted reproduction. *Id.* § 160.704(a). However, section 160.704(b) acknowledges that a child may be born without the husband's consent. *Id.* § 160.704(b). Section 160.706 addresses paternity in the event of divorce as follows: "if a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child." *Id.* § 160.706(a). This section also provides that consent of the former spouse may be withdrawn at any time before the placement of eggs, sperm, or embryos. *Id.* § 160.706(b). Noticeably absent from these sections is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce. Nor is there anything in the case law that is incompatible with the recognition of the parties' agreement as controlling.

11 The Uniform Parentage Act became effective on June 14, 2001. *See* Tex. Fam.Code Ann. §§ 160.001–.763 (Vernon 2002 & Supp.2005). The act governs every determination of parentage in Texas. *See id.* § 160.103(a) (Vernon 2002).

We also look to new legislation concerning gestational agreements. A gestational agreement is an agreement between a woman and the intended parents of a child in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction and which provides that the intended parents become the parents of the child. *See id.* § 160.752(a) (Vernon Supp.2005). The statute specifically authorizes a gestational mother, her husband if she is married, each donor, and each intended parent to enter into a written agreement that relinquishes all parental rights of the gestational mother and provides that the intended parents become the parents of the child. *See id.* § 160.754(a). The statute also requires that the parties to a gestational agreement must enter into the agreement before the 14th day preceding the date of transfer of eggs, sperm, or embryos to the gestational mother. *See id.* § 160.754(e).[12] Parental rights are transferred when a court validates the gestational agreement. *See id.* § 160.753(a), (b). To validate a gestational agreement, the court must find, in relevance to our issue, that each party to the agreement voluntarily entered into and understood the terms of the agreement. *Id.* § 160.756(b)(4). The statute also provides that "[b]efore a prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother, her husband if she is married, or either intended parent may terminate a gestational agreement...." *Id.* § 160.759(a).[13]

12 Section (g) of this section provides that a gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo. *See* Tex. Fam.Code Ann. § 160.754(g) (Vernon Supp.2005).

13 If the gestational mother terminates the gestational agreement, she is not liable to the intended parents. Tex. Fam.Code Ann. § 160.759(d) (Vernon Supp.2005).

We glean from these statutes that the public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in the event of a contingency, such ***50** as divorce, death, or changed circumstances. We agree with the New York Court of Appeals that "[a]dvance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." *Kass,* 673 N.Y.S.2d 350, 696 N.E.2d at 180. These agreements should thus be "presumed valid and should be enforced as between the progenitors." *Davis,* 842 S.W.2d at 597; *Kass,* 673 N.Y.S.2d 350, 696 N.E.2d at 180–181.

We believe that allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties. We hold, therefore, that an embryo agreement that satisfies these criteria does not violate the public policy of the State of Texas.

We now determine whether the embryo agreement in this case manifests a voluntary unchanged mutual intention of the parties regarding disposition of the embryos upon divorce.

Embryo Agreement

Absent ambiguity, we interpret a contract as a matter of law. *DeWitt County Elec. Co-op., Inc. v. Parks,* 1 S.W.3d 96, 100 (Tex.1999). "Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered." *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.,* 940 S.W.2d 587, 589 (Tex.1996). "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex.1983). "An ambiguity exists only if the contract language is susceptible to two or more reasonable interpretations." *Am. Mfrs. Mut. Ins. Co. v. Schaefer,* 124 S.W.3d 154, 157 (Tex.2003). The language in a contract is to be given its plain grammatical meaning unless doing so would defeat the parties' intent. *DeWitt County Elec. Coop.,* 1 S.W.3d at 101. We presume that the parties intended every clause to have an effect. *Heritage Res., Inc. v. NationsBank,* 939 S.W.2d 118, 121 (Tex.1996).

The following elements are required for the formation of a valid and binding contract: 1) an offer, 2) acceptance in strict compliance with the terms of the offer, 3) a meeting of the minds, 4) each party's consent to the terms, and 5) execution and delivery of the contract with the intent that it be mutual and binding. *Wal–Mart Stores, Inc. v. Lopez,* 93 S.W.3d 548, 555–56 (Tex. App.-Houston [14th Dist.] 2002, no pet.). Consideration is also a fundamental element of every valid contract.[14] *Turner–Bass Assocs. of Tyler v. Williamson,* 932 S.W.2d 219, 222 (Tex.App.-Tyler 1996, writ denied).

14 At least one commentator has suggested that the consideration in embryo agreements is the gamete donation process that both husband and wife experience. Marysol Rosado, *Sign on the Dotted Line: Enforceability of Signed Agreements, upon Divorce of the Married Couple, Concerning the Disposition of Their Frozen Preembryos,*36 New Eng. L.Rev.. 1041, 1069 (2002).

The evidence shows that the parties came to the Center on March 27, 2002 to sign a variety of forms. The parties received a cover page along with nine forms.[15] The cover page stated, "Many ***51** forms require careful thought regarding decisions you and your spouse will be asked to make." We focus our discussion on one of the documents entitled, "Informed Consent for Cryopreservation of Embryo."[16]

15 The forms include: Informed Consent for Use of Oral Contraceptives, Informed Consent for Intracytoplasmic Sperm Injection, Request for and Consent for Anesthesia, Informed Consent for Cryopreservation of Embryos, IVF Clinical Contract, Pre–Pay IVF Contract, Informed Consent for the Use of Estrace and Progesterone in IVF, In Vitro Fertilization and Embryo Transfer Informed Consent, and Informed Consent for Assisted Hatching.

16 Page 1 of the agreement provides that after the embryos are cryopreserved they will be maintained for up to three years, unless the decision to thaw them sooner is made or cryopreservation is terminated. Neither party relies on this section of the agreement.

On page two, under the sub-heading "Consent for Cryopreservation," the document states,

> 1. We, Augusta Roman (wife) and Randy Roman (husband), the undersigned, hereby authorize and consent to the freezing of some or all of the remaining embryos that result from our participating in the IVF process.
>
> 2. We consent and authorize the embryo(s) to be stored in a frozen state until Dr. Schnell and the IVF Laboratory determine that appropriate conditions exist for transfer of the embryo(s) to the wife's uterus and both husband and wife agree to the transfer.

On page three, the document states,

> 7. We understand that legal principles and requirements regarding IVF and embryo freezing have not been firmly established. There is presently no state legislation dealing specifically with these issues. We have been advised that each embryo resulting from the fertilization of the wife's oocytes by the husband's sperm shall be the joint property of both partners based on

currently accepted principles regarding legal ownership of human sperm and oocytes. We are aware that these regulations may change at any time.

8. We hereby authorize and require that the actions we have marked below be taken if either or both of us should die while any of our frozen embryos are still in possession of the Center of Reproductive Medicine IVF Program. We consent to the following: If only one of us survives, the surviving spouse shall have full authority to decide what is to be done with the embryo(s).

9. We understand that if both of us die, the frozen embryo(s) will be discarded.

On page four, the document states,

10. If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken:

The frozen embryo(s) shall be ... Discarded.[17]

17 The embryo agreement also gave the parties the option of releasing the frozen embryos to either Randy or Augusta, which they declined.

11. If other circumstances arise whereby embryos remain which are not used for the purpose of attempting to initiate a pregnancy in the wife or if the husband and wife are not able to agree on disposition of remaining embryos for any reason, we hereby authorize and direct that the unused frozen embryo(s) will be discarded.

On page five, the document states,

16. We agree and acknowledge that we are voluntary participants, but we understand that we are free to withdraw ***52** our consent as to the disposition of our embryo(s) and to discontinue participation by requesting relocation of our embryo(s) to another suitable location at any time without prejudice.

20. Our questions regarding these procedures have been answered to our satisfaction. Our participation is voluntary. We understand that we may withdraw our consent at any time prior to the procedure. We have read and understand this form. We have received a copy of this form.

Neither party disputes that he or she signed the agreement or initialed the bottom of each page of this agreement. They also do not dispute that each one of them specifically initialed section 8 (embryo disposition in the event of a death) and section 10 (embryo disposition in the event of divorce). They also do not dispute that their frozen embryos were still in the program or that, when they filed for divorce, they had not withdrawn consent as to the disposition of the embryos and discontinued in the participation in the program.

Rather, Augusta argues that she understood the embryo agreement to apply to remaining embryos only after implantation had occurred. She testified that she never agreed to destroy all the embryos without an opportunity to get pregnant. Although she does not refer specifically to it in her brief, Augusta is apparently relying on the first section of the embryo agreement, entitled *Consent for Cryopreservation.* This section provides, "[The parties] hereby authorize and consent to the freezing of some or all of the remaining embryos that result from our participation in the IVF process." We disagree with Augusta's interpretation of the embryo agreement.

For this Court to follow Augusta's interpretation, we would necessarily have to impute language to the contract that is not present and disregard language that is. Specifically, Augusta would have us read the clause as stating that "the parties hereby authorize and consent to the freezing of some or all of the remaining embryos [after an initial set of embryos is implanted] that result from our participating in the IVF process." In an unambiguous contract, we will not imply language, add to language, or

interpret it other than pursuant to its plain meaning. *See Schaefer,* 124 S.W.3d at 162; *Natural Gas Clearinghouse v. Midgard Energy Co.,* 113 S.W.3d 400, 407 (Tex.App.-Amarillo 2003, pet. denied).

Section 10 of the agreement specifically states, "If we are divorced or either of us files for divorce while *any of our frozen embryos are still in the program,* we hereby authorize and direct, jointly and individually, that one of the following actions be taken: The frozen embryo(s) shall be ... Discarded." (Emphasis added). Although the parties could have chosen to release the frozen embryos either to Randy or Augusta, they chose the option to discard the frozen embryos in the event of divorce.

The embryo agreement's language could not be clearer. Section 10 specifically addresses the disposition of the frozen embryos in the event of a divorce. It is undisputed that Augusta and Randy both signed the entire embryo agreement, and they both initialed section 10. The evidence shows that the parties considered this section and did not sign it without thought.

Randy testified that before signing the embryo agreement, he and Augusta discussed their options about what would happen to the embryos upon divorce. Randy stated that they were both excited about taking the next step forward, but also nervous. Randy did not notice that Augusta was too emotionally upset to give ***53** consent. He also testified that they did not disagree as what to do in the event of a divorce. He further testified that no coercion, threats, bribery, or promises were used to make them sign the embryo agreement.

Dr. Schnell testified that the purpose of the cryopreservation form was to determine the parties' desires for the disposition of their embryos upon certain events such as divorce or death. Dr. Schnell testified that the couple had chosen to have the embryos discarded in the event that they divorced. On the day the parties signed the consent forms, Dr. Schnell testified that Augusta "was able to participate in the consult, and that she was able to understand the questions that I asked her, and she was able to state that she did initial those and that she understood the consents and that all her questions were answered concerning the process." At that time, Dr. Schnell did not notice any outward signs of an emotional problem that would prevent Augusta from understanding and making an informed consent.

Augusta testified that she would have signed anything to move forward because her goal was to have a child. She testified that it was possible that because she was taking birth control pills she was not in the right mental state to understand the agreement. Augusta further stated that she understood the agreement, "but I wasn't focusing on much on the [inaudible] to the outcome of the whole process of having a child." She also stated that no one was putting any force, coercion or threats on either of the parties to sign the agreement. She understood that one of the options she had been offered was to give the embryos to herself in the event of divorce. Augusta testified that she signed the agreement with the Center. When asked whether she and Randy had had a meeting of their minds as to what would happen in the unlikely event that they ever divorced, Augusta responded, "We didn't talk about divorce. I mean, it wasn't even a remote—it wasn't a conversation that we had. He signed and I signed—and I initialed it." She was also asked, "So you and Randy Roman never had an agreement on what would happen if you divorce, what would happen to the embryos if you divorced." She responded, "No, we didn't have a discussion." Augusta clarified that they did not have an agreement, other than that expressed in the consent form with the center.

"[P]arties strike the deal *they* choose to strike and, thus, voluntarily bind themselves in the manner *they* choose." *Natural Gas,* 113 S.W.3d at 407. Although Augusta's choice may not have been fully considered, the evidence shows that she was aware of and understood the significance of her decision. The parties' embryo agreement clearly indicates their wishes in the event of divorce. We conclude that the parties' embryo agreement was not ambiguous so as to preclude a meeting of the minds.

Our conclusion that section 10 shows a meeting of the minds is bolstered by section 8 of the embryo agreement, which provides that in the event that one or both of the parties should die, they agree to give the embryos to the surviving spouse even though they could have chosen to discard the embryos. The parties' choice to give the surviving spouse full authority over the embryos indicates that the parties were aware of other options in the agreement. The agreement shows that when the parties wanted to discard the embryos, they made that choice. When the parties wanted to give the embryos to one party, they made that choice. In fact, the embryo agreement shows that at some point in signing section 8, Augusta's initials were on the option that would

have discarded ***54** the embryos. Her initials were subsequently crossed out and re-entered on the choice giving the surviving spouse full authority for the embryos.

We also note that section 11 is applicable to this dispute. Section 11 states, "[I]f the husband and wife are not able to agree on disposition of remaining embryos for any reason, we hereby authorize and direct that the unused frozen embryo(s) will be discarded." Even without section 10, which clearly provides the course of action in the event of divorce, section 11 would also inform the trial court of what to do in the event of a contingency when the parties could not agree.

Texas statutory law and section 16 of the embryo agreement allow a party to withdraw consent to assisted reproduction procedures. *See* Tex. Fam.Code Ann. § 160.706(b) (Vernon 2002) (stating that consent may be withdrawn at any time before the placement of eggs, sperm, or embryos). Neither Randy nor Augusta withdrew consent to the provision in the embryo agreement that the frozen embryos were to be discarded in the event of divorce. Nor did they withdraw consent to the provision within section 11 of the embryo agreement—that if the parties could not agree on the disposition of the embryos, the frozen embryos were to be discarded. Rather, their embryos were still in the program, and the embryo agreement was still in effect when the parties divorced.[18]

18 Randy argues in his fifth issue that the trial court erred in awarding the embryos to Augusta after he had withdrawn his consent to their implantation. We note that Randy's withdrawal of consent to implantation of the embryos on April 20, 2002 did not constitute repudiation of the embryo agreement and withdrawal from the program.

Augusta also argues that Randy "breached the intent and purpose of the IVF agreements, thereby invalidating any decisions made by Mrs. Roman based upon her belief that the entire *agreement* would be honored." (Emphasis in original.) Augusta does not cite any argument or authority for this proposition. Therefore, we will not consider it on appeal. *See* Tex.R.App. P. 38.1(h).

Augusta also argues that the embryo agreement did not reflect a meeting of the minds and was not a valid agreement concerning the disposition of the embryos. She reasons that because Randy deceived her as to his true state of mind, there could be no meeting of the minds. Although there was evidence that Randy had been upset with Augusta in the two years prior to the scheduled implantation, we cannot see how this precludes a meeting of the minds in regard to their mutual decision for the disposition of their embryos in the event of a divorce. *See CU Lloyd's of Texas v. Hatfield,* 126 S.W.3d 679, 682 (Tex.App.-Houston [14th Dist.] 2004, pet. denied) ("If a written contract is so worded that it can be given a definite or certain legal meaning, then it is unambiguous, and [we] may not consider parol evidence as to the parties' intent."). Randy's deceit may have been relevant for proving fraud, but the trial court found against Augusta on that issue.

Augusta additionally argues that because the Center agreed to do whatever the Court ordered it to do, the Center's actions supersede the Center's cryopreservation document and render it moot. Augusta does not state why the embryo agreement is rendered moot, nor does she cite any authority for the proposition. We decline to address her argument. *See* Tex.R.App. P. 38.1(h).

We hold that the embryo agreement provides that the frozen embryos are to be discarded in the event of divorce. By ***55** awarding the frozen embryos to Augusta, the trial court improperly rewrote the parties' agreement instead of enforcing what the parties had voluntarily decided in the event of divorce. Accordingly, the trial court abused its discretion in not enforcing the embryo agreement.

We sustain Randy's second issue.[19]

19 Because we find that the embryo agreement is unambiguous as a matter of law and that its interpretation is therefore a matter of law for the Court, we do not address Randy's first issue, objecting to the trial court's failure to declare the rights of the parties pursuant to a contract. *See* Tex.R.App. P. 47.1.

Because Randy's second issue is dispositive, we decline to address Randy's remaining issues. *See* Tex.R.App. P. 47.1.

Conclusion

We reverse the judgment and remand the cause to the trial court to enter an order consistent with this opinion and with the parties' agreement that the frozen embryos be discarded. All pending motions are denied.

All Citations

193 S.W.3d 40

Tex. Health & Safety Code Ann. Section 245.002

Sec. 245.002. DEFINITIONS. In this chapter:

(1) "Abortion" means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:

(A) save the life or preserve the health of an unborn child;

(B) remove a dead, unborn child whose death was caused by spontaneous abortion; or

(C) remove an ectopic pregnancy.

(2) "Abortion facility" means a place where abortions are performed.

(3) Repealed by Acts 2015, 84th Leg., R.S., Ch. 1, Sec. 3.1639(62), eff. April 2, 2015.

(4) "Department" means the Department of State Health Services.

(4-a) "Ectopic pregnancy" means the implantation of a fertilized egg or embryo outside of the uterus.

(4-b) "Executive commissioner" means the executive commissioner of the Health and Human Services Commission.

(5) "Patient" means a female on whom an abortion is performed, but does not include a fetus.

(6) "Person" means an individual, firm, partnership, corporation, or association.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989.
Amended by:

Acts 2015, 84th Leg., R.S., Ch. 1 (S.B. 219), Sec. 3.0685, eff. April 2, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1 (S.B. 219), Sec. 3.1639(62), eff. April 2, 2015.

Acts 2017, 85th Leg., R.S., Ch. 441 (S.B. 8), Sec. 8, eff. September 1, 2017.

Tex. Health & Safety Code 170A.001

Sec. 170A.001. DEFINITIONS. In this chapter:

(1) "Abortion" has the meaning assigned by Section 245.002.

(2) "Fertilization" means the point in time when a male human sperm penetrates the zona pellucida of a female human ovum.

(3) "Pregnant" means the female human reproductive condition of having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth.

(4) "Reasonable medical judgment" means a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved.

(5) "Unborn child" means an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development.

Added by Acts 2021, 87th Leg., R.S., Ch. 800 (H.B. 1280), Sec. 2, eff. August 25, 2022.

Tex. Health & Safety Code Ann. § 170A.001(5).

(5) "Unborn child" means an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development.

Tex. Health & Safety Code §170A.001(2)(3).

(2) "Fertilization" means the point in time when a male human sperm penetrates the zona pellucida of a female human ovum.

(3) "Pregnant" means the female human reproductive condition of having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth.

APPENDIX 14

HEALTH AND SAFETY CODE

TITLE 2. HEALTH

SUBTITLE H. PUBLIC HEALTH PROVISIONS

CHAPTER 170A. PERFORMANCE OF ABORTION

Sec. 170A.001. DEFINITIONS. In this chapter:

(1) "Abortion" has the meaning assigned by Section 245.002.

(2) "Fertilization" means the point in time when a male human sperm penetrates the zona pellucida of a female human ovum.

(3) "Pregnant" means the female human reproductive condition of having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth.

(4) "Reasonable medical judgment" means a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved.

(5) "Unborn child" means an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development.

Added by Acts 2021, 87th Leg., R.S., Ch. 800 (H.B. 1280), Sec. 2, eff. August 25, 2022.

Sec. 170A.002. PROHIBITED ABORTION; EXCEPTIONS. (a) A person may not knowingly perform, induce, or attempt an abortion.

(b) The prohibition under Subsection (a) does not apply if:

(1) the person performing, inducing, or attempting the abortion is a licensed physician;

(2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced; and

(3) the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the

best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create:

(A) a greater risk of the pregnant female's death; or

(B) a serious risk of substantial impairment of a major bodily function of the pregnant female.

(c) A physician may not take an action authorized under Subsection (b) if, at the time the abortion was performed, induced, or attempted, the person knew the risk of death or a substantial impairment of a major bodily function described by Subsection (b)(2) arose from a claim or diagnosis that the female would engage in conduct that might result in the female's death or in substantial impairment of a major bodily function.

(d) Medical treatment provided to the pregnant female by a licensed physician that results in the accidental or unintentional injury or death of the unborn child does not constitute a violation of this section.

Added by Acts 2021, 87th Leg., R.S., Ch. 800 (H.B. 1280), Sec. 2, eff. August 25, 2022.

Sec. 170A.003. CONSTRUCTION OF CHAPTER. This chapter may not be construed to authorize the imposition of criminal, civil, or administrative liability or penalties on a pregnant female on whom an abortion is performed, induced, or attempted.

Added by Acts 2021, 87th Leg., R.S., Ch. 800 (H.B. 1280), Sec. 2, eff. August 25, 2022.

Sec. 170A.004. CRIMINAL OFFENSE. (a) A person who violates Section 170A.002 commits an offense.

(b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if an unborn child dies as a result of the offense.

Added by Acts 2021, 87th Leg., R.S., Ch. 800 (H.B. 1280), Sec. 2, eff. August 25, 2022.

Sec. 170A.005. CIVIL PENALTY. A person who violates Section 170A.002 is subject to a civil penalty of not less than $100,000 for each violation. The attorney general shall file an action to recover a civil penalty assessed under this section and may recover attorney's fees and costs incurred in bringing the action.

Added by Acts 2021, 87th Leg., R.S., Ch. 800 (H.B. 1280), Sec. 2, eff. August 25, 2022.

Sec. 170A.006. CIVIL REMEDIES UNAFFECTED. The fact that conduct is subject to a civil or criminal penalty under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit.

Added by Acts 2021, 87th Leg., R.S., Ch. 800 (H.B. 1280), Sec. 2, eff. August 25, 2022.

Sec. 170A.007. DISCIPLINARY ACTION. In addition to any other penalty that may be imposed under this chapter, the appropriate licensing authority shall revoke the license, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion in violation of Section 170A.002.

Added by Acts 2021, 87th Leg., R.S., Ch. 800 (H.B. 1280), Sec. 2, eff. August 25, 2022.

Tex. Fam. Code §101.003(a).

101.003. CHILD OR MINOR; ADULT. (a) "Child" or "minor" means a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.

Tex. Fam. Code. §101.025.

Sec. 101.025. PARENT-CHILD RELATIONSHIP. "Parent-child relationship" means the legal relationship between a child and the child's parents as provided by Chapter 160. The term includes the mother and child relationship and the father and child relationship.

Added by Acts 1995, 74th Leg., ch. 20, Sec. 1, eff. April 20, 1995. Amended by Acts 2001, 77th Leg., ch. 821, Sec. 2.06, eff. June 14, 2001.

Tex. Fam. Code §102.008(b)(2).

(b) The petition must include:

(1) a statement that:

(A) (omitted)

(B) in a suit in which adoption of a child is requested, the court in which the petition is filed has jurisdiction of the suit under Section 103.001(b);

(2) the name and date of birth of the child, except that if adoption of a child is requested, the name of the child may be omitted;

Texas Family Code Section §160.201

ec. 160.201. ESTABLISHMENT OF PARENT-CHILD RELATIONSHIP.
(a) The mother-child relationship is established between a woman and a child by:

(1) the woman giving birth to the child;

(2) an adjudication of the woman's maternity; or

(3) the adoption of the child by the woman.

(b) The father-child relationship is established between a man and a child by:

(1) an unrebutted presumption of the man's paternity of the child under Section 160.204;

(2) an effective acknowledgment of paternity by the man under Subchapter D, unless the acknowledgment has been rescinded or successfully challenged;

(3) an adjudication of the man's paternity;

(4) the adoption of the child by the man; or

(5) the man's consenting to assisted reproduction by his wife under Subchapter H, which resulted in the birth of the child.

Amended by Acts 2001, 77th Leg., ch. 821, Sec. 1.01, eff. June 14, 2001.

Tex. Family Code §160.704(a).

Sec. 160.704. CONSENT TO ASSISTED REPRODUCTION. (a) Consent by a married woman to assisted reproduction must be in a record signed by the woman and her husband and kept by a licensed physician. This requirement does not apply to the donation of eggs by a married woman for assisted reproduction by another woman.

Tex. Fam. Code §161.102(a).

Sec. 161.102. FILING SUIT FOR TERMINATION BEFORE BIRTH. (a) A suit for termination may be filed before the birth of the child.

(b) If the suit is filed before the birth of the child, the petition shall be styled "In the Interest of an Unborn Child." After the birth, the clerk shall change the style of the case to conform to the requirements of Section 102.008.

Added by Acts 1995, 74th Leg., ch. 20, Sec. 1, eff. April 20, 1995.

Tex. Fam. Code §161.102(b)

(b) If the suit is filed before the birth of the child, the petition shall be styled "In the Interest of an Unborn Child." After the birth, the clerk shall change the style of the case to conform to the requirements of Section 102.008.

Added by Acts 1995, 74th Leg., ch. 20, Sec. 1, eff. April 20, 1995.

APPENDIX 22

Tex. Fam. Code §161.103(a)(2).

(a) An affidavit for voluntary relinquishment of parental rights must be:(1) signed after the birth of the child, but not before 48 hours after the birth of the child, by the parent, whether or not a minor, whose parental rights are to be relinquished;(2) witnessed by two credible persons;

87R3903 SCL-F

APPENDIX 23

By: Capriglione H.B. No. 1280

A BILL TO BE ENTITLED
AN ACT

relating to prohibition of abortion; providing a civil penalty; creating a criminal offense.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act may be cited as the Human Life Protection Act of 2021.

SECTION 2. Subtitle H, Title 2, Health and Safety Code, is amended by adding Chapter 170A to read as follows:

CHAPTER 170A. PERFORMANCE OF ABORTION

Sec. 170A.001. DEFINITIONS. In this chapter:

(1) "Abortion" has the meaning assigned by Section 245.002.

(2) "Fertilization" means the point in time when a male human sperm penetrates the zona pellucida of a female human ovum.

(3) "Pregnant" means the female human reproductive condition of having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth.

(4) "Reasonable medical judgment" means a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved.

(5) "Unborn child" means an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development.

Sec. 170A.002. PROHIBITED ABORTION; EXCEPTIONS. (a) A person may not knowingly perform, induce, or attempt an abortion.

(b) The prohibition under Subsection (a) does not apply if:

(1) the person performing, inducing, or attempting the abortion is a licensed physician;

(2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced; and

(3) the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create:

(A) a greater risk of the pregnant female's death; or

(B) a serious risk of substantial impairment of a major bodily function of the pregnant female.

(c) A physician may not take an action authorized under Subsection (b) if, at the time the abortion was performed, induced, or attempted, the person knew the risk of death or a substantial impairment of a major bodily function described by Subsection (b)(2) arose from a claim or diagnosis that the female would engage in conduct that might result in the female's death or in substantial impairment of a major bodily function.

(d) Medical treatment provided to the pregnant female by a licensed physician that results in the accidental or unintentional injury or death of the unborn child does not constitute a violation of this section.

Sec. 170A.003. CONSTRUCTION OF CHAPTER. This chapter may not be construed to authorize the imposition of criminal, civil, or administrative liability or penalties on a pregnant female on whom an abortion is performed, induced, or attempted.

Sec. 170A.004. CRIMINAL OFFENSE. (a) A person who violates Section 170A.002 commits an offense.

(b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if an unborn child dies as a result of the offense.

Sec. 170A.005. CIVIL PENALTY. A person who violates Section 170A.002 is subject to a civil penalty of not less than $100,000 for each violation. The attorney general shall file an action to recover a civil penalty assessed under this section and may recover attorney's fees and costs incurred in bringing the action.

Sec. 170A.006. CIVIL REMEDIES UNAFFECTED. The fact that conduct is subject to a civil or criminal penalty under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit.

Sec. 170A.007. DISCIPLINARY ACTION. In addition to any other penalty that may be imposed under this chapter, the appropriate licensing authority shall revoke the license, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion in violation of Section 170A.002.

SECTION 3. Section 2 of this Act takes effect, to the extent permitted, on the 30th day after:

(1) the issuance of a United States Supreme Court judgment overruling, wholly or partly, *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), thereby allowing the states of the United States to prohibit abortion;

(2) the issuance of any other United States Supreme Court decision that recognizes, wholly or partly, the authority of the states to prohibit abortion; or

(3) adoption of an amendment to the United States Constitution that, wholly or partly, restores to the states the authority to prohibit abortion.

SECTION 4. The provisions of this Act are hereby declared severable, and if any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this Act.

SECTION 5. This Act takes effect September 1, 2021.

APPENDIX 24

CIVIL PRACTICE AND REMEDIES CODE

TITLE 4. LIABILITY IN TORT

CHAPTER 71. WRONGFUL DEATH; SURVIVAL; INJURIES OCCURRING OUT OF STATE

SUBCHAPTER A. WRONGFUL DEATH

Sec. 71.001. DEFINITIONS. In this subchapter:

(1) "Corporation" means a municipal, private, public, or quasi-public corporation other than a county or a common or independent school district.

(2) "Person" means an individual, association of individuals, joint-stock company, or corporation or a trustee or receiver of an individual, association of individuals, joint-stock company, or corporation.

(3) "Death" includes, for an individual who is an unborn child, the failure to be born alive.

(4) "Individual" includes an unborn child at every stage of gestation from fertilization until birth.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 2003, 78th Leg., ch. 822, Sec. 1.01, eff. Sept. 1, 2003.

Sec. 71.002. CAUSE OF ACTION. (a) An action for actual damages arising from an injury that causes an individual's death may be brought if liability exists under this section.

(b) A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.

(c) A person is liable for damages arising from an injury that causes an individual's death if:

(1) the person is a proprietor, owner, charterer, or hirer of an industrial or public utility plant or of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers; and

(2) the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.

(d) A person is liable for damages arising from an injury that causes an individual's death if:

(1) the person is a receiver, trustee, or other person in charge of or in control of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery; and

(2) the injury was caused by:

(A) the person's wrongful act, neglect, carelessness, unskillfulness, or default;

(B) the person's servant's or agent's wrongful act, neglect, carelessness, unfitness, unskillfulness, or default; or

(C) a bad or unsafe condition of the railroad, street railway, or other machinery under the person's control or operation.

(e) A person is liable for damages arising from an injury that causes an individual's death if:

(1) the person is a receiver, trustee, or other person in charge of or in control of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery; and

(2) the action could have been brought against the owner of the railroad, street railway, or other machinery if he had been acting as operator.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 71.003. APPLICATION; CERTAIN CONDUCT EXCEPTED. (a) This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if the individual had lived or had been born alive.

(b) This subchapter applies whether the injury occurs inside or outside this state.

(c) This subchapter does not apply to a claim for the death of an individual who is an unborn child that is brought against:

(1) the mother of the unborn child;

(2) a physician or other licensed health care provider, if the death is the intended result of a lawful medical procedure performed by the physician or health care provider with the requisite consent;

(3) a person who dispenses or administers a drug in accordance with law, if the death is the result of the dispensation or administration of the drug; or

(4) a physician or other health care provider licensed in this state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or the health care provider.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 2003, 78th Leg., ch. 822, Sec. 1.02, eff. Sept. 1, 2003.

Sec. 71.004. BENEFITTING FROM AND BRINGING ACTION. (a) An action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased.

(b) The surviving spouse, children, and parents of the deceased may bring the action or one or more of those individuals may bring the action for the benefit of all.

(c) If none of the individuals entitled to bring an action have begun the action within three calendar months after the death of the injured individual, his executor or administrator shall bring and prosecute the action unless requested not to by all those individuals.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 71.005. EVIDENCE RELATING TO MARITAL STATUS. In an action under this subchapter, evidence of the actual ceremonial remarriage of the surviving spouse is admissible, if it is true, but the defense is prohibited from directly or indirectly mentioning or alluding to a common-law marriage, an extramarital relationship, or the marital prospects of the surviving spouse.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 71.0055. EVIDENCE OF PREGNANCY. In an action under this subchapter for the death of an individual who is an unborn child, the plaintiff shall provide medical or other evidence that the mother of the individual was pregnant at the time of the individual's death.

Added by Acts 2003, 78th Leg., ch. 822, Sec. 1.03, eff. Sept. 1, 2003.

Sec. 71.006. EFFECT OF FELONIOUS ACT. An action under this subchapter is not precluded because the death is caused by a felonious act or because there may be a criminal proceeding in relation to the felony.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 71.007. INEFFECTIVE AGREEMENT. An agreement between the owner of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery and an individual, corporation, trustee, receiver, lessee, joint-stock association, or other entity in control of or operating the vehicle, plant, or other machinery does not release the owner or the entity controlling or operating the vehicle, plant, or other machinery from liability provided by this subchapter.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 71.008. DEATH OF DEFENDANT. (a) If a defendant dies while an action under this subchapter is pending or if the individual against whom the action may have been instituted dies before the action is begun, the executor or administrator of the estate may be made a defendant, and the action may be prosecuted as though the defendant or individual were alive.

(b) A judgment in favor of the plaintiff shall be paid in due course of administration.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 71.009. EXEMPLARY DAMAGES. When the death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 71.010. AWARD AND APPORTIONMENT OF DAMAGES. (a) The jury may award damages in an amount proportionate to the injury resulting from the death.

(b) The damages awarded shall be divided, in shares as found by the jury in its verdict, among the individuals who are entitled to recover and who are alive at that time.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 71.011. DAMAGES NOT SUBJECT TO DEBTS. Damages recovered in an action under this subchapter are not subject to the debts of the deceased.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 71.012. QUALIFICATION OF FOREIGN PERSONAL REPRESENTATIVE. If the executor or administrator of the estate of a nonresident individual is the plaintiff in an action under this subchapter, the foreign personal representative of the estate who has complied with the requirements of Chapter 503, Estates Code, for the probate of a foreign will is not required to apply for ancillary letters testamentary under Section 501.006, Estates Code, to bring and prosecute the action.

Added by Acts 1999, 76th Leg., ch. 382, Sec. 1, eff. May 29, 1999.
Amended by:

Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 22.005, eff. September 1, 2017.

Acts 2019, 86th Leg., R.S., Ch. 846 (H.B. 2780), Sec. 1, eff. September 1, 2019.

SUBCHAPTER B. SURVIVAL

Sec. 71.021. SURVIVAL OF CAUSE OF ACTION. (a) A cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury.

(b) A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives.

(c) The suit may be instituted and prosecuted as if the liable person were alive.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 71.022. QUALIFICATION OF FOREIGN PERSONAL REPRESENTATIVE. If the executor or administrator of the estate of a nonresident individual is the plaintiff in an action under this subchapter, the foreign personal representative of the estate who has complied with the requirements of Chapter 503, Estates Code, for the probate of a foreign will is not required to apply for ancillary letters testamentary under Section 501.006, Estates Code, to bring and prosecute the action.

Added by Acts 1999, 76th Leg., ch. 382, Sec. 2, eff. May 29, 1999.
Amended by:

Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 22.006, eff. September 1, 2017.

Acts 2019, 86th Leg., R.S., Ch. 846 (H.B. 2780), Sec. 1, eff. September 1, 2019.

SUBCHAPTER C. DEATH OR INJURY CAUSED BY ACT OR OMISSION OUT OF STATE

Sec. 71.031. ACT OR OMISSION OUT OF STATE. (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action;

(3) for a resident of a foreign state or country, the action is begun in this state within the time provided by the laws of the foreign state or country in which the wrongful act, neglect, or default took place; and

(4) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) Except as provided by Subsection (a), all matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1997, 75th Leg., ch. 424, Sec. 3, eff. May 29, 1997.

SUBCHAPTER D. FORUM NON CONVENIENS

Sec. 71.051. FORUM NON CONVENIENS. (a) Repealed by Acts 2003, 78th Leg., ch. 204, Sec. 3.09.

(b) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action. In determining whether to grant a motion to

stay or dismiss an action under the doctrine of forum non conveniens, the court shall consider whether:

(1) an alternate forum exists in which the claim or action may be tried;

(2) the alternate forum provides an adequate remedy;

(3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;

(4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;

(5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and

(6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

(c) The court may set terms and conditions for staying or dismissing a claim or action under this section as the interests of justice may require, giving due regard to the rights of the parties to the claim or action. If a moving party violates a term or condition of a stay or dismissal, the court shall withdraw the order staying or dismissing the claim or action and proceed as if the order had never been issued. Notwithstanding any other law, the court shall have continuing jurisdiction for purposes of this subsection.

(d) A request for stay or dismissal under this section is timely if it is filed not later than 180 days after the time required for filing a motion to transfer venue of the claim or action. The court may rule on a motion filed under this section only after a hearing with notice to all parties not less than 21 days before the date specified for the hearing. The court shall afford all of the parties ample opportunity to obtain discovery of information relevant to the motion prior to a hearing on a motion under this section. The moving party shall have the responsibility to request and obtain a hearing on such motion at a reasonable time prior to commencement of the trial, and in no case shall the hearing be held less than 30 days prior to trial.

(e) The court may not stay or dismiss a plaintiff's claim under Subsection (b) if the plaintiff is a legal resident of this state or a derivative claimant of a legal resident of this state. The determination of whether a claim may be stayed or dismissed under Subsection (b) shall be

made with respect to each plaintiff without regard to whether the claim of any other plaintiff may be stayed or dismissed under Subsection (b) and without regard to a plaintiff's country of citizenship or national origin. If an action involves both plaintiffs who are legal residents of this state and plaintiffs who are not, the court shall consider the factors provided by Subsection (b) and determine whether to deny the motion or to stay or dismiss the claim of any plaintiff who is not a legal resident of this state.

(f) A court that grants a motion to stay or dismiss an action under the doctrine of forum non conveniens shall set forth specific findings of fact and conclusions of law.

(g) Any time limit established by this section may be extended by the court at the request of any party for good cause shown.

(h) For purposes of Subsection (e):

(1) "Derivative claimant" means a person whose damages were caused by personal injury to or the wrongful death of another.

(2) "Plaintiff" means a party seeking recovery of damages for personal injury or wrongful death. The term does not include:

(A) a counterclaimant, cross-claimant, or third-party plaintiff or a person who is assigned a cause of action for personal injury; or

(B) a representative, administrator, guardian, or next friend who is not otherwise a derivative claimant of a legal resident of this state.

(i) This section applies to actions for personal injury or wrongful death. This section shall govern the courts of this state in determining issues under the doctrine of forum non conveniens in the actions to which it applies, notwithstanding Section 71.031(a) or any other law.

Added by Acts 1993, 73rd Leg., ch. 4, Sec. 1, eff. Aug. 30, 1993. Amended by Acts 1995, 74th Leg., ch. 567, Sec. 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 424, Sec. 1, eff. May 29, 1997; Acts 2003, 78th Leg., ch. 204, Sec. 3.04, 3.09, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 248 (H.B. 755), Sec. 1, eff. September 1, 2005.

Acts 2015, 84th Leg., R.S., Ch. 537 (H.B. 1692), Sec. 1, eff. June 16, 2015.

APPENDIX 25

Go to previous versions of this Section ↓

2022 Code of Alabama
Title 6 - Civil Practice.
Chapter 5 - Actions.
Article 22 - Injury and Death of Minor.
Section 6-5-391 - Wrongful Death of Minor.

Universal Citation: AL Code § 6-5-391 (2022)

Section 6-5-391

Wrongful death of minor.

(a) When the death of a minor child is caused by the wrongful act, omission, or negligence of any person, persons, or corporation, or the servants or agents of either, the father, or the mother as specified in Section 6-5-390, or, if the father and mother are both dead or if they decline to commence the action, or fail to do so, within six months from the death of the minor, the personal representative of the minor may commence an action.

(b) An action under subsection (a) for the wrongful death of the minor shall be a bar to another action either under this section or under Section 6-5-410.

(c) Any damages recovered in an action under this section shall be distributed according to the laws of intestate succession, Article 3 (commencing with Section 43-8-40) of Chapter 8 of Title 43.

(Code 1876, §2899; Code 1886, §2588; Code 1896, §26; Code 1907, §2485; Code 1923, §5695; Code 1940, T. 7, §119; Acts 1995, No. 95-774, p. 1834, §1.)

APPENDIX 26

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Code of **Alabama**
Constitution of **Alabama** of 2022 (Refs & Annos)
Article I. Declaration of Rights. (Refs & Annos)

Ala.Const. **Art**. **I**, § **36**.**06**
Alternatively cited as AL **CONST** Amend. No. 930

Sec. **36**.**06**. Sanctity of unborn life.

Effective: January 1, 2023
Currentness

(a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.

(b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate.

(c) Nothing in this **constitution** secures or protects a right to abortion or requires the funding of an abortion.

Editors' Notes

Relevant Additional Resources
Additional Resources listed below contain your search terms.

HISTORY

This section was proposed by Act 2017-188, submitted November 6, 2018, and proclaimed ratified December 3, 2018 (Proclamation Register No. 14, p. 1555), as Amendment 930.

Code Commissioner's Notes

Act 2017-188, which proposed this amendment, provides in § 4: "It is the intent of the Legislature that the Attorney General exhaust the internal resources and personnel of the office prior to the retention of any outside counsel to assist in the defense of any **constitutional** challenge to this act."

Relevant Notes of Decisions (1)
View all 1
Notes of Decisions listed below contain your search terms.

Relation to other laws

State **constitutional** amendment on the sanctity of unborn life represents the supreme law of the state, meaning that all statutes must yield to it, even if they were enacted prior to its adoption. LePage v. Center for Reproductive Medicine, P.C., 2024 WL 656591 (**Ala**.2024).

Ala. **Const**. **Art**. **I**, § **36**.**06**, AL **CONST** **Art**. **I**, § **36**.**06**
Current with amendments ratified through November 28, 2022. Some provisions may be more current; see credits for details.

End of Document

APPENDIX 27

VERNON'S CIVIL STATUTES

TITLE 71. HEALTH--PUBLIC

CHAPTER 6-1/2. ABORTION

The following article was held to have been impliedly repealed in McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004).

In Section 2, Chapter 62 (S.B. 8), and Section 4, Chapter 800 (H.B. 1280), Acts of the 87th Legislature, Regular Session, 2021, the legislature finds that the state statutes enacted before the ruling in Roe v. Wade, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger, have not been repealed by the legislature, either expressly or by implication.

Art. 4512.1. ABORTION. If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be caused.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred from Art. 1191, Penal Code of Texas, 1925, by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), pg. 996e, eff. January 1, 1974.

The following article was held to have been impliedly repealed in McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004).

In Section 2, Chapter 62 (S.B. 8), and Section 4, Chapter 800 (H.B. 1280), Acts of the 87th Legislature, Regular Session, 2021, the legislature finds that the state statutes enacted before the ruling in Roe v. Wade, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger, have not been repealed by the legislature, either expressly or by implication.

Art. 4512.2. FURNISHING THE MEANS. Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred from Art. 1192, Penal Code of Texas, 1925, by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), pg. 996e, eff. January 1, 1974.

The following article was held to have been impliedly repealed in McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004).

In Section 2, Chapter 62 (S.B. 8), and Section 4, Chapter 800 (H.B. 1280), Acts of the 87th Legislature, Regular Session, 2021, the legislature finds that the state statutes enacted before the ruling in Roe v. Wade, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger, have not been repealed by the legislature, either expressly or by implication.

Art. 4512.3. ATTEMPT AT ABORTION. If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred from Art. 1193, Penal Code of Texas, 1925, by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), pg. 996e, eff. January 1, 1974.

The following article was held to have been impliedly repealed in McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004).

In Section 2, Chapter 62 (S.B. 8), and Section 4, Chapter 800 (H.B. 1280), Acts of the 87th Legislature, Regular Session, 2021, the legislature finds that the state statutes enacted before the ruling in Roe v. Wade, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger, have not been repealed by the legislature, either expressly or by implication.

Art. 4512.4. MURDER IN PRODUCING ABORTION. If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred from Art. 1194, Penal Code of Texas, 1925, by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), pg. 996e, eff. January 1, 1974.

Art. 4512.5. DESTROYING UNBORN CHILD. Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred from Art. 1195, Penal Code of Texas, 1925, by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), pg. 996e, eff. January 1, 1974.

The following article was held to have been impliedly repealed in McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004).

In Section 2, Chapter 62 (S.B. 8), and Section 4, Chapter 800 (H.B. 1280), Acts of the 87th Legislature, Regular Session, 2021, the legislature finds that the state statutes enacted before the ruling in Roe v. Wade, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger, have not been repealed by the legislature, either expressly or by implication.

Art. 4512.6. BY MEDICAL ADVICE. Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred from Art. 1196, Penal Code of Texas, 1925, by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), pg. 996e, eff. January 1, 1974.

UPDATED ADVISORY ON TEXAS LAW UPON REVERSAL OF *ROE V. WADE*

Yesterday—July 26, 2022—the United States Supreme Court issued its final judgment in *Dobbs v. Jackson Women's Health Organization*. As previously stated in our June 24th Advisory, Texas's Human Life Protection Act ("the Act") takes effect on the 30th day after issuance of a judgment in a case overturning *Roe v. Wade*. *See* H.B. 1280, 87th Reg. Session 2021. Accordingly, we now know with certainty that the Act takes effect on August 25, 2022.

The Act provides that a "person may not knowingly perform, induce, or attempt an abortion" unless the mother has "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places [her] at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced." Tex. Health & Safety Code § 170A.002(a)–(b).

"Abortion" is defined in section 245.002(1) of the Health and Safety Code as "the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives." The term "abortion" in Texas law does not apply when these acts are done to "(A) save the life or preserve the health of an unborn child; (B) remove a dead, unborn child whose death was caused by spontaneous abortion; or (C) remove an ectopic pregnancy." Tex. Health & Safety Code § 245.002(1)(A)–(C).

A person who violates the Act commits a first-degree felony if an unborn child dies as a result, a second-degree felony if the child lives, incurs civil penalties of no less than $100,000 for each violation, and may lose his or her professional license. *Id.* § 170A.004–.007. The pregnant woman upon whom the abortion is performed cannot be penalized, *id.* § 170A.003, and the law protects women facing life-threatening physical conditions resulting from pregnancy complications, *id.* § 170A.002(b)(2).

My office is specifically authorized to pursue and recover civil penalties for violations of the Act, *id.* § 170A.005, and I will do my duty to enforce this law. Further, we stand ready to assist any local prosecutor who pursues criminal charges. Tex. Gov't Code § 402.028. Additionally, state licensing authorities "shall revoke the license, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion in violation of" the Act. Tex. Health & Safety Code § 170A.007.

At the same time, local prosecutors may choose to immediately pursue criminal prosecutions based on violations of Texas abortion prohibitions predating *Roe* that were never repealed by the Texas Legislature.[1] Although these statutes were unenforceable while *Roe* was on the books, they are still Texas law. Now that *Roe* has been overturned, those statutes are in full effect.[2]

Texas law in a post-*Roe* world has already been written. Now that the Supreme Court has finally overturned *Roe*, I will do everything in my power to protect mothers, families, and unborn children, and to uphold the state laws duly enacted by the Texas Legislature.

K E N P A X T O N
Attorney General of Texas

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[1] *See* Tex. Rev. Civ. Stat. art. 4512.1 ("Abortion"), previously codified at Tex. Pen. Code art. 1191 (1925) ("If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."); Tex. Rev. Civ. Stat. art. 4512.2. ("Furnishing the means"), previously codified at Tex. Pen. Code art. 1192 (1925) ("Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice."); Tex. Rev. Civ. Stat. art. 4512.3 ("Attempt at abortion"), previously codified at Tex. Pen. Code art. 1193 (1925) ("If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."); Tex. Rev. Civ. Stat. art. 4512.4 ("Murder in producing abortion"), previously codified at Tex. Pen. Code art. 1194 (1925) ("If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."); Tex. Rev. Civ. Stat. art. 4512.6 ("By medical advice"), previously codified at Tex. Pen. Code art. 1196 (1925) ("Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.").

[2] With one exception: Only the Dallas County District Attorney is currently enjoined from enforcing these statutes.

APPENDIX 29

NO. 21-5535-367

IN THE MATTER OF THE MARRIAGE OF	§	**IN THE DISTRICT COURT**
	§	
	§	
CAROLINE MICHELLE ANTOUN AND GABY ELIAS ANTOUN	§	**367th JUDICIAL DISTRICT**
	§	
AND IN THE INTEREST OF T.G.A. AND T.G.A., CHILDREN	§	
	§	
	§	
	§	**DENTON COUNTY, TEXAS**

AFFIDAVIT

Before me, the undersigned authority, personally appeared Renee Jackson, who, being by me duly sworn, deposed as follows:

My name is Renee Jackson, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of Dallas-Fort Worth Fertility Associates. Attached here to are 11 pages of records from Dallas-Fort Worth Fertility Associates. These said 11 pages of records are kept by Dallas Fertility Center in the regular course of business, and it was the regular course of business of Dallas Fertility Center for an employee or representative of Dallas-Fort Worth Fertility Associates, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

Renee Jackson
Affiant

STATE OF TEXAS §
§
COUNTY OF TARRANT §

SWORN TO AND SUBSCRIBED BEFORE ME on this the 25th day of May 2022 by Renee Jackson, to certify which witness my hand and seal of office.

LINDA PRYOR
Notary Public, State of Texas
Comm. Expires 05-03-2024
Notary ID 130647059

Linda Pryor
Notary Public, State of TEXAS

Notary's printed name: Linda Pryor

RESPONDENT'S EXHIBIT 1

PENGAD 800-631-6989

DALLAS FERTILITY CENTER, LLC
Dallas - Ft. Worth Fertility Associates

CONSENT FORM
CRYOPRESERVATION OF EMBRYOS

To The Patient:
Please take the opportunity to speak with your physician and request information on your condition, the recom testing and procedures, alternative procedures, and the risks and benefits of the proposed cryopreservation of e for the treatment of infertility.

We, Caroline & Gaby Antoun *(name of both husband and wife)* the undersigned, are cu participants with the Dallas Fertility Center. We understand that as a result of our participation with the Dallas F Center, more fertilized eggs and subsequent quality embryos may result than our physician recommend to be tran in the *in vitro* fertilization/embryo transfer (IVF/ET) treatment cycle. We wish these embryos to be (cryopreserved) so that they may be transferred to the wife's uterus in a later cycle for the purpose of establis pregnancy. We understand that freezing of embryos may occur just following fertilization at the pronuclear stage (I at later multiple-cell stages (Days 2 or 3), or at the blastocyst stage (Day 5 or 6).

Risk of Loss in Freezing and Thawing:
We understand that there is no guarantee that embryos will survive the freeze/thaw process, nor that a pregnanc occur with embryos that had been frozen and thawed. We also understand that mechanical failure or human err occur at any point in the process, which would result in the damage and/or total loss of the embryos. We accept th of mechanical failure and human error and release DFW Fertility Associates, the Dallas Fertility Center and our phy (s) from liability for any loss of embryos due to mechanical failure and/or human error.

We release and hold harmless DFW Fertility Associates, the Dallas Fertility Center, their parent and affiliated comp successors and assigns, officers, trustees, employees and our physician (s) from any and all liability arising from or i way connected with the liability for any loss of embryos due to mechanical failure or human error. We understan that Dallas Fertility Center, LLC is a separate legal entity from DFW Fertility Associates; they are engaged in p medical practice

Risk of Abnormalities:
We understand that extensive animal data and limited human studies do not reasonably indicate at the present tim children born as the result of the freeze and thaw of IVF-created embryos experience a higher rate of abnormalities due to IVF/ET or due to the freeze-thaw process. However, we understand that until very large numbers of children been born following freezing and thawing of IVF embryos, it is not possible to be sure whether the rate of abnormalit different from the normal rate. We understand that amniocentesis or other prenatal tests may detect some but not abnormalities that can affect children. We accept these risks and acknowledge that any abnormality of a child born freezing and thawing of embryos is not the responsibility of Dallas Fertility Center nor DFW Fertility Associates.

We release and hold harmless DFW Fertility Associates, Dallas Fertility Center, and affiliated companies, successor assigns, officers, trustees, employees and our physician (s) from any and all liability arising from or in any way conn with abnormalities due to IVF/ET or due to the freeze/thaw process.

Joint Disposition:
We understand that the embryos are subject to our joint disposition as limited by the conditions stated in this fori that all decisions about their disposition, within those limits may be affected by applicable law or by court decisio understand that we can jointly change the directions for future disposition contained in this form at any time by sig new consent form incorporating any new disposition acceptable to Dallas Fertility Center ARTS Program. W understand that if we fail to provide joint direction on the disposition of the frozen embryos, the embryos v considered abandoned after five (5) years of storage and disposed of as described below.

Placement of thawed embryos:
We understand that when we are ready to have cryopreserved embryos thawed for the purpose of establist pregnancy, one or more of the cryopreserved embryos may be thawed and placed in the wife's uterus for that pu We understand that only thawed embryos considered to be potentially viable, as determined by the embryologist(s), in his or her sole discretion, will be transferred to the uterus for that purpose.

Monitoring of Wife's Cycle:
We understand that frozen embryos will be thawed and placed in the wife's uterus only if our physician (s) determir the embryo replacement cycle is adequate to receive thawed embryos. This determination requires careful monitor the wife's cycle. We understand that this monitoring will require several blood tests and/or other medically ind examinations/treatments. The cost of the monitoring is in addition to the other costs incurred for freezing, storin thawing of our embryos.

Inability to Transfer Embryos:
We understand that in freezing embryos, it is the intent of all parties to enable those embryos to be placed in the uterus in later cycles. However, there may be future circumstances that make us unable or unwilling to undergo placement, or that make it impossible or medically inadvisable for our physician (s) to proceed with such placement understand that Dallas Fertility Center ARTS Program and physician (s) are not obligated to proceed with transfer, the basis of reasonable medical judgement or new scientific evidence, the physician concludes that the risks of trans thawed embryos outweigh the benefits of a potential pregnancy.

Embryo Abandonment:
In the event that the husband and wife have not contacted the Dallas Fertility Center ARTS Program after a storage p of 5 years with new directives, the embryos will be considered abandoned. Dallas Feritlity Center ARTS Program reserves the right to discard abandoned embryos in a manner consistent with federal, state, professional and institut guidelines.

Embryo Donation:
At any time during the storage period, we understand that we may choose to donate our embryos to infertile couples. disposition may require additional consents and blood testing at some time in the future. Dallas Fertility Center A Program currently does not have an embryo donation program, therefore, donated embryos may require transfer to an program for this disposition. If requested, Dallas Fertility Center ARTS Program will make reasonable efforts to l such programs. We agree that if Dallas Fertility Center ARTS Program is unable to locate a program to accept do embryos within the 5-year storage period, these embryos will be considered abandoned , and we then direct D Fertility Center ARTS Program to discard the embryos in a manner consistent with federal, state, professional institutional guidelines.

Divorce or Death of Spouse:
We understand that in the event of divorce or the death of either spouse, the spouse given the dispositional authorit frozen embryos by this agreement shall have the same dispositional rights that we have under this Agreement, inc the right to withdraw from Dallas Fertility ARTS Program as stated below, and to dispose of the embryos. dispositional rights are subject to all guidelines of Dallas Fertility Center ARTS Program, which at the present tir not permit placement of embryos in a woman who is not married.

Voluntary Relinquishment; Withdrawal from Program; Transfer:
We understand that at any time we have frozen embryos stored at Dallas Fertility ARTS Program, we may, by a s and notarized written statement, relinquish any or all of those frozen embryos for donation to infertile women. W understand that we have the right at any time to withdraw from Dallas Fertility ARTS Program and to remove our f embryos to another program or storage facility of our choice. We understand that in the event of withdrawal and tr of embryos to another facility, we assume the risk of any damage and/or loss of embryos that may occur in the proc transfer, or in the subsequent storage and handling of our frozen embryos, including any reduction in the char successfully establishing a pregnancy with these embryos.

We hereby release and hold harmless Dallas Fertility Center ARTS Program, their parent and affiliated comp successors and assigns, officers, trustees, employees and our physician (s) from any and all liability arising from or i way connected with the transfer, subsequent storage and/or handling of our frozen embryos by another facility.

5-Year Storage Period:
We understand that Dallas Fertility Center has a maximum storage period of 5-years. After a 5-year storage perio embryo (s) must be transferred to a long term storage facility.

Termination of DFW Fertility Associates ARTS Program:
We understand that Dallas Fertility Center ARTS Program reserves the right to terminate its participation i cryopreservation of embryos. In this event, reasonable efforts will be made to arrange for the transfer or frozen emb to another program or storage facility. In the absence of timely directions from us concerning transfer of our fr embryos to another program or storage facility, Dallas Fertility Center ARTS Program will select another progra storage facility for continued storage of our embryos. If we have paid our storage fees, Dallas Fertility Center A Program will pay the expenses that arise from transfer to and storage at another program or storage facility for up to year. We understand that we will then be responsible for contracting with the new program or storage facility for fu storage of our embryos, and will be subject to any limitations which that program or storage facility for further stora our embryos, and will be subject to any limitations which that program or storage facility places on the storage of fr embryos, including discarding or donation of embryos for nonpayment of storage fees.

Charges:
We understand that the embryo freezing, storing and thawing process is intricate and time-consuming and that wi responsible for all related expenses. The initial cost of embryo freezing includes the freezing procedure and one ye storage. After one year of storage, an invoice will be generated annually to collect fees for storage of any remai embryos still stored at Dallas Fertility Center. We understand that if we fail to pay our account when due, the emb will be treated as abandoned and may be disposed of as provided above.

Change of Address:
We agree to advise ARTS of any change of address within three months of such change.

Disposition of Others:
We direct Dallas Fertility Center ARTS Program and our physician (s) treating us regarding the disposition of our embryos if the following events occur:

1. In the event of both of our deaths, we understand that frozen embryos will be considered abandoned, a direct Dallas Fertility Center ARTS Program to discard our embryos. In the event of death of only the hu or wife, we direct Dallas Fertility Center ARTS Program to: *(both Husband and Wife should initial one only)*

GAIC preserve the frozen embryos for disposition by the surviving spouse (subject to the 5-year storage period).
___/___ donate the frozen embryos to an infertile couple.
___/___ discard the frozen embryos immediately.

2. In the event of divorce, we direct Dallas Fertility Center ARTS Program to: *(both Husband and Wife s initial one choice only)*

GAIC place the frozen embryos at the disposal of the wife or husband *(please circle choice of Wife or Husband)* (subject to the 5-year storage period).
___/___ donate the frozen embryos to an infertile couple.
___/___ discard the frozen embryos.

PLEASE PRINT
Patient: Caroline Antoun Signature: Caroline Antoun

Husband: Gaby Antoun Signature:

Witness: Cindy Vasquez Signature:
(ARTS Program/ Physician Office Staff/ Notary)

Date: 5.10.11

I certify that I have explained to the above couple the nature and purpose of this treatment, of the potential benefits and possible associated with participation in this treatment. I have answered any questions that have been raised.

Physician's signature Date 5.10.11

DALLAS FERTILITY CENTER, LLC

Dallas – Ft. Worth Fertility Associates

CONSENT FORM
IN-VITRO FERTILIZATION/EMBRYO TRANSFER

To The Patient:
Please take the opportunity to speak with your health care providers and request information on your condition, the recommended testing and procedures, alternative procedures, and the risks and benefits of the proposed IN-VITRO FERTILIZATION/EMBRYO TRANSFER for your infertility. By frank and open discussion with your health care providers, you will be afforded the opportunity to participate in the decision-making process concerning your treatment.

We, Caroline & Gaby Antoun (husband and wife), the undersigned, request In-Vitro Fertilization/Embryo Transfer, hereafter referred to as IVF/ET. We have been unable to achieve a pregnancy due to an infertility problem that has not been or cannot be corrected by any other currently available medical treatment.

Several individuals will be involved in our IVF/ET care. These include our physician, consulting physicians, nurses and laboratory personnel.

We understand that the following surgical, medical and/or diagnostic procedures are involved:

1. Medical history, physical examination and standard infertility tests.
2. The use of "fertility drugs" to stimulate growth and maturation of follicles (eggs) in the ovary.
3. Laboratory tests:
   a. Blood tests – frequent samples will be taken to monitor hormone secretions from the ovary and pituitary gland.
4. Ultrasound examinations will be performed to confirm growth of follicle (s).
5. Transvaginal ultrasound-guided egg retrieval will be done under IV sedation/local anesthesia. Transvaginal ultrasound is a procedure, which allows the operator to visualized the ovaries and follicles with an ultrasound transducer inserted into the vagina. The "image" produced is then used to guide a thin aspiration needle, through the vagina, into the follicle(s) for egg retrieval.
6. Collection of a semen specimen (by masturbation) and laboratory treatment of the specimen to prepare it for insemination.
7. Insemination and embryo culture – placing of the egg(s) and sperm together in a suitable medium so that fertilization and early embryo development can occur.
8. Embryo transfer-placement of the embryo (s) into the uterus.

We understand that the above steps may not result in a pregnancy, even after several attempts. No guarantee has been made to us. Because IVF/ET is a medical procedure involving multiple variables that determine outcome, insufficient data is available to express a precise success rate.

Dallas – Ft. Worth Fertility Associates
DALLAS FERTILITY CENTER

CONSENT FORM
IN-VITRO FERTILIZATION/EMBRYO TRANSFER

We understand that any of the following may occur which would prevent pregnancy:

1. The time of egg maturation may be unpredictable and misjudged. Egg maturation may not occur, thus precluding any attempt at obtaining an egg.
2. Recovery of the egg(s) by transvaginal ultrasound-guided retrieval may not be successful.
3. The husband may be unable to provide a suitable semen specimen.
4. The egg(s) may not mature in the laboratory environment.
5. Fertilization may not occur and/or abnormal embryo(s) may result from penetration of a single egg by two or more sperm.
6. Transfer of the embryo(s) may not be successful.
7. Implantation of an embryo into the uterus may not occur.
8. A laboratory mishap may result in loss or damage to the egg, sperm, or fertilized egg (embryo).

We understand there are risks and hazards related to the performance of the diagnostic, surgical and laboratory procedures planned. These include, but are not limited to, the following:

1. Ovulation inducing drugs may result in overstimulation of the ovaries. This may cause pain and necessitate hospitalization. In addition, an embryo transfer may be cancelled in severe cases of overstimulation.
2. Blood tests may cause discomfort and development of a bruise at the needle site.
3. Transvaginal ultrasound-guided retrieval may result in bleeding, infection or injury to abdominal organs requiring immediate major surgery.
4. There is the possibility that the early embryo(s) may implant in a fallopian tube causing an ectopic (tubal) pregnancy that would require surgical treatment.
5. The implantation of multiple embryos into the uterus may result in a multiple pregnancy with an increased risk of miscarriage or premature labor and an attendant financial and emotional burden.
6. Anesthesia involves the use of anesthetics for the prevention of pain. Complications may result from the use of any anesthetic including respiratory problems, drug reaction, paralysis, and brain damage or even death. Other risks range from minor discomforts to injury to vocal cords, teeth or eyes.

It is possible that a fetus conceived via IVF will develop some abnormality. Such abnormalities might neither result in spontaneous abortion nor be detectable by prenatal tests. Although amniocentesis can be performed to analyze fetal cells for chromosomal abnormalities, some defects cannot be determined by this or by any other tests. Therefore, it is possible that an abnormal child could be born as a result of IVF.

We understand that all decisions concerning a pregnancy that may result from our IVF therapy are our sole responsibility and we hereby release the health care providers in this program of any consequences arising from our decisions in this regard.

Dallas – Ft. Worth Fertility Associates
DALLAS FERTILITY CENTER

CONSENT FORM
IN-VITRO FERTILIZATION/EMBRYO TRANSFER

Consensus on Birth Defects in Children Born Following Assisted Reproduction:

1. Overall, ART has produced approximately five million children and can be regarded as safe technology for the vast majority of children resulting from treatment.

2. Couples who have infertility and then conceive naturally, compared to fertile couples, have a slightly increased chance of conceiving a child with a birth defect.

3. Overall, there is a modest increase in the possibility of a baby born following ART suffering from a birth defect compared to a fertile population, but not compared to infertile women who give birth without ART.

4. There are insufficient data to demonstrate a proven relationship with a particular anomaly, possibly excepting hypospadias in ICSI offspring.

5. There is no proven or consistent relationship to a specific assisted conception procedure. Studies comparing outcomes from IVF and ICSI are inconsistent. Some have reported similar increases in the risk of birth defect with both IVF and ICSI whereas other publications indicate a significant risk with ICSI but not with IVF irrespective of giving birth naturally or following ART.

6. Multiple pregnancy is known to be associated with an increased incidence in birth defects. This increase is most marked in monozygotic compared to dizygotic pregnancies. Some studies suggest that blastocyst transfer increased the risk of monozygotic twin pregnancy, although the overall prevalence of monozygotic twins in the ART population is less than in the general population.

7. Available evidence shows that cryopreservation of gametes and embryos is not associated with an additional risk of birth defects.

We understand and agree that each health care provider involved in our IVF therapy shall be responsible only for the performance of his/her own analysis and testing. All other information, counseling, testing, procedures, treatments and examinations are the responsibilities of those who actually perform these services.

We hereby authorize the release of information regarding our IVF therapy to our other health care providers and to insurance carriers and other third parties for reimbursement, collection and payment purposes.

We understand that insurance coverage for all or any of the above procedures may not be available and that we will be personally responsible for all expenses related to this treatment.

We consent to the use of body fluids, cells and tissues, which remain after the testing and procedures involved in our treatment. Tissues and cells may be used for quality control or research and may not be used in any procedure that may result in pregnancy.

We understand that the physician and his/her associates will, unless otherwise compelled by law, make all reasonable efforts to keep information obtained about us during the course of treatment confidential. We agree that specific medical details may be revealed in professional publications as long as our confidentiality is maintained. We also authorize the filming, televising and/or photographing of the female reproductive organs during the course of the transvaginal-guided retrieval and/or laparoscopy.

We have been given opportunities to ask questions about our condition, alternative forms of anesthesia and treatment, risks of non-treatment, the procedures to be used and the hazards involved and we believe that we have sufficient information to give this informed consent.

PLEASE PRINT

Patient: Caroline Antona Signature: Caroli Ana

Husband: Gaby Antona Signature:

Witness: Cindy Velasco Signature:
(Physician Office Staff / Notary)

Date: 5.10.19

I certify that I have explained to the above couple the nature and purpose of this treatment, of the potential benefits and possible risks associated with participation in this treatment. I have answered any questions that have been raised.

Physician's Signature

5.10.15
Date

DALLAS FERTILITY CENTER, LLC
Dallas – Ft. Worth Fertility Associates

CONSENT FORM
INTRA-CYTOPLASMIC SPERM INJECTION INTO EGGS

To The Patient:
Please take the opportunity to speak with your health care providers and request information on your condition, the recommended testing and procedure (s), alternative procedures, and the risks and benefits of the proposed INTRA-CYTOPLASMIC SPERM INJECTION (ICSI) for treatment of infertility. By frank and open discussion with your health care providers, you will be afforded the opportunity to participate in the decision making process concerning your treatment.

We voluntarily request, Dr. Goda, as our physician, and such associates, technical assistants and other health care providers as may be deemed necessary, to treat our condition which has been explained to us as infertility.

We Caroline + Gaby Antoun, hereby consent to the micromanipulation of our gametes (eggs and sperm) in order to increase the possibility of pregnancy.

DESCRIPTION: Micromanipulation of oocytes (eggs) for assisted fertilization is a technique designed to bring the sperm and egg closer together, increasing the chances of fertilization for certain infertile couples. The procedure is performed by piercing the zona pellucida (the egg "shell") and the cell membrane of the egg with a microneedle. A single sperm is then injected into the egg.

Micromanipulation of the egg requires specialized equipment specifically designed to perform the very small intricate movements utilized during the procedure. We understand that prior to manipulation, eggs may be treated with a solution containing hyaluronidase, an enzyme which will remove the cumulus cells surrounding the egg and which will allow visualization of the egg itself. The egg will be held in place by an egg-holding pipette while the microneedle is introduced into the egg. After the egg is manipulated, it is released and washed in fresh culture medium. All subsequent treatment will be the same as for non-manipulated eggs. Any embryos developing normally after this procedure will be transferred to the uterus (womb) or cryopreserved.

If pregnancy is established following intra-cytoplasmic sperm injection, close observation is important and should be conducted throughout the pregnancy.

INCLUSION CRITERIA: We have been selected as possible participants in this treatment protocol for one of the following reasons: (1) previous in-vitro fertilization (IVF) attempt(s) have failed to result in fertilized eggs; (2) we have semen parameters too poor for acceptance in the standard IVF procedure; or (3) sperm quality is borderline and we wish to undergo micromanipulation to try to enhance the number of embryos available for transfer.

RISKS AND BENEFITS: We understand that these techniques are intended to benefit us personally by creating additional opportunities for the initiation of pregnancy.

We understand that the micromanipulation techniques may damage an egg resulting in its loss of fertilizability and/or viability.

We understand that the ability of the manipulated eggs to establish pregnancy after transfer in the human has not been fully determined. It is unknown if manipulation of the egg will increase the risk of obstetric complications or fetal abnormalities.

We further understand that with any technique necessitating mechanical systems, equipment failure can occur. We release and hold harmless DFW Fertility Associates, the Dallas Fertility Center, their parent and affiliated companies, successors and assigns, officers, trustees, employees and our physician (s) from any and all liability arising from or in any way connected with the liability for any loss of embryos due to mechanical failure or human error. We understand that that Dallas Fertility Center, LLC is a separate legal entity from DFW Fertility Associates; they are engaged in private medical practice

We understand that any pregnancy may produce an infant with a birth defect; this includes any pregnancy that results from the above described therapy. Birth defects can be minor (such as an extra rib) or major (such as a defect in the development of the heart, lungs or kidneys that is incompatible with life). We understand that a birth defect, whether or not resulting from this procedure, may not be detected by prenatal testing.

In addition to the risks listed above, there may be others that are unforeseeable at this time.

COSTS AND PAYMENTS: We understand that all costs for infertility testing and standard IVF procedures (including the manipulation techniques described herein) will be our responsibility.

NEW INFORMATION: We understand that the data derived from this treatment may be used in reports, presentations, and publications, but that we will not be individually indentified.

CONFIDENTIALITY: We understand that any information about us that is obtained from the treatment, including answers to questionnaires, history, laboratory data findings, or physical examination will be kept strictly confidential. We also understand however, that our records, just like hospital records, may be subpoenaed by court order or may be inspected by the federal regulatory authorities. We understand that in order that Food and Drug Administration (FDA) regulations are being followed, it may be necessary for a representative of the FDA to review our medical records.

VOLUNTARY CONSENT: We certify that we have read the preceding or it has been read to us, that we understand its contents and that any questions we have pertaining to intra-cytoplasmic sperm injection have been or will be answered by our physician or Dallas Fertility Center Laboratory Supervisor. A copy of this consent form will be given to us. Our signatures below mean that we have freely agreed to participate in this treatment.

We understand and accept the risks involved in the use of intra-cytoplasmic sperm injection to increase the chances of becoming pregnant. We understand no guarantee has been made to us as the result of this procedure.

We have been provided an opportunity to ask questions and such questions have been answered to our satisfaction. We understand we may continue to ask questions about this therapy at any time. This form has ben filled in, and we understand its contents.

PLEASE PRINT

Patient: Caroline Anton Signature: Caroline Anton

Husband: Kelby Anton Signature:

Witness: Cindy Velasco Signature:

(Physician Office Staff/Notary)

Date: 5.10.19

I certify that I have explained to the above couple the nature and purpose of this treatment, of the potential benefits and possible risks associated with participation in this treatment. I have answered any questions that have been raised.

Physician's Signature

5.10.19

Date

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-22-00343-CV

CAROLINE MICHELLE ANTOUN, Appellant

V.

GABY ELIAS ANTOUN, Appellee

On Appeal from the 367th District Court
Denton County, Texas
Trial Court No. 21-5535-367

Before Kerr, Bassel, and Wallach, JJ.
Opinion by Justice Wallach
Concurring Opinion by Justice Kerr

OPINION

For the first time in Texas since the United States Supreme Court's opinion in *Dobbs*,[1] we are now asked to determine the question of whether a trial court abused its discretion in awarding rights to frozen embryos in a divorce decree. Under the facts presented in this case, we hold that the trial court did not abuse its discretion. We will affirm the judgment of the trial court.

I. Background

Gaby Elias Antoun, Appellee (husband), and Caroline Michelle Antoun, Appellant (wife), married on or about August 4, 2014, and separated on or about July 20, 2021. They began IVF (in vitro fertilization) treatment in 2019. Fifteen eggs were removed, and fourteen were fertilized. Three of those eggs were implanted successfully. Those implants resulted in one miscarriage and two live births. Out of the fourteen fertilized embryos, seven of the embryos were sufficiently viable to be cryogenically preserved. Three of those seven embryos are currently in cryogenic storage. Those three cryogenically stored embryos are the subject of this dispute.

As part of the IVF process, the parties signed a document with the Dallas Fertility Center, LLC (the clinic) entitled "Consent Form Cryopreservation of Embryos" (the agreement) on May 10, 2019. The embryos are stored in Dallas, Texas, with the clinic. The storage of the embryos is addressed in the agreement, which

[1] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

provides that in the event of a divorce that the embryos are to be at the disposition of husband.

On November 22, 2021, wife filed a Second Amended Original Petition for Divorce and listed the children subject to the proceedings as the two children born of the marriage. She asked the court to divide their marital estate in a manner that the court deemed just and right, as provided by the law. On January 13, 2022, husband filed a First Amended Original Counterpetition for Divorce, which listed their children as the two children born of the marriage and asked the court to divide the marital estate in a manner that the court deemed just and right, as provided by law. Neither petition identified the disputed embryos as children.

On May 16, 2022, a Mediated Settlement Agreement (MSA) was filed based on the parties' agreement for custody, possession, and access to the identified children. The MSA did not resolve the marital property and embryo issues.

The parties commenced trial on June 29, 2022, and the court heard the property issues first and then heard the embryo issues separately. Both parties testified to the division of personal property, retirement assets, and debts. The court then heard testimony on the disposition of the embryos.

The agreement is a printed form bearing the name Dallas Fertility Center, LLC at the top with "Dallas-Ft. Worth Fertility Associates" directly below it. This is followed by the title "Consent Form Cryopreservation of Embryos." The first paragraph identifies "Caroline & Gaby Antoun" in handwriting as husband and wife

and as being the "undersigned." They both signed the agreement. Under the paragraph entitled "Joint Disposition," it states that the embryos are "subject to **our joint disposition** as limited by the conditions stated in this form" as limited by applicable law or by court decision and that "**we can jointly change** the directions for future disposition contained in this form" through appropriate written designation to the storage facility. [Emphasis added.] Under the paragraph entitled "Embryo Donation," it provides that "**we** may choose to donate our embryos to infertile couples." [Emphasis added.] Under the paragraph entitled **"Divorce or Death of Spouse,"** it provides that in the event of **divorce** or death of either spouse, "**the spouse given the dispositional authority over the frozen embryos by this agreement shall have the same dispositional authority that 'we' have under this Agreement."** [Emphasis added.] Finally, under the "Disposition of Others" paragraph, the agreement provides that, **in the event of divorce, husband and wife direct the storage facility to place the frozen embryos at the disposal of the husband (circled on the form from the options "Wife" or "Husband")**. [Emphasis added.] This line was initialed by both husband and wife.

The testimony at trial regarding the embryos showed the following:

a. The embryos remain cryogenically preserved. They are stored in Dallas, Texas, with the clinic. The storage of the embryos is subject to the agreement.

b. The agreement provides that the embryos are subject to husband's disposition in the event of divorce.

c. The agreement was admitted into evidence.

d. Wife testified that she signed the agreement.

e. Wife admitted that she read the agreement.

f. Husband testified he did not make wife sign the agreement.

g. Husband testified that he believed that both parties understood the agreement.

h. Husband testified that wife never told him that she did not understand the agreement.

i. Wife testified that she did not understand what she was signing, that she did not understand the agreement to be enforceable by either spouse against the other, that she did not intend to relinquish any future parental rights regarding the embryos, and that she did not intend for the embryos to be implanted in anyone other than herself.[2]

On June 29, 2022, the court awarded the embryos to husband per the agreement. The final order of divorce was judicially pronounced and rendered in court on June 29, 2022, and the judgment was signed on August 19, 2022. The judgment, in pertinent part, reads:

> IT IS ORDERED AND DECREED that the remaining frozen embryos stored at Dallas Fertility Center are awarded to [husband].
>
> [Husband] shall be responsible for all charges due or to become due in relation to the frozen embryos stored at Dallas Fertility Center.

[2]There were no verified pleadings by wife that the agreement was not supported by consideration. *See* Tex. R. Civ. P. 93(9). Likewise, wife did not plead fraud or duress as a defense to the agreement. *See* Tex. R. Civ. P. 94. Wife's contention in the trial court was (1) the agreement did not create a separately enforceable agreement between husband and wife, who are not in privity with each other for the agreement, and (2) the disposition of the embryo(s) as provided for by the contract functions as a relinquishment of parental rights in a manner non-compliant with the family code.

> [Wife] is divested of all right, title, interest, and claim in and to the remaining frozen embryos stored at Dallas Fertility Center.

On July 26, 2022, wife filed a "Motion for Reconsideration of Disposition of Embryos After of [sic] Change in Law." On July 24, 2022, the United States Supreme Court issued its final judgment in the *Dobbs* case holding that the federal constitution does not provide a federal constitutional right to an abortion, and the authority to regulate abortions rests with the individual states. *Dobbs*, 142 S. Ct. at 2242. On August 1, 2022, wife's motion for reconsideration was denied, and the court signed an "Order [Denying] Petitioner's Motion for Reconsideration of Disposition of Embryos."

Wife contended that on August 26, 2022, triggered by the *Dobbs* decision, the Texas Human Life Protection Act took effect, having been codified in Texas Health and Safety Code Section 170A. On August 26, 2022, wife filed her motion for new trial, a notice of appeal, and a request for findings of fact and conclusions of law. The motion for new trial was overruled by operation of law. On September 28, 2022, the trial court signed Findings of Fact and Conclusions of Law. This appeal ensued.

II. Standards of Review

We review a trial court's denial of a motion for new trial based on an abuse of discretion standard. *Hogue v. Propath Lab'y, Inc.*, 192 S.W.3d 641, 647 (Tex. App.—Fort Worth 2006, pet. denied). "When reviewing the trial court's denial of a new trial, every reasonable presumption will be made in favor of the court's ruling." *Fantasy Ranch, Inc.*

v. City of Arlington, 193 S.W.3d 605, 612 (Tex. App.—Fort Worth 2006, pet. denied); *Hogue*, 192 S.W.3d at 647. The reviewing court will ultimately determine whether the trial court abused its discretion by acting without reference to any guiding rules or principles. *Marvelli v. Alston*, 100 S.W.3d 460, 483 (Tex. App.—Fort Worth 2003, pet. denied).

Regarding the standards for review for a division of a community estate,

> [b]ecause the standards for dividing a community estate involve the exercise of sound judgment, a trial court must be accorded much discretion in its decision. The division should be corrected on appeal only where an abuse of discretion is shown in that the disposition made of some property is manifestly unjust and unfair. The appellate court cannot merely reweigh the evidence. Rather, a determination of whether the property division decreed in a divorce constitutes an abuse of discretion presents a legal rather than a factual question for appellate review. And in deciding that legal question, the trial court is entitled to no deference. A trial court has no discretion in determining what the law is or applying the law to the facts, even when the law is unsettled.

Bradshaw v. Bradshaw, 555 S.W.3d 539, 543 (Tex. 2018) (internal quotation marks and footnotes omitted); *see also Aleman v. Aleman*, No. 14-22-00313-CV, 2023 WL 3641122, at *1 (Tex. App.—Houston [14th Dist.] May 25, 2023, no pet. h.) (mem. op.).

III. Analysis

Wife raises five issues on appeal:

1. whether the trial court erred by failing to grant a new trial after an allegedly significant change in the law relating to the procedures by which the case was tried;

2. whether the trial court erred by treating the embryos as property;

3. whether there was "privity of contract" between husband and wife for purposes of making the contractual agreement between the couple and the IVF clinic separately binding between the husband and the wife;

4. whether the trial court terminated the "parental rights" of wife regarding the embryos in violation of the Family Code and without sufficient due process of law; and

5. whether the trial court created a gestational agreement regarding the embryos in violation of the Family Code.

Issues one, two, and four turn on the issue of whether the embryos are "unborn children." Because we answer that question in the negative as applied to the facts of this case, those points are overruled. Because we hold that there was an enforceable agreement between husband and wife regarding disposition of the embryos, we overrule issue three. Because the trial court did not create a gestational agreement by its judgment, we overrule issue five.

a. Issue 1

Citing *United States v. Schooner Peggy*, wife contends that the *Dobbs* opinion constituted a change in the "applicable" law, which justified granting a new trial. 5 U.S. (1 Cranch) 103, 110 (1801). The key word is "applicable." *Dobbs* held that the United States Constitution does not guarantee a right to an abortion. 142 S. Ct. at 2242. *Dobbs* did not determine the rights of cryogenically stored embryos outside the human body before uterine implantation. *Dobbs* is not law "applicable" to this case, and thus its pronouncement did not justify a new trial.

Texas has no statute that directly addresses the legal status of frozen fertilized embryos preserved outside the body before implantation in a uterus. To establish that such embryos are "children," not property, and subject to the Family Code provisions regarding child custody and gestational agreements, wife relies on Texas Health and Safety Code Section 170A.001(5), which became effective with the *Dobbs* decision. Section 170A.001(5) defines an "unborn child" as "an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development." According to wife, since the embryos were fertilized and then cryogenically preserved outside her body, they fall within this definition and are "unborn children."[3] *See* Tex. Health & Safety Code Ann. § 170A.001(5).

---

[3]Wife also argues that the *Dobbs* holding renewed the viability of this state's former abortion prohibition found in Texas Revised Civil Statute Article 4512.1. *See* Tex. Rev. Civ. Stat. Ann. art. 4512.1. Assuming such to be true, our analysis of Section 170A is equally applicable because Article 4512.1 is a prohibition of abortions on pregnant women, not a determination of the status of fertilized embryos cryogenically preserved outside a woman's body before implantation in the uterus. Wife also cites to Texas Penal Code Section 1.07(a)(26), which defines an "individual" as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." Tex. Penal Code Ann. § 1.07(a)(26). "Gestation" is not a defined term, so we look to its common ordinary meaning found in sources like dictionaries. *Kawcak v. Antero Resources Corp.*, 582 S.W.3d 566, 575 (Tex. App.—Fort Worth 2019, pet. denied). According to Merriam-Webster, "gestation" is defined as "the carrying of young in the uterus: Pregnancy." *Gestation*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/gestation (last visited July 5, 2023). Similarly, Collins defines gestation as "the process in which babies grow inside their mother's body before they are born." *Gestation*, Collins Online Dictionary, https://www.collinsdictionary.com/dictionary/english/gestation (last visited July 5, 2023). And, as explained in DifferenceBetween.net,

Wife's argument is a classic example of taking a definition out of its legislatively created context and using it in a context that the legislature did not intend. The definition of "unborn child" relied upon by wife is found in Chapter 170A, entitled "Performance of Abortion." Section 170A.001(1) defines "abortion" as defined by Texas Health and Safety Code Section 245.002, which provides

> (1) "Abortion" means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent **to cause the death of an unborn child of a woman known to be pregnant**. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:
>
> (A) save the life or preserve the health of an unborn child;

> Gestation is the period of time between conception/fertilization and birth. During this time, the baby **grows and develops inside the mother's womb**. **Gestation means carrying, to carry or to bear. Gestation is the carrying of an embryo or foetus inside the female's womb in mammals and non-mammalian species.** Pregnancy, more accurately, is the process and series of changes that take place in a woman's body and tissues as a result of the developing foetus. During a pregnancy, there can be one or more gestations occurring simultaneously; for example in case of twins.

Difference between Gestation and Pregnancy, Difference Between Similar Terms and Objects (June 21, 2018), http://www.differencebetween.net/science/health/difference-between-gestation-and-pregnancy-2/ (emphasis added). Wife admits in her brief that "IVF embryos, prior to being implanted are not gestating." Thus, we do not construe the Penal Code definition of an "individual" to include fertilized embryos cryogenically preserved outside a woman's body. A similar conclusion would arguably be reached under the wrongful death statute which defines an "individual" to include "an unborn child at every stage of gestation from fertilization until birth." Tex. Civ. Prac. & Rem. Code Ann. § 71.001(4).

(B) remove a dead, unborn child whose death was caused by spontaneous abortion; or

(C) remove an ectopic pregnancy.

Tex. Health & Safety Code Ann. § 245.002(1) (emphasis added). "Pregnant" is defined as "the female human reproductive condition of **having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth**." Tex. Health & Safety Code Ann. § 170A.001(3) (Emphasis added).

These definitions are used to give meaning to the terms used in Section 170A.002, which prohibits "abortion" with certain exceptions. Thus, a **living unborn child**, i.e., one living in the body of a pregnant female, cannot have its life terminated by an abortion that is prohibited under Section 170A.002. These definitions, by the express wording of the statute, are not established to apply to any other situation. Section "170A.001. Definitions" begins with the prefatory phrase "In this chapter" and then defines "abortion," "pregnant," and "unborn child" among others. *Id.*; *see also KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 185 (Tex. 2019) (holding that defined term "transportation project" in Chapter 370 of the Transportation Code was intended to apply only to matters covered by that code since the definitions were made applicable to terms "in this chapter"). We therefore reject wife's argument that the cryogenically preserved fertilized embryos are "unborn children" for purposes of this proceeding. We overrule wife's issue number one.

b. Issues 2 & 3

In issue two, wife contends that the trial court erred by treating the cryogenically preserved fertilized embryos as property. The crux of her argument is that the embryos are "unborn children" and not property. Our disposition of the first issue disposes of this argument as well.

In issue three, wife challenges whether there was "privity of contract" between husband and wife for purposes of making the contractual agreement between the couple and the IVF clinic separately binding between the husband and the wife. She argues that as the party seeking enforcement of the agreement, husband had the burden to prove that she had obligated herself under the contract.

There is persuasive authority in Texas, which pre-existed *Dobbs*, that supports the trial court's determination on both issues two and three. *Roman v. Roman*, 193 S.W.3d 40, 54–55 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In *Roman*, the husband and wife entered into an agreement with the IVF clinic as part of their IVF treatment program. The agreement was substantially similar to the agreement in this case. It was entitled "Informed Consent for Cryopreservation of Embryo." *Id.* at 51. It provided that the embryos resulting from fertilization would be the "joint property" of both parties. *Id.* It provided for the disposition of the embryos if the parties should die, including that if only one of them died, then the surviving spouse would have full authority to decide what to do with the embryos. *Id.* It expressly provided that if the Romans divorced or filed for divorce while any of their frozen

embryos were in their program, the embryos should be discarded. *Id.* at 44. Both parties acknowledged signing the agreement and initialed the disposition paragraph. *Id.* at 52.

The trial court disregarded the parties' IVF agreement and awarded the embryos to the wife. *Id.* at 43. The court of appeals, after reviewing out of state authority on the enforceability of similar types of agreements and reviewing the elements of contract law in Texas, held that the trial court abused its discretion in awarding the embryos to the wife and reversed the judgment of the trial court. *Id.* at 54–55. The *Roman* court observed that, in addition to consideration, the following elements are required for a valid and binding contract to exist: (1) an offer, (2) acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Id.* at 50. The court held that the IVF Consent for Cryopreservation agreement was not against public policy in Texas, was enforceable as a contract between the Romans, and was clear and unambiguous that the Romans had agreed to discard the embryos in the event of divorce and, thus, that the trial court "improperly rewrote the parties' agreement." *Id.* at 54–55.

We hold that the agreement in this case met the requirements for an enforceable contract using the criteria described in *Roman,* that the terms of the agreement clearly and unambiguously set out the intent of the parties regarding their

mutual rights and responsibilities regarding the IVF process in general, and that the agreed upon disposition of the embryos in the event of divorce was for husband to have the right to dispose of the embryos.[4]

Wife argues that we should not follow *Roman*. However, since *Roman* was decided, no other Texas cases have addressed this issue. Prior to *Roman*, the legislature enacted laws dealing with assisted reproduction and gestational agreements,[5] but it had not, and has not since, addressed the legal status of frozen embryos or the rights to ownership or possession of frozen embryos upon the divorce of the parties creating the frozen embryos. We are persuaded that the legislature's failure to address

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[4]Citing *Fidelity Lumber Co. v. Howell* and two other cases, wife argues that she and husband were not in privity with regard to the agreement because there is no legal privity between husband and wife. 206 S.W. 947, 950 (Tex. App.—Beaumont 1918), *aff'd*, *Howell v. Fid. Lumber Co.*, 228 S.W. 181, 182 (Tex. Comm'n App. 1921); *see also Smith v. Mount*, 851 F.2d 361 (9th Cir. 1988) (unpublished table decision); *Lansburgh & Bro. v. Clark*, 127 F.2d 331, 333 (D.C. Cir. 1942). The line of cases relied on by wife are inapplicable here because they do not address contractual privity and because husband did not claim privity with wife by virtue of their status as a married couple. He sought to enforce his rights under the contract that he and wife executed.

[5]In 2001, the legislature enacted the Uniform Parentage Act, dealing with assisted reproduction. Act of May 25, 2001, 77th Leg., R.S., ch. 821, § 1.01, 2001 Tex. Gen. Laws 1610, 1610–1626 (codified at Tex. Fam. Code §§ 160.701–.707). Certain amendments were enacted in 2007. *See* Act of May 27, 2007, 80th Leg., R.S., ch. 972 §§ 41–43, 2007 Tex. Gen. Laws. 3390, 3399–3400 (codified at Tex. Fam. Code Ann. §§ 160.704, 160.706–.707). In 2003, the legislature authorized gestational agreements. Act of May 23, 2003, 78th Leg., R.S., ch. 457, § 2, 2003 Tex. Gen. Laws 1699, 1699–1702 (codified at Tex. Fam. Code Ann. §§ 160.751–.763).

the holding in *Roman* indicates its acquiescence in its holding.[6] In matters of statutory construction, the legislature is free to rectify court interpretations or change its policy at any time, and the legislature's failure to act may constitute acquiescence in court interpretations. *See City of San Antonio v. Tenorio*, 543 S.W.3d 772, 779 (Tex. 2018). Though this situation is not precisely an issue of statutory construction, the *Roman* court put the legislature on notice of the significance of the issue and the need for legislative action in an area where the legislature had exercised its legislative prerogative. In the ensuing seventeen years, the legislature has done nothing to change the law as pronounced in *Roman*.

We hold that the trial court did not abuse its discretion in treating the embryos in question as property subject to contractual requirements between the parties.

c. Issue 4

In issue four, wife questions whether the trial court terminated the "parental rights" of wife regarding the embryos in violation of the Family Code and without sufficient due process of the law. The basis of wife's argument is that the embryos are "unborn children." Having ruled against wife on this point, we overrule her fourth issue.

d. Issue 5

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[6]The *Roman* court noted, "We answer the issue with which we are presented as narrowly as possible in anticipation that the issue will ultimately be resolved by the Texas Legislature." *Roman*, 193 S.W.3d at 44.

In her fifth issue, wife questions whether the trial court created a gestational agreement regarding the embryos in violation of the Family Code. Wife contends that by awarding the embryos to husband and divesting her of any interest in them, that the court's order created a "gestational agreement" in violation of Section 160.754 of the Texas Family Code. We need look no further than the first sentence of Subsection (a) to determine that this argument is without merit. A "gestational agreement" is a written agreement between a prospective gestational mother, her husband if she is married, each donor, and each intended parent. *See* Tex. Fam. Code Ann. § 160.754(a). In this case, the court's judgment did two things: (a) it awarded the embryos to husband, and (b) it divested wife of all right, title, interest, and claim in and to the remaining frozen embryos. There is no involvement of any of a prospective gestational mother, her husband, and intended parent(s), and there is nothing about any of the other requirements for a gestational agreement set forth in Section 160.754. The trial court simply awarded the embryos to the husband and divested wife of any interest in them. We overrule wife's fifth issue.

IV. Conclusion

Having overruled all of wife's issues, we affirm the judgment of the trial court.

/s/ Mike Wallach
Mike Wallach
Justice

Delivered: July 13, 2023

APPENDIX 31

FILED AT THE BENCH
IN OPEN COURT THIS THE
18 DAY OF Aug, 2022
M. Barnes
JUDGE, DENTON COUNTY
367th DISTRICT COURT

NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA

NO. 21-5535-367

IN THE MATTER OF THE MARRIAGE OF	§	**IN THE DISTRICT COURT**
CAROLINE MICHELLE ANTOUN AND GABY ANTOUN	§	**367 JUDICIAL DISTRICT**
AND IN THE INTEREST OF T.G.A. AND T.G.A., CHILDREN	§	**DENTON COUNTY, TEXAS**

FILED
DENTON COUNTY, TEXAS
2022 AUG 19 AM 11:33
DAVID TRANTHAM
DISTRICT CLERK
BY _____ DEPUTY

FINAL DECREE OF DIVORCE

On June 29, 2022 the Court heard this case.

Appearances

Petitioner, CAROLINE MICHELLE ANTOUN, appeared in person and through attorney of record, Theresa Blake Goline, and announced ready for trial.

Respondent, GABY ELIAS ANTOUN, appeared in person and through attorney of record, James H. Horton, and announced ready for trial.

Record

The record of testimony was duly reported by the court reporter for the 367th Judicial District Court.

Jurisdiction and Domicile

The Court finds that the pleadings of Petitioner are in due form and contain all the allegations, information, and prerequisites required by law. The Court, after receiving evidence, finds that it has jurisdiction of this case and of all the parties and that at least sixty days have elapsed since the date the suit was filed.

The Court further finds that, at the time this suit was filed, Petitioner had been a domiciliary of Texas for the preceding six-month period and a resident of the county in which this suit was filed for the preceding ninety-day period. All persons entitled to citation were properly cited.

Jury

A jury was waived, and questions of fact and of law were submitted to the Court.

Divorce

IT IS ORDERED AND DECREED that CAROLINE MICHELLE ANTOUN, Petitioner, and GABY ELIAS ANTOUN, Respondent, are divorced and that the marriage between them is dissolved on the ground of insupportability.

Children of the Marriage

The Court finds that Petitioner and Respondent are the parents of the following children:

Name: [redacted]
Sex: Male
Birth date: [redacted]

Name: [redacted]
Sex: Female
Birth date: [redacted]

The Court finds no other children of the marriage are expected.

Parenting Plan

The Court finds that the provisions in this decree relating to the rights and duties of the parties with relation to the children, possession of and access to the children, child support, and optimizing the development of a close and continuing relationship between each party and the children constitute the parties' agreed parenting plan.

Conservatorship

The Court, having considered the circumstances of the parents and of the children, finds that the following orders are in the best interest of the children.

IT IS ORDERED that CAROLINE MICHELLE ANTOUN and GABY ELIAS ANTOUN are appointed Joint Managing Conservators of the following children: [redacted]

IT IS ORDERED that, at all times, CAROLINE MICHELLE ANTOUN, as a parent joint managing conservator, shall have the following rights:

1. the right to receive information from any other conservator of the children concerning the health, education, and welfare of the children;

2. the right to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the children;

3. the right of access to medical, dental, psychological, and educational records of the children;

4. the right to consult with a physician, dentist, or psychologist of the children;

5. the right to consult with school officials concerning the children's welfare and educational status, including school activities;

6. the right to attend school activities, including school lunches, performances, and field trips;

7. the right to be designated on the children's records as a person to be notified in case of an emergency;

8. the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the children; and

9. the right to manage the estates of the children to the extent the estates have been created by the parent's family or by the parent, other than by the community or joint property of the parent.

IT IS ORDERED that, at all times, GABY ELIAS ANTOUN, as a parent joint managing conservator, shall have the following rights:

1. the right to receive information from any other conservator of the children concerning the health, education, and welfare of the children;

2. the right to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the children;

3. the right of access to medical, dental, psychological, and educational records of the children;

4. the right to consult with a physician, dentist, or psychologist of the children;

5. the right to consult with school officials concerning the children's welfare and educational status, including school activities;

6. the right to attend school activities, including school lunches, performances, and field trips;

7. the right to be designated on the children's records as a person to be notified in case of an emergency;

8. the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the children; and

9. the right to manage the estates of the children to the extent the estates have been created by the parent's family or by the parent, other than by the community or joint property of the parent.

IT IS ORDERED that, at all times, CAROLINE MICHELLE ANTOUN and GABY ELIAS ANTOUN, as parent joint managing conservators, shall each have the following duties:

1. the duty to inform the other conservator of the children in a timely manner of significant information concerning the health, education, and welfare of the children;

2. the duty to inform the other conservator of the children if the conservator resides with for at least thirty days, marries, or intends to marry a person who the conservator knows is registered as a sex offender under chapter 62 of the Texas Code of Criminal Procedure or is currently charged with an offense for which on conviction the person would be required to register under that chapter. IT IS ORDERED that notice of this information shall be provided to the other conservator of the children as soon as practicable, but not later than the fortieth day after the date the conservator of the children begins to reside with the person or on the tenth day after the date the marriage occurs, as appropriate. IT IS ORDERED that the notice must include a description of the offense that is the basis of the person's requirement to register as a sex offender or of the offense with which the person is charged. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE;

3. the duty to inform the other conservator of the children if the

conservator establishes a residence with a person who the conservator knows is the subject of a final protective order sought by an individual other than the conservator that is in effect on the date the residence with the person is established. IT IS ORDERED that notice of this information shall be provided to the other conservator of the children as soon as practicable, but not later than the thirtieth day after the date the conservator establishes residence with the person who is the subject of the final protective order. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE;

4. the duty to inform the other conservator of the children if the conservator resides with, or allows unsupervised access to a child by, a person who is the subject of a final protective order sought by the conservator after the expiration of sixty-day period following the date the final protective order is issued. IT IS ORDERED that notice of this information shall be provided to the other conservator of the children as soon as practicable, but not later than the ninetieth day after the date the final protective order was issued. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE; and

5. the duty to inform the other conservator of the children if the conservator is the subject of a final protective order issued after the date of the order establishing conservatorship. IT IS ORDERED that notice of this information shall be provided to the other conservator of the children as soon as practicable, but not later than the thirtieth day after the date the final protective order was issued. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE.

IT IS ORDERED that, during her periods of possession, CAROLINE MICHELLE ANTOUN, as parent joint managing conservator, shall have the following rights and duties:

1. the duty of care, control, protection, and reasonable discipline of the children;

2. the duty to support the children, including providing the children with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

3. the right to consent for the children to medical and dental care not involving an invasive procedure; and

4. the right to direct the moral and religious training of the children.

IT IS ORDERED that, during his periods of possession, GABY ELIAS ANTOUN, as parent joint managing conservator, shall have the following rights and duties:

1. the duty of care, control, protection, and reasonable discipline of the children;

2. the duty to support the children, including providing the children with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

3. the right to consent for the children to medical and dental care not involving an invasive procedure; and

4. the right to direct the moral and religious training of the children.

IT IS ORDERED that CAROLINE MICHELLE ANTOUN, as a parent joint managing conservator, shall have the following rights and duty:

1. the exclusive right to designate the primary residence of the children within Denton County, Texas, and counties contiguous to Denton County, Texas;

2. the exclusive right, after meaningful consultation with the other parent conservator, to consent to medical, dental, and surgical treatment involving invasive procedures;

3. the exclusive right, after meaningful consultation with the other parent conservator, to consent to psychiatric and psychological treatment of the children;

4. the exclusive right to receive and give receipt for periodic payments for the support of the children and to hold or disburse these funds for the benefit of the children;

5. the independent right to represent the children in legal action and to make other decisions of substantial legal significance concerning the children;

6. the independent right to consent to marriage and to enlistment in the armed forces of the United States;

7. the exclusive right, after meaningful consultation with the other parent conservator, to make decisions concerning the children's education;

8. except as provided by section 264.0111 of the Texas Family Code, the independent right to the services and earnings of the children;

9. except when a guardian of the children's estates or a guardian or attorney ad litem has been appointed for the children, the independent right to act as an agent of the children in relation to the children's estates if the children's action is required by a state, the United States, or a foreign government;

10. the duty, subject to the agreement of the other parent conservator, to manage the estates of the children to the extent the estates have been created by the community or joint property of the parent.

IT IS ORDERED that GABY ELIAS ANTOUN, as a parent joint managing conservator, shall have the following rights and duty:

1. the right to be consulted with by the other parent conservator as to decisions regarding medical, dental, and surgical treatment involving invasive procedures;

2. the right to be consulted with by the other parent conservator as to decisions regarding psychiatric and psychological treatment of the children;

3. the independent right to represent the children in legal action and to make other decisions of substantial legal significance concerning the children;

4. the independent right to consent to marriage and to enlistment in the armed forces of the United States;

5. the right to be consulted with by the other parent conservator as to decisions regarding decisions concerning the children's education;

6. except as provided by section 264.0111 of the Texas Family Code, the independent right to the services and earnings of the children;

7. except when a guardian of the children's estates or a guardian or attorney ad litem has been appointed for the children, the independent right to act as an agent of the children in relation to the children's estates if the children's action is required by a state, the United States, or a foreign government;

8. the duty, subject to the agreement of the other parent conservator, to manage the estates of the children to the extent the estates have been created by the community or joint property of the parent.

The Court finds that, in accordance with section 153.001 of the Texas Family Code, it is the public policy of Texas to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child, to provide a safe, stable, and nonviolent environment for the child, and to encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage. IT IS ORDERED that the primary residence of the children shall be within Denton County, Texas, and counties contiguous to Denton County, Texas, and the parties shall not remove the children from Denton County, Texas, and counties contiguous to Denton County, Texas for the purpose of changing the primary residence of the children until this geographic restriction is modified by further order of the court of continuing jurisdiction or by a written agreement that is signed by the parties and filed with that court.

IT IS FURTHER ORDERED that CAROLINE MICHELLE ANTOUN shall have the exclusive right to designate the children's primary residence within Denton County, Texas, and counties contiguous to Denton County, Texas.

Notwithstanding any provision in this decree to the contrary, IT IS ORDERED that CAROLINE MICHELLE ANTOUN shall have the exclusive right to enroll the children in school. Each conservator, during that conservator's period of possession, is ORDERED to ensure the children's attendance in the schools in which CAROLINE MICHELLE ANTOUN has enrolled the children.

IT IS ORDERED that CAROLINE MICHELLE ANTOUN shall have the exclusive right and duty to prepare and file income tax returns for the estates of [redacted].

IT IS ORDERED that GABY ELIAS ANTOUN shall furnish such information to CAROLINE MICHELLE ANTOUN as is requested to prepare federal income tax returns for the children's estates within thirty days of receipt of a written request for the information. As requested information becomes available after that date, it shall be furnished within ten days of receipt.

Possession and Access

1. Custom Possession Order

IT IS ORDERED that each conservator shall comply with all terms and conditions of this Custom Possession Order. IT IS ORDERED that this Custom Possession Order is effective immediately and applies to all periods of possession occurring on and after the date the Court signs this Custom Possession Order. IT IS, THEREFORE, ORDERED:

(a) Definitions

1. In this Custom Possession Order "school" means the elementary or secondary school in which the child is enrolled or, if the child is not enrolled in an elementary or secondary school, the public school district in which the child primarily resides.

2. In this Custom Possession Order "child" includes each child, whether one or more, who is a subject of this suit while that child is under the age of eighteen years and not otherwise emancipated.

(b) Mutual Agreement or Specified Terms for Possession

IT IS ORDERED that the conservators shall have possession of the child at times mutually agreed to in advance by the parties, and, in the absence of mutual agreement, it is ORDERED that the conservators shall have possession of the child under the specified terms set out in this Custom Possession Order.

(c) **Possession until August 31, 2023**

Except as otherwise expressly provided in this Possession Order, GABY ELIAS ANTOUN shall have the right to possession of the children as follows:

1. Weekends- Beginning on January 21, 2022, every other weekend beginning on the Friday of the weekend at 6:00 p.m. and ending the following Sunday at 6:00 p.m.

2. Tuesdays - On Tuesday of each week beginning at 5:00 p.m. and ending at 7:00 p.m.

3. Thursdays - On Thursday of each week beginning at 5:00 p.m. and ending at 7:00 p.m.

4. Extended Summer Possession by GABY ELIAS ANTOUN –

In 2023 with written notice by April 15 - If GABY ELIAS ANTOUN gives CAROLINE MICHELLE ANTOUN written notice by April 15 of that year specifying an extended period or periods of summer possession for that year, GABY ELIAS ANTOUN shall have possession of the child for 7 days beginning no earlier than May 15 and ending no later than August 31 in that year, to be exercised in no more

than one single period of 7 consecutive days, as specified in the written notice. These periods of possession shall begin and end at 6:00 p.m. on each applicable day.

Notwithstanding the weekend periods of possession ORDERED for GABY ELIAS ANTOUN, it is expressly ORDERED that CAROLINE MICHELLE ANTOUN shall have a superior right of possession of the child as follows:

5. Extended Summer Possession by CAROLINE MICHELLE ANTOUN

In 2023, with written notice by April 1 - CAROLINE MICHELLE ANTOUN gives GABY ELIAS ANTOUN written notice by June 1 of that year specifying an extended period or periods of summer possession for that year, CAROLINE MICHELLE ANTOUN shall have possession of the child for 7 days beginning no earlier than May 15 and ending no later than August 31 in that year, to be exercised in no more than one single period of 7 consecutive days, as specified in the written notice. These periods of possession shall begin and end at 6:00 p.m. on each applicable day.

(d) **Possession from September 1, 2023 until Kindergarten**

Except as otherwise expressly provided in this Custom Possession Order, GABY ELIAS ANTOUN shall have the right to possession of the child as follows:

1. Weekends - GABY ELIAS ANTOUN shall have the right to possession of the child on weekends beginning at 6:00 p.m., on the first, third, and fifth Friday of each month and ending at 6:00 p.m. on the following Sunday.

2. Thursdays – During the school year, on Thursdays of each week beginning at 5:00 p.m. and ending at 7:00 p.m.

3. Extended Summer Possession by GABY ELIAS ANTOUN

In 2024 with written notice by April 1 - If GABY ELIAS ANTOUN gives CAROLINE MICHELLE ANTOUN written notice by April 1 of 2024 specifying an extended period or periods of summer possession for that year, GABY ELIAS ANTOUN shall have possession of the child for 14 days beginning no earlier than May 15, and ending no later than August 31 in that year, to be exercised in no more than

one single period of 14 consecutive days, as specified in the written notice. These periods of possession shall begin and end at 6:00 p.m. on each applicable day.

Notwithstanding the weekend periods of possession ORDERED for GABY ELIAS ANTOUN, it is expressly ORDERED that CAROLINE MICHELLE ANTOUN shall have a superior right of possession of the child as follows:

4. Extended Summer Possession by CAROLINE MICHELLE ANTOUN

In 2024, with written notice by April 15 – CAROLINE MICHELLE ANTOUN gives GABY ELIAS ANTOUN written notice by April 15 of 2024 specifying an extended period or periods of summer possession for that year, CAROLINE MICHELLE ANTOUN shall have possession of the child for 14 days beginning no earlier than May 15, and ending no later than August 31 in that year, to be exercised in no more than one single period of 14 consecutive days, as specified in the written notice. These periods of possession shall begin and end at 6:00 p.m. on each applicable day.

(e) **Possession Starting When Children Begin Kindergarten**

Except as otherwise expressly provided in this Custom Possession Order, when GABY ELIAS ANTOUN resides 100 miles or less from the primary residence of the child, GABY ELIAS ANTOUN shall have the right to possession of the child as follows:

1. Weekends –

On weekends that occur during the regular school term, beginning at the time the child's school is regularly dismissed, on the first, third, and fifth Friday of each month and ending at 6:00 p.m. on the following Sunday.

On weekends that do not occur during the regular school term, beginning at 6:00 p.m., on the first, third, and fifth Friday of each month and ending at 6:00 p.m. on the following Sunday.

2. Weekend Possession Extended by a Holiday –

Except as otherwise expressly provided in this Custom Possession Order, if a weekend period of possession by GABY ELIAS

ANTOUN begins on a student holiday or a teacher in-service day that falls on a Friday during the regular school term, as determined by the school in which the child is enrolled, or a federal, state, or local holiday that falls on a Friday during the summer months when school is not in session, that weekend period of possession shall begin at the time the child's school is regularly dismissed on the Thursday immediately preceding the student holiday or teacher in-service day and 6:00 p.m. on the Thursday immediately preceding the federal, state, or local holiday during the summer months.

3. Thursdays - On Thursday of each week during the regular school term, beginning at the time the child's school is regularly dismissed and ending at the time the child's school resumes on Friday.

4. Spring Vacation in Even-Numbered Years - In even-numbered years, beginning at the time the child's school is dismissed for the school's spring vacation and ending at 6:00 p.m. on the day before school resumes after that vacation.

5. Extended Summer Possession by GABY ELIAS ANTOUN

In odd years, with written notice by April 15 - If GABY ELIAS ANTOUN gives CAROLINE MICHELLE ANTOUN written notice by April 15 of a year specifying an extended period or periods of summer possession for that year, GABY ELIAS ANTOUN shall have possession of the child for two 7 day periods beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than the day before school resumes at the end of the summer vacation in that year, to be exercised in two separate periods of 7 consecutive days each, as specified in the written notice. These periods of possession shall begin and end at 6:00 p.m. on each applicable day.

In even years, with written notice by April 1 - If GABY ELIAS ANTOUN gives CAROLINE MICHELLE ANTOUN written notice by April 1 of a year specifying an extended period or periods of summer possession for that year, GABY ELIAS ANTOUN shall have possession of the child for two 7 day periods beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than the day before school resumes at the end of the summer vacation in that year, to be exercised in two separate periods of 7 consecutive days each, as specified in the written notice. These periods of possession shall begin and end at 6:00 p.m. on each

applicable day.

Notwithstanding the Thursday periods of possession during the regular school term and the weekend periods of possession ORDERED for GABY ELIAS ANTOUN, it is expressly ORDERED that CAROLINE MICHELLE ANTOUN shall have a superior right of possession of the child as follows:

Spring Vacation in Odd-Numbered Years - In odd-numbered years, beginning at the time the child's school is dismissed for the school's spring vacation and ending at 6:00 p.m. on the day before school resumes after that vacation.

6. Extended Summer Possession by CAROLINE MICHELLE ANTOUN:

In odd years, with written notice by April 1 – CAROLINE MICHELLE ANTOUN gives GABY ELIAS ANTOUN written notice by April 1 of a year specifying an extended period or periods of summer possession for that year, CAROLINE MICHELLE ANTOUN shall have possession of the child for two 14 day periods beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than the day before school resumes at the end of the summer vacation in that year, to be exercised in two separate periods of 14 consecutive days each, as specified in the written notice. These periods of possession shall begin and end at 6:00 p.m. on each applicable day

In even years, with written notice by April 15 – CAROLINE MICHELLE ANTOUN gives GABY ELIAS ANTOUN written notice by April 15 of a year specifying an extended period or periods of summer possession for that year, CAROLINE MICHELLE ANTOUN shall have possession of the child for two 14 day periods beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than the day before school resumes at the end of the summer vacation in that year, to be exercised in two separate periods of 14 consecutive days each, as specified in the written notice. These periods of possession shall begin and end at 6:00 p.m. on each applicable day

(f) Holidays Beginning September 1, 2023

Notwithstanding the weekend and Thursday periods of possession of GABY ELIAS ANTOUN, CAROLINE MICHELLE

ANTOUN and GABY ELIAS ANTOUN shall have the right to possession of the child as follows:

1. Christmas Holidays in Odd-Numbered Years - In odd-numbered years, GABY ELIAS ANTOUN shall have the right to possession of the child beginning at 6:00 p.m. on the day the child is dismissed from school for the Christmas school vacation and ending at noon on December 28, and CAROLINE MICHELLE ANTOUN shall have the right to possession of the child beginning at noon on December 28 and ending at 6:00 p.m. on the day before school resumes after that Christmas school vacation.

2. Christmas Holidays in Even-Numbered Years - In even-numbered years, CAROLINE MICHELLE ANTOUN shall have the right to possession of the child beginning at 6:00 p.m. on the day the child is dismissed from school for the Christmas school vacation and ending at noon on December 28, and GABY ELIAS ANTOUN shall have the right to possession of the child beginning at noon on December 28 and ending at 6:00 p.m. on the day before school resumes after that Christmas school vacation.

3. Thanksgiving in Even-Numbered Years - In even-numbered years, GABY ELIAS ANTOUN shall have the right to possession of the child beginning at 6:00 p.m. on the day the child is dismissed from school for the Thanksgiving holiday and ending at 6:00 p.m. on the Sunday following Thanksgiving.

4. Thanksgiving in Odd-Numbered Years - In odd-numbered years, CAROLINE MICHELLE ANTOUN shall have the right to possession of the child beginning at 6:00 p.m. on the day the child is dismissed from school for the Thanksgiving holiday and ending at 6:00 p.m. on the Sunday following Thanksgiving.

5. Child's Birthday - If a parent is not otherwise entitled under this Custom Possession Order to present possession of a child on the child's birthday, that parent shall have possession of the child beginning at 6:00 p.m. and ending at 8:00 p.m. on that day, provided that that parent picks up the child from the other parent's residence and returns the child to that same place.

6. Father's Day - GABY ELIAS ANTOUN shall have the right to possession of the child each year, beginning at 6:00 p.m. on the Friday preceding Father's Day and ending at 6:00 p.m. on Father's Day, provided that if GABY ELIAS ANTOUN is not otherwise entitled

under this Custom Possession Order to present possession of the child, he shall pick up the child from CAROLINE MICHELLE ANTOUN's residence and return the child to that same place.

7. Mother's Day - CAROLINE MICHELLE ANTOUN shall have the right to possession of the child each year, beginning at 6:00 p.m. on the Friday preceding Mother's Day and ending at 6:00 p.m. on Mother's Day, provided that if CAROLINE MICHELLE ANTOUN is not otherwise entitled under this Custom Possession Order to present possession of the child, she shall pick up the child from GABY ELIAS ANTOUN's residence and return the child to that same place.

(g) Undesignated Periods of Possession

CAROLINE MICHELLE ANTOUN shall have the right of possession of the child at all other times not specifically designated in this Custom Possession Order for GABY ELIAS ANTOUN.

(h) General Terms and Conditions

Except as otherwise expressly provided in this Custom Possession Order, the terms and conditions of possession of the child that apply regardless of the distance between the residence of a parent and the child are as follows:

1. Surrender of Child by CAROLINE MICHELLE ANTOUN - CAROLINE MICHELLE ANTOUN is ORDERED to surrender the child to GABY ELIAS ANTOUN at the beginning of each period of GABY ELIAS ANTOUN's possession at the residence of CAROLINE MICHELLE ANTOUN.

2. Surrender of Child by GABY ELIAS ANTOUN - GABY ELIAS ANTOUN is ORDERED to surrender the child to CAROLINE MICHELLE ANTOUN at the residence of GABY ELIAS ANTOUN at the end of each period of possession.

3. Surrender of Child by GABY ELIAS ANTOUN - GABY ELIAS ANTOUN is ORDERED to surrender the child to CAROLINE MICHELLE ANTOUN, if the child is in GABY ELIAS ANTOUN's possession or subject to GABY ELIAS ANTOUN's control, at the beginning of each period of CAROLINE MICHELLE ANTOUN's exclusive periods of possession, at the place designated in this Custom Possession Order.

4. Return of Child by CAROLINE MICHELLE ANTOUN - CAROLINE MICHELLE ANTOUN is ORDERED to return the child to GABY ELIAS ANTOUN, if GABY ELIAS ANTOUN is entitled to possession of the child, at the end of each of CAROLINE MICHELLE ANTOUN's exclusive periods of possession, at the place designated in this Custom Possession Order.

5. Personal Effects - Each conservator is ORDERED to return with the child the personal effects that the child brought at the beginning of the period of possession.

6. Designation of Competent Adult - Each conservator may designate any competent adult to pick up and return the child, as applicable. IT IS ORDERED that a conservator or a designated competent adult be present when the child is picked up or returned.

7. Inability to Exercise Possession - Each conservator is ORDERED to give notice to the person in possession of the child on each occasion that the conservator will be unable to exercise that conservator's right of possession for any specified period.

8. Written Notice - Written notice, including notice provided by electronic mail or facsimile, shall be deemed to have been timely made if received or, if applicable, postmarked before or at the time that notice is due. Each conservator is ORDERED to notify the other conservator of any change in the conservator's electronic mail address or facsimile number within twenty-four hours after the change.

This concludes the Custom Possession Order.

2. Duration

The periods of possession ordered above apply to each child the subject of this suit while that child is under the age of eighteen years and not otherwise emancipated.

3. Termination of Orders

The provisions of this decree relating to conservatorship, possession, or access terminate on the remarriage of CAROLINE MICHELLE ANTOUN to GABY ELIAS ANTOUN unless a nonparent or agency has been appointed conservator of the children under chapter 153 of the Texas Family Code.

4. International Travel

Unless by written consent, neither conservator may take the children out of the United States of America before the children are 3 years old. After the children are 3 years old, the conservators may only take the children to countries that are part of the Hague convention. Each conservator is ORDERED to provide the other conservator with the appropriate written authorization, within ten days after written request is received, as is necessary to allow the children to travel with the other conservator beyond the territorial limits of the United States.

5. Domestic Travel

Each parent will give at least a 24-hour notice to the other parent if they plan to travel outside of Texas. The parent travelling with the child(ren) will provide itinerary and location of lodging.

Child Support

IT IS ORDERED that GABY ELIAS ANTOUN is obligated to pay and shall pay to CAROLINE MICHELLE ANTOUN child support of one thousand two hundred twenty seven dollars and thirty one cents ($1,227.31) per month, with the first payment being due and payable on June 1, 2022 and a like payment being due and payable on the first day of each month thereafter until the first month following the date of the earliest occurrence of one of the events specified below:

1. any child reaches the age of eighteen years or graduates from high school, whichever occurs later, subject to the provisions for support beyond the age of eighteen years set out below;
2. any child marries;
3. any child dies;
4. any child enlists in the armed forces of the United States and begins active service as defined by section 101 of title 10 of the United States Code; or
5. any child's disabilities are otherwise removed for general purposes.

If the child is eighteen years of age and has not graduated from high school and GABY ELIAS ANTOUN's obligation to support the child has not already terminated, IT IS ORDERED that GABY ELIAS ANTOUN's obligation to pay child support to CAROLINE MICHELLE ANTOUN shall not terminate but shall continue for as long as the child is enrolled-

1. under chapter 25 of the Texas Education Code in an accredited secondary school in a program leading toward a high school diploma or under section 130.008 of the Education Code in courses for joint high school and junior college credit and is complying with the minimum attendance requirements of

subchapter C of chapter 25 of the Education Code or

2. on a full-time basis in a private secondary school in a program leading toward a high school diploma and is complying with the minimum attendance requirements imposed by that school.

Withholding from Earnings

IT IS ORDERED that any employer of GABY ELIAS ANTOUN shall be ordered to withhold the child support payments ordered in this decree from the disposable earnings of GABY ELIAS ANTOUN for the support of [redacted]

IT IS FURTHER ORDERED that all amounts withheld from the disposable earnings of GABY ELIAS ANTOUN by the employer and paid in accordance with the order to that employer shall constitute a credit against the child support obligation. Payment of the full amount of child support ordered paid by this decree through the means of withholding from earnings shall discharge the child support obligation. If the amount withheld from earnings and credited against the child support obligation is less than 100 percent of the amount ordered to be paid by this decree, the balance due remains an obligation of GABY ELIAS ANTOUN, and it is hereby ORDERED that GABY ELIAS ANTOUN pay the balance due directly as specified below.

On this date the Court signed an Income Withholding for Support.

Payment

IT IS ORDERED that all payments shall be made through the state disbursement unit at Texas Child Support Disbursement Unit, P.O. Box 659791, San Antonio, Texas 78265-9791, and thereafter promptly remitted to CAROLINE MICHELLE ANTOUN for the support of the children. IT IS ORDERED that all payments shall be made payable to the Office of the Attorney General and include the ten-digit Office of the Attorney General case number (if available), the cause number of this suit, GABY ELIAS ANTOUN's name as the name of the noncustodial parent (NCP), and CAROLINE MICHELLE ANTOUN's name as the name of the custodial parent (CP). Payment options are found on the Office of the Attorney General's website at https://www.texasattorneygeneral.gov/cs/payment-options-and-types.

IT IS ORDERED that each party shall pay, when due, all fees charged to that party by the state disbursement unit and any other agency statutorily authorized to charge a fee.

Change of Employment

IT IS FURTHER ORDERED that GABY ELIAS ANTOUN shall notify this Court and CAROLINE MICHELLE ANTOUN by U.S. certified mail, return receipt requested, of any change of address and of any termination of employment. This notice shall be given no later than seven days after the change of address or the termination of employment. This notice or a subsequent notice shall also provide the current address of GABY ELIAS ANTOUN and the name and address of his current employer, whenever that information becomes available.

Clerk's Duties

IT IS ORDERED that, on the request of a prosecuting attorney, the title IV-D agency, the friend of the Court, a domestic relations office, CAROLINE MICHELLE ANTOUN, GABY ELIAS ANTOUN, or an attorney representing CAROLINE MICHELLE ANTOUN or GABY ELIAS ANTOUN, the clerk of this Court shall cause a certified copy of the Income Withholding for Support to be delivered to any employer.

Medical and Dental Support

1. IT IS ORDERED that CAROLINE MICHELLE ANTOUN and GABY ELIAS ANTOUN shall each provide additional child support for each child as set out in this order for as long as the Court may order CAROLINE MICHELLE ANTOUN and GABY ELIAS ANTOUN to provide support for the child under sections 154.001 and 154.002 of the Texas Family Code. Beginning on the day CAROLINE MICHELLE ANTOUN and GABY ELIAS ANTOUN's actual or potential obligation to support a child under sections 154.001 and 154.002 of the Family Code terminates, IT IS ORDERED that CAROLINE MICHELLE ANTOUN and GABY ELIAS ANTOUN are discharged from these obligations with respect to that child, except for any failure by a parent to fully comply with these obligations before that date.

2. Definitions -

"Health Insurance" means insurance coverage that provides basic health-care services, including usual physician services, office visits, hospitalization, and laboratory, X-ray, and emergency services, that may be provided through a health maintenance organization or other private or public organization, other than medical assistance under chapter 32 of the Texas Human Resources Code.

"Reasonable cost" means the total cost of health insurance coverage for all children for which GABY ELIAS ANTOUN is responsible under a medical support order that does not exceed 9 percent of GABY ELIAS ANTOUN's annual resources,

as described by section 154.062(b) of the Texas Family Code.

"Dental insurance" means insurance coverage that provides preventive dental care and other dental services, including usual dentist services, office visits, examinations, X-rays, and emergency services, that may be provided through a single service health maintenance organization or other private or public organization.

"Reasonable cost" of dental insurance means the total cost of dental insurance coverage for all children for which GABY ELIAS ANTOUN is responsible under a medical support order that does not exceed 1.5 percent of GABY ELIAS ANTOUN's annual resources, as described by section 154.062(b) of the Texas Family Code.

"Health-care expenses" include, without limitation, medical, surgical, prescription drug, mental health-care services, dental, eye care, ophthalmological, and orthodontic charges but do not include expenses for travel to and from the provider or for nonprescription medication.

"Health-care expenses that are not reimbursed by insurance" ("unreimbursed expenses") include related copayments and deductibles.

"Furnish" means –

a. to deliver the document to the recipient at the recipient's electronic mail address as follows:

CAROLINE MICHELLE ANTOUN:

GABY ELIAS ANTOUN: Gaby_antoun@hotmail.com

and in the event of any change in either recipient's electronic mail address, that recipient is ORDERED to notify the other recipient of such change in writing within twenty-four hours after the change

3. Findings on Availability of Health Insurance - Having considered the cost, accessibility, and quality of health insurance coverage available to the parties, the Court finds:

Health insurance is available or is in effect for the children through GABY ELIAS ANTOUN's employment or membership in a union, trade association, or other organization at a reasonable cost per month.

IT IS FURTHER FOUND that the following orders regarding health-care coverage are in the best interest of the children.

4. Provision of Health-Care Coverage -

As additional child support, GABY ELIAS ANTOUN is ORDERED to maintain health insurance for each child as long as child support is payable for that child. GABY ELIAS ANTOUN is ORDERED -

a. to furnish to each conservator of the children the following information no later than the thirtieth day after the date the notice of the rendition of this order is received:
   i. GABY ELIAS ANTOUN's Social Security number;
   ii. the name and address of GABY ELIAS ANTOUN's employer;
   iii. whether GABY ELIAS ANTOUN's employer is self-insured or has health insurance available;
   iv. proof that health insurance has been provided for each child;
   v. if GABY ELIAS ANTOUN's employer has health insurance available:
      (a) the name of the health insurance carrier;
      (b) the number of the policy;
      (c) a copy of the policy;
      (d) a schedule of benefits;
      (e) a health insurance membership card;
      (f) claim forms, and
      (g) any other information necessary to submit a claim; and
   vi. if GABY ELIAS ANTOUN's employer is self-insured:
      (a) a copy of the schedule of benefits;
      (b) a membership card;
      (c) claim forms; and
      (d) any other information necessary to submit a claim;
b. to furnish to each conservator of the children a copy of any renewals or changes to the health insurance coverage of a child and additional information regarding health insurance coverage of the children not later than the fifteenth day after GABY ELIAS ANTOUN receives or is provided with the renewal, change, or additional information;
c. to notify each conservator of the children of any termination or lapse of the health insurance coverage of a child no later than the fifteenth day after the date of the termination or lapse;
d. after termination or lapse of health insurance coverage, to notify each conservator of the children of the availability to GABY ELIAS ANTOUN of additional health insurance for the children not later than the fifteenth day after the date the insurance becomes available;

e. after termination or lapse of health insurance coverage, to enroll the children in a health insurance plan that is available to GABY ELIAS ANTOUN at reasonable cost at the next available enrollment period.

Pursuant to section 1504.051 of the Texas Insurance Code, IT IS ORDERED that if GABY ELIAS ANTOUN is eligible for dependent health coverage but fails to apply to obtain coverage for the children, the insurer shall enroll the children on application of CAROLINE MICHELLE ANTOUN or others as authorized by law.

5. Findings on Availability of Dental Insurance – Having considered the cost, accessibility, and quality of dental insurance coverage available to the parties, the Court finds:

Dental insurance is available or is in effect for the children through GABY ELIAS ANTOUN's employment or membership in a union, trade association, or other organization at a reasonable cost per month.

IT IS FURTHER FOUND that the following orders regarding dental coverage are in the best interest of the children.

6. Provision of Dental Coverage -

As additional child support, GABY ELIAS ANTOUN is ORDERED to maintain dental insurance for each child as long as child support is payable for that child. GABY ELIAS ANTOUN is ORDERED -

a. to furnish to each conservator of the children the following information no later than the thirtieth day after the date the notice of the rendition of this order is received:
   i. GABY ELIAS ANTOUN's Social Security number;
   ii. the name and address of GABY ELIAS ANTOUN's employer;
   iii. whether GABY ELIAS ANTOUN's employer is self-insured or has dental insurance available;
   iv. proof that dental insurance has been provided for each child;
   v. if GABY ELIAS ANTOUN's employer has dental insurance available:
      (a) the name of the dental insurance carrier;
      (b) the number of the policy;
      (c) a copy of the policy;
      (d) a schedule of benefits;
      (e) a dental insurance membership card;
      (f) claim forms, and
      (g) any other information necessary to submit a claim; and
   vi. if GABY ELIAS ANTOUN's employer is self-insured:

(a) a copy of the schedule of benefits;
(b) a membership card;
(c) claim forms; and
(d) any other information necessary to submit a claim;

b. to furnish to each conservator of the children a copy of any renewals or changes to the dental insurance coverage of a child and additional information regarding dental insurance coverage of the children not later than the fifteenth day after GABY ELIAS ANTOUN receives or is provided with the renewal, change, or additional information;

c. to notify each conservator of the children of any termination or lapse of the dental insurance coverage of a child no later than the fifteenth day after the date of the termination or lapse;

d. after termination or lapse of dental insurance coverage, to notify each conservator of the children of the availability to GABY ELIAS ANTOUN of additional dental insurance for the children not later than the fifteenth day after the date the insurance becomes available;

e. after termination or lapse of dental insurance coverage, to enroll the children in a dental insurance plan that is available to GABY ELIAS ANTOUN at reasonable cost at the next available enrollment period.

Pursuant to section 1504.051 of the Texas Insurance Code, IT IS ORDERED that if GABY ELIAS ANTOUN is eligible for dependent dental coverage but fails to apply to obtain coverage for the children, the insurer shall enroll the children on application of CAROLINE MICHELLE ANTOUN or others as authorized by law.

7. Allocation of Unreimbursed Expenses -

Pursuant to section 154.183(c) of the Texas Family Code, the reasonable and necessary health-care expenses of the children that are not reimbursed by health insurance or dental insurance are allocated as follows: CAROLINE MICHELLE ANTOUN is ORDERED to pay 50 percent and GABY ELIAS ANTOUN is ORDERED to pay 50 percent of the unreimbursed health-care expenses if, at the time the expenses are incurred, GABY ELIAS ANTOUN is providing health insurance and GABY ELIAS ANTOUN is providing dental insurance as ordered.

The conservator who incurs a health-care expense on behalf of a child is ORDERED to furnish to the other conservator all forms, receipts, bills, statements, and explanations of benefits reflecting the uninsured portion of the health-care expenses within thirty days after the incurring conservator receives them. If the incurring conservator furnishes to the nonincurring conservator the forms, receipts, bills, statements, and explanations of benefits reflecting the unreimbursed portion of the health-care expenses within thirty days after the incurring conservator receives them, the nonincurring conservator is ORDERED to pay the non-incurring conservator's percentage of the unreimbursed portion of the health-care expenses

either by paying the health-care provider directly or by reimbursing the incurring conservator for any advance payment exceeding the incurring conservator's percentage of the unreimbursed portion of the health-care expenses within thirty days after the nonincurring conservator receives the forms, receipts, bills, statements, and/or explanations of benefits. If the incurring conservator fails to furnish to the nonincurring conservator the forms, receipts, bills, statements, and explanations of benefits reflecting the unreimbursed portion of the health-care expenses within thirty days after the incurring conservator receives them, the nonincurring conservator is ORDERED to pay the nonincurring conservator's percentage of the unreimbursed portion of the health-care expenses either by paying the health-care provider directly or by reimbursing the incurring conservator's percentage of the unreimbursed portion of the health-care expenses within 120 days after the nonincurring conservator receives the forms, receipts, bills, statements, and/or explanations of benefits.

8. Secondary Coverage - IT IS ORDERED that if a conservator provides secondary health insurance coverage or dental insurance coverage for the children, the conservators shall cooperate fully with regard to the handling and filing of claims with the insurance carrier providing the coverage in order to maximize the benefits available to the children and to ensure that the conservator who pays for health-care expenses for the children is reimbursed for the payment from both carriers to the fullest extent possible.

9. Compliance with Insurance Company Requirements - Each conservator is ORDERED to conform to all requirements imposed by the terms and conditions of any policy of health or dental insurance covering the children in order to assure the maximum reimbursement or direct payment by any insurance company of the incurred health-care expense, including but not limited to requirements for advance notice to any carrier, second opinions, and the like. Each conservator is ORDERED to use "preferred providers," or services within the health maintenance organization or preferred provider network, if applicable. Disallowance of the bill by an insurance company shall not excuse the obligation of a conservator to make payment. Excepting emergency health-care expenses incurred on behalf of the children, if a party incurs health-care expenses for the children using "out-of-network" health-care providers or services, or fails to follow the insurance company procedures or requirements, that conservator shall pay all such health-care expenses incurred absent (1) written agreement of the conservators allocating such health-care expenses or (2) further order of the Court.

10. Claims - Except as provided in this paragraph, a conservator who is not carrying the health or dental insurance policy covering the children is ORDERED to furnish to the party carrying the policy, within fifteen days of receiving them, all forms, receipts, bills, and statements reflecting the health-care expenses the conservator not carrying the policy incurs on behalf of the children. In

accordance with section 1204.251 and 1504.055(a) of the Texas Insurance Code, IT IS ORDERED that the conservator who is not carrying the health or dental insurance policy covering the children, at that conservator's option, or others as authorized by law, may file any claims for health-care expenses directly with the insurance carrier with and from whom coverage is provided for the benefit of the children and receive payments directly from the insurance company. Further, for the sole purpose of section 1204.251 of the Texas Insurance Code, CAROLINE MICHELLE ANTOUN is designated the managing conservator or possessory conservator of the children.

The conservator who is carrying the health or dental insurance policy covering the children is ORDERED to submit all forms required by the insurance company for payment or reimbursement of health-care expenses incurred by either party on behalf of a child to the insurance carrier within fifteen days of that party's receiving any form, receipt, bill, or statement reflecting the expenses.

11. Constructive Trust for Payments Received - IT IS ORDERED that any insurance payments received by a conservator from the health or dental insurance carrier as reimbursement for health-care expenses incurred by or on behalf of a child shall belong to the conservator who paid those expenses. IT IS FURTHER ORDERED that the conservator receiving the insurance payments is designated a constructive trustee to receive any insurance checks or payments for health-care expenses paid by the other conservator, and the conservator carrying the policy shall endorse and forward the checks or payments, along with any explanation of benefits received, to the other conservator within three days of receiving them.

12. WARNING - A PARENT ORDERED TO PROVIDE HEALTH INSURANCE OR DENTAL INSURANCE OR TO PAY THE OTHER PARENT ADDITIONAL CHILD SUPPORT FOR THE COST OF HEALTH INSURANCE OR DENTAL INSURANCE WHO FAILS TO DO SO IS LIABLE FOR NECESSARY MEDICAL EXPENSES OF THE CHILDREN, WITHOUT REGARD TO WHETHER THE EXPENSES WOULD HAVE BEEN PAID IF HEALTH INSURANCE OR DENTAL INSURANCE HAD BEEN PROVIDED, AND FOR THE COST OF HEALTH INSURANCE PREMIUMS, DENTAL INSURANCE PREMIUMS, OR CONTRIBUTIONS, IF ANY, PAID ON BEHALF OF THE CHILDREN.

Miscellaneous Child Support Provisions

Support as Obligation of Estate

IT IS ORDERED that the provisions for child support in this decree shall be an obligation of the estate of GABY ELIAS ANTOUN and shall not terminate on the death of GABY ELIAS ANTOUN. IT IS ORDERED that payment received by CAROLINE MICHELLE ANTOUN for the benefit of the children due to the death

of GABY ELIAS ANTOUN, including payments from the Social Security Administration, Department of Veterans Affairs or other governmental agency or life insurance proceeds, annuity payments, trust distributions, or retirement survivor benefits, shall be a credit against this obligation. Any remaining balance of the child support is an obligation of GABY ELIAS ANTOUN's estate.

Termination of Orders on Remarriage of Parties but Not on Death of Obligee

The provisions of this decree relating to current child support terminate on the remarriage of CAROLINE MICHELLE ANTOUN to GABY ELIAS ANTOUN unless a nonparent or agency has been appointed conservator of the children under chapter 153 of the Texas Family Code. An obligation to pay child support under this decree does not terminate on the death of CAROLINE MICHELLE ANTOUN but continues as an obligation to THEODORE GABY ANTOUN and TALIA GABY ANTOUN.

Information Regarding Parties

The information required for each party by section 105.006(a) of the Texas Family Code is as follows:

Name: CAROLINE MICHELLE ANTOUN
Social Security number: [redacted]
Driver's license number: [redacted] Issuing state: [redacted]
Current residence address: [redacted]
Home telephone number:
Name of employer: [redacted]
Address of employment:

Name: GABY ELIAS ANTOUN
Social Security number: [redacted]
Driver's license number [redacted] Issuing state: [redacted]
Current residence address: [redacted]
Home telephone number: [redacted]
Name of employer: [redacted]
Address of employment: [redacted]

Required Notices

EACH PERSON WHO IS A PARTY TO THIS ORDER IS ORDERED TO NOTIFY EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY OF ANY CHANGE IN THE PARTY'S CURRENT RESIDENCE ADDRESS, MAILING ADDRESS, HOME TELEPHONE NUMBER, NAME OF EMPLOYER, ADDRESS OF EMPLOYMENT, DRIVER'S LICENSE NUMBER,

AND WORK TELEPHONE NUMBER. THE PARTY IS ORDERED TO GIVE NOTICE OF AN INTENDED CHANGE IN ANY OF THE REQUIRED INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY ON OR BEFORE THE 60TH DAY BEFORE THE INTENDED CHANGE. IF THE PARTY DOES NOT KNOW OR COULD NOT HAVE KNOWN OF THE CHANGE IN SUFFICIENT TIME TO PROVIDE 60-DAY NOTICE, THE PARTY IS ORDERED TO GIVE NOTICE OF THE CHANGE ON OR BEFORE THE FIFTH DAY AFTER THE DATE THAT THE PARTY KNOWS OF THE CHANGE.

THE DUTY TO FURNISH THIS INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY CONTINUES AS LONG AS ANY PERSON, BY VIRTUE OF THIS ORDER, IS UNDER AN OBLIGATION TO PAY CHILD SUPPORT OR ENTITLED TO POSSESSION OF OR ACCESS TO A CHILD.

FAILURE BY A PARTY TO OBEY THE ORDER OF THIS COURT TO PROVIDE EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY WITH THE CHANGE IN THE REQUIRED INFORMATION MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

Notice shall be given to the other party by delivering a copy of the notice to the party by registered or certified mail, return receipt requested. Notice shall be given to the Court by delivering a copy of the notice either in person to the clerk of this Court or by registered or certified mail addressed to the clerk at 1450 E McKinney St, Denton TX 76209. Notice shall be given to the state case registry by mailing a copy of the notice to State Case Registry, Contract Services Section, MC046S, P.O. Box 12017, Austin, Texas 78711-2017.

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE TERMS OF CHILD CUSTODY SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CLAIM, CIVIL OR OTHERWISE, REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THE ORDER THAT RELATE TO CHILD CUSTODY. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO

YEARS AND A FINE OF AS MUCH AS $10,000.

THE COURT MAY MODIFY THIS ORDER THAT PROVIDES FOR THE SUPPORT OF A CHILD, IF:

(1) THE CIRCUMSTANCES OF THE CHILD OR A PERSON AFFECTED BY THE ORDER HAVE MATERIALLY AND SUBSTANTIALLY CHANGED; OR

(2) IT HAS BEEN THREE YEARS SINCE THE ORDER WAS RENDERED OR LAST MODIFIED AND THE MONTHLY AMOUNT OF THE CHILD SUPPORT AWARD UNDER THE ORDER DIFFERS BY EITHER 20 PERCENT OR $100 FROM THE AMOUNT THAT WOULD BE AWARDED IN ACCORDANCE WITH THE CHILD SUPPORT GUIDELINES.

Warnings to Parties

WARNINGS TO PARTIES: FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO A CHILD MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

FAILURE OF A PARTY TO MAKE A CHILD SUPPORT PAYMENT TO THE PLACE AND IN THE MANNER REQUIRED BY A COURT ORDER MAY RESULT IN THE PARTY'S NOT RECEIVING CREDIT FOR MAKING THE PAYMENT.

FAILURE OF A PARTY TO PAY CHILD SUPPORT DOES NOT JUSTIFY DENYING THAT PARTY COURT-ORDERED POSSESSION OF OR ACCESS TO A CHILD. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO A CHILD DOES NOT JUSTIFY FAILURE TO PAY COURT-ORDERED CHILD SUPPORT TO THAT PARTY.

Division of Marital Estate

The Court finds that the following is a just and right division of the parties' marital estate, having due regard for the rights of each party and the children of the marriage.

Property Temporarily Awarded to Petitioner

IT IS ORDERED AND DECREED that Petitioner, CAROLINE MICHELLE

ANTOUN, is awarded the temporary exclusive possession of the following property:

RESPONDENT IS DIVESTED OF ALL RIGHT & TITLE IN & TO SAID PROPERTY IF PETITIONER SUCCESSFULLY COMPLETES THE RE-FI OF SAID PROPERTY

BEING ALL OF LOT 2 IN BLOCK C ON DONNA DEL ESTATES, AN ADDITION IN THE CITY OF DENTON, TEXAS, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 3, PAGE 2, OF THE PLAT RECORDS OF DENTON COUNTY, TEXAS, AND TOGETHER WITH ALL THAT CERTAIN TRACT DESCRIBED IN THE DEED FROM THE CITY OF DENTON TO JAMES A. LEWIS AND WIFE RECORDED IN VOLUME 610, PAGE 70, OF THE DEED RECORDS OF DENTON COUNTY, TEXAS, AS RECOGNIZED AND OCCUPIED ON THE GROUD, THE SUBJECT TRACT BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS: BEGINNING FOR THE NORTH EAST CORNER OF THE TRACT BEING DESCRIBED HEREIN AT A 5/8 INCH IRON ROD FOUND FOR THE NORTHEAST CORNER OF THE SAID LOT 2 IN THE SOUTH LINE OF THAT CERTAIN TRACT DESCRIBED IN THE DEED TO DENTON COLUMBUS CLUB RECORDS UNDER CLERK'S FILE NO 94-0025703, REAL PROPERTY RECORDS;

THENCE SOUTH 00 DEGREES 55 MINUTES 54 SECONDS EAST, WITH THE EAST LINE OF SAID LOT 2 AND THE WEST LINE OF LOT 3, AT 179.84 FEET PASSING A 5/8 INCH IRON ROD FOR THE SOUTHEAST CORNEY OF SAID LOT 2 AND THE NORTHEAST CORNER OF THE SAID LEWIS TRACT AND CONTINUING ALONG SAID COURSE, WITH THE EAST LINE OF SAID LEWIS TRACT, IN ALL A TOTAL DISTANCE OF 184.89 FEET TO THE SOUTHEAST CORNER OF SAID LEWIS TRACT IN THE APPARENT NORTH LINE OF DEL DRIVE;

THENCE SOUTH 88 DEGREES 49 MINUTES 00 SECONDS WEST, WITH THE SOUTH LINE OF SAID LEWIS TRACT, ALONG SAID DRIVE, A DISTANCE OF 241.87 FEET TO THE SOUTHWEST CORNER OF SAID LEWIS TRACT;

THENCE NORTH 00 DEGREES 55 MINUTES 49 SECONDS WEST, WITH THE WEST LINE THEREOF AT 5.0 FEET PASSING A 5/8 INCH IRON ROD FOUND FOR THE NORTHWEST CORNER OF SAID LEWIS TRACT AND THE SOUTHWEST CORNER OF SAID LOT 2 AND CONTINUING ALONG SAID COURSE, GENERALLY ALONG A FENCE, IN ALL A TOTAL DISTANCE OF 184.92 FEET TO A 5.8 INCH IRON ROD FOUND FOR THE NORTHWEST CORNER OF SAID LOT 3 IN THE SOUTH LINE OF SAID COLUMBUS TRACT;

THENCE NORTH 88 DEGREES 49 MINUTES 30 SECONDS EAST WITH THE NORTH LINE OF SAID LOT 2 AND THE SOUTH LINE OR SAID COLUMBUS TRACT, GENERALLY ALONG A FENCE, A DISTANCE OF 241.86 FEET TO THE PLACE OF BEGINNING AND ENCLOSING 1.027 ACRES OF LAND, MORE OR LESS.

More commonly known as: [redacted]

Provisions Dealing with Refinance of Residence

IT IS ORDERED that Petitioner shall refinance the mortgage and all indebtedness related to the real property as defined herein, commonly known as [redacted], by January 1, 2023. Petitioner shall pay respondent 50% of the equity in the property. A full appraisal shall be done and Respondent, GABY ELIAS ANTOUN, shall be paid 50 percent (50%) of the equity in the property. ~~Equity defined as appraisal price minus mortgage.~~

If CAROLINE MICHELLE ANTOUN cannot refinance the property by January 1, 2023, IT IS ORDERED that the property and all improvements located thereon at [redacted] shall be sold under the following terms and conditions:

1. The property shall be sold for a price that is mutually agreeable to Petitioner and Respondent. If Petitioner and Respondent are unable to agree on a sales price, on the application of either party, the property shall be listed with a duly licensed real estate broker having sales experience in the area where the property is located, provided further that the real estate broker shall be an active member in the Multiple Listing Service with the State Board of Realtors.

2. Petitioner shall continue to make all payments of principal, interest, taxes, and insurance on the property during the pendency of the sale, and Petitioner shall have the exclusive right to enjoy the use and possession of the premises until closing. All maintenance and repairs necessary to keep the property in its present condition shall be paid by Petitioner.

3. Petitioner and Respondent shall each receive 50% of the net proceeds from the sale of the home, less $425.00 from GABY ELIAS ANTOUN to pay past due medical support for the children.

<u>Property Awarded to Petitioner</u>

IT IS ORDERED AND DECREED that Petitioner, CAROLINE MICHELLE ANTOUN, is awarded the exclusive use of the following property, and Respondent, GABY ELIAS ANTOUN, is divested of all right, title, interest, and claim in and to that property:

P-1. All household furniture, furnishings, fixtures, goods, art objects, collectibles, appliances, and equipment in the possession of Petitioner or subject to her sole control except king bed frame and TV located in garage.

P-2. All clothing, jewelry, and other personal effects in the possession of

Petitioner or subject to her sole control.

P-3. All sums of cash in the possession of Petitioner or subject to her sole control, including funds on deposit, together with accrued but unpaid interest, in banks, savings institutions, or other financial institutions, which accounts stand in Petitioner's sole name or from which Petitioner has the sole right to withdraw funds or which are subject to Petitioner's sole control.

P-4. The 2016 Hyundai Sante Fe motor vehicle, vehicle identification number [redacted], together with all prepaid insurance, keys, and title documents.

P-5. Awarded judgment of forty-two thousand one hundred fifty-eight dollars ($42,158.00) against Respondent, GABY ELIAS ANTOUN, payable in accordance with the terms of the closing documents ordered in this decree to be executed, with interest at 6 percent per year compounded annually from the date of judgment.

P-6. All sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profit-sharing plan, retirement plan, Keogh plan, pension plan, employee stock option plan, 401(k) plan, employee savings plan, accrued unpaid bonuses, disability plan, or other benefits existing by reason of Petitioner's past, present, or future employment.

Property to Respondent

IT IS ORDERED AND DECREED that Respondent, GABY ELIAS ANTOUN, is awarded the following as his sole and separate property, and Petitioner, CAROLINE MICHELLE ANTOUN, is divested of all right, title, interest, and claim in and to that property:

R-1. All household furniture, furnishings, fixtures, goods, art objects, collectibles, appliances, and equipment in the possession of Respondent or subject to his sole control.

R-2. All clothing, jewelry, and other personal effects in the possession of Respondent or subject to his sole control, along with king bed frame and TV from garage of marital residence.

R-3. All sums of cash in the possession of Respondent or subject to his sole control, including funds on deposit, together with accrued but unpaid interest, in banks, savings institutions, or other financial institutions, which accounts stand in Respondent's sole name or from which Respondent has the sole right to withdraw

funds or which are subject to Respondent's sole control.

R-4. The 2013 Honda Civic motor vehicle, vehicle identification number [redacted], together with all prepaid insurance, keys, and title documents.

R-5. All sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profit-sharing plan, retirement plan, Keogh plan, pension plan, employee stock option plan, 401(k) plan, employee savings plan, accrued unpaid bonuses, disability plan, or other benefits existing by reason of Respondent's past, present, or future employment.

R-6. The king size bed with frame and mattress in the garage.

R-7. One television of his choice from the property located at [redacted].

Division of Debt

Debts to Petitioner

IT IS ORDERED AND DECREED that Petitioner, CAROLINE MICHELLE ANTOUN, shall pay, as a part of the division of the estate of the parties, and shall indemnify and hold Respondent, GABY ELIAS ANTOUN, and his property harmless from any failure to so discharge, these items:

P-1. All payments due, including principal, interest, tax, and insurance escrow, on the promissory note executed by CAROLINE MICHELLE ANTOUN and GABY ELIAS ANTOUN, in the original principal sum of $211,105.00, dated December 23, 2015, payable to Finance of America Mortgage, LLC, and secured by deed of trust on the real property awarded in this decree to the Petitioner, until such time as Petitioner, CAROLINE MICHELLE ANTOUN, refinances the property.

P-2. The balance due, including principal, interest, and all other charges, on the promissory note payable to American Airlines Credit Union, ending in 0003, and given as part of the purchase price of and secured by a lien on the 2016 Hyundai Sante Fe motor vehicle awarded to Petitioner.

P-3. The following debts, charges, liabilities, and obligations:

a. Debt owed to Wells Fargo Credit Card, Account number 2812

b. Debt owed to Chase Credit Card, Account number 5921
c. Debt owed to Chase Credit Card, Account number 2903
d. Debt owed to American Airlines Visa, Account number 0560
e. Debt owed to Saudi Loan, Account number 0903

P-4. All individual Student Loans in Petitioner's name.

P-5. All encumbrances, ad valorem taxes, liens, assessments, premiums, or other charges due or to become due on the real and personal property awarded to Petitioner in this decree unless express provision is made in this decree to the contrary.

Debts to Respondent

IT IS ORDERED AND DECREED that Respondent, GABY ELIAS ANTOUN, shall pay, as a part of the division of the estate of the parties, and shall indemnify and hold Petitioner, CAROLINE MICHELLE ANTOUN, and her property harmless from any failure to so discharge, these items:

R-1. The balance due, including principal, interest, and all other charges, on the promissory note payable to American Airlines Credit Union, ending in 0002, and given as part of the purchase price of and secured by a lien on the 2013 Honda Civic motor vehicle awarded to Respondent.

R-2. All individual Student Loans in Respondent's name.

R-3. Judgment of forty-two thousand one hundred fifty-eight dollars ($42,158.00) against Respondent, GABY ELIAS ANTOUN, payable to CAROLINE MICHELLE ANTOUN in accordance with the terms of the closing documents ordered in this decree to be executed, with interest at 6 percent per year compounded annually from the date of judgment.

R-4. All encumbrances, ad valorem taxes, liens, assessments, premiums, or other charges due or to become due on the real and personal property awarded to Respondent, in this decree unless express provision is made in this decree to the contrary.

Notice

IT IS ORDERED AND DECREED that each party shall send to the other party, within three days of its receipt, a copy of any correspondence from a creditor or taxing authority concerning any potential liability of the other party.

Judgment to Equalize Division

For the purpose of a just and right division of property made in this decree, IT IS FURTHER ORDERED AND DECREED that Petitioner, CAROLINE MICHELLE ANTOUN, is awarded judgment of forty two thousand one hundred fifty eight dollars ($42,158.00) against Respondent, GABY ELIAS ANTOUN, payable in accordance with the terms of the closing documents ordered in this decree to be executed, with interest at 6 percent per year compounded annually from the date of judgment, for which let execution issue.

This judgment is part of the division of community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony, or child support.

Attorney's Fees

To effect an equitable division of the estate of the parties and as a part of the division, and for services rendered in connection with conservatorship and support of the children, each party shall be responsible for his or her own attorney's fees, expenses, and costs incurred as a result of legal representation in this case.

Treatment/Allocation of Community Income for Year of Divorce

The term "I.R.C." means the Internal Revenue Code of 1986, as amended.

IT IS ORDERED AND DECREED that, for the calendar year 2022, each party shall file a federal income tax return and report thereon the reporting party's share of the income, gains, losses, deductions, and credits, including estimated taxes and withholding taxes, of the parties during the calendar year 2022 prior to the date of divorce, and of the reporting party on and after the date of divorce, in accordance with the I.R.C. and this decree.

IT IS ORDERED AND DECREED that for calendar year 2022, each party shall indemnify and hold the other party and the other party's property harmless from any tax liability associated with the reporting party's federal tax return for that year unless the parties have agreed to allocate their tax liability in a manner different from that reflected on their returns.

IT IS ORDERED AND DECREED that each party shall furnish such

information to the other party as is requested to prepare federal income tax returns for 2022 within thirty days of receipt of a written request for the information, and in no event shall the available information be exchanged later than March 1, 2023. As requested information becomes available after that date, it shall be provided within ten days of receipt.

IT IS ORDERED AND DECREED that all payments made to the other party in accordance with the allocation provisions for payment of federal income taxes contained in this Final Decree of Divorce are not deemed income to the party receiving those payments but are part of the property division and necessary for a just and right division of the parties' estate.

IT IS ORDERED AND DECREED that CAROLINE MICHELLE ANTOUN shall have the sole right to claim THEODORE GABY ANTOUN and TALIA GABY ANTOUN as dependents for income tax purposes on CAROLINE MICHELLE ANTOUN's income tax returns for all years beginning with the calendar year 2022. IT IS FURTHER ORDERED AND DECREED that not later than 30 days after the date of divorce GABY ELIAS ANTOUN shall execute and deliver to CAROLINE MICHELLE ANTOUN at the law offices of Theresa Blake Goline at 1409 E. McKinney St., Ste. 121, Denton, Texas 76209 an IRS Form 8332 permitting CAROLINE MICHELLE ANTOUN this right. GABY ELIAS ANTOUN is ORDERED not to try to claim these children as dependents for income tax purposes beginning with the calendar year 2022 unless CAROLINE MICHELLE ANTOUN has executed and delivered to GABY ELIAS ANTOUN an IRS Form 8332 permitting GABY ELIAS ANTOUN that right.

IT IS ORDERED AND DECREED that the parties shall cooperate with each other and exchange all relevant information, notices, and documents in the event of an audit or examination (or notice thereof) of their income tax returns for any period during their marriage through the date of divorce by the Internal Revenue Service or other governmental agency, and each party shall have the right to participate, at that participant party's cost and expense, in that audit or examination individually or by that party's designated representative.

Court Costs

IT IS ORDERED AND DECREED that costs of court are to be borne by the party who incurred them.

Special Provisions

IT IS ORDERED AND DECREED that the remaining frozen embryos stored at Dallas Fertility Center are awarded to GABY ELIAS ANTOUN.

GABY ELIAS ANTOUN shall be responsible for all charges due or to become due in relation to the frozen embryos stored at Dallas Fertility Center.

CAROLINE MICHELLE ANTOUN is divested of all right, title, interest, and claim in and to the remaining frozen embryos stored at Dallas Fertility Center.

Resolution of Temporary Orders

IT IS ORDERED AND DECREED that Petitioner and Respondent are discharged from all further liabilities and obligations imposed by the temporary order of this Court rendered on January 20, 2022.

Discharge from Discovery Retention Requirement

IT IS ORDERED AND DECREED that the parties and their respective attorneys are discharged from the requirement of keeping and storing the documents produced in this case in accordance with rule 191.4(d) of the Texas Rules of Civil Procedure.

Decree Acknowledgment

Petitioner, CAROLINE MICHELLE ANTOUN, and Respondent, GABY ELIAS ANTOUN, each acknowledge that before signing this Final Decree of Divorce they have read this Final Decree of Divorce fully and completely, have had the opportunity to ask any questions regarding the same, and fully understand that the contents of this Final Decree of Divorce constitute a full and complete resolution of this case. Petitioner and Respondent acknowledge that they have voluntarily affixed their signatures to this Final Decree of Divorce, believing this agreement to be a just and right division of the marital debt and assets, and state that they have not signed by virtue of any coercion, any duress, or any agreement other than those specifically set forth in this Final Decree of Divorce.

Indemnification

Each party represents and warrants that he or she has not incurred any outstanding debt, obligation, or other liability on which the other party is or may be liable, other than those described in this decree. Each party agrees and IT IS ORDERED that if any claim, action, or proceeding is hereafter initiated seeking to hold the party not assuming a debt, an obligation, a liability, an act, or an omission of the other party liable for such debt, obligation, liability, act or omission of the other party, that other party will, at that other party's sole expense, defend the party not assuming the debt, obligation, liability, act, or omission of the other party against any such claim or demand, whether or not well founded, and will indemnify the party not assuming the debt, obligation, liability, act, or omission of the other

party and hold him or her harmless from all damages resulting from the claim or demand.

Damages, as used in this provision, includes any reasonable loss, cost, expense, penalty, and other damage, including without limitation attorney's fees and other costs and expenses reasonably and necessarily incurred in enforcing this indemnity.

IT IS ORDERED that the indemnifying party will reimburse the indemnified party, on demand, for any payment made by the indemnified party at any time after the entry of the divorce decree to satisfy any judgment of any court of competent jurisdiction or in accordance with a bona fide compromise or settlement of claims, demands, or actions for any damages to which this indemnity relates.

The parties agree and IT IS ORDERED that each party will give the other party prompt written notice of any litigation threatened or instituted against either party that might constitute the basis of a claim for indemnity under this decree.

Clarifying Orders

Without affecting the finality of this Final Decree of Divorce, this Court expressly reserves the right to make orders necessary to clarify and enforce this decree.

Relief Not Granted

IT IS ORDERED AND DECREED that all relief requested in this case and not expressly granted is denied. This is a final judgment, for which let execution and all writs and processes necessary to enforce this judgment issue. This judgment finally disposes of all claims and all parties and is appealable.

Date of Judgment

This divorce judicially PRONOUNCED AND RENDERED in court at 367th Judicial District Court, Denton County, Texas, on June 29, 2022 and further noted on the court's docket sheet on the same date, but signed on 8-19-22.

Margaret Barnes
JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

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APPENDIX 32

CAUSE NO. 21-5535-367

FILED
DENTON COUNTY, TEXAS
2022 SEP 28 AM 11:26
DAVID TRANTHAM
DISTRICT CLERK
BY _____ DEPUTY

IN THE MATTER OF THE MARRIAGE OF	§	**IN THE DISTRICT COURT**
CAROLINE MICHELLE ANTOUN AND GABY ANTOUN	§	**367TH JUDICIAL DISTRICT**
AND IN THE INTEREST OF [redacted] AND [redacted] CHILDREN	§	**DENTON COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the requests of Petitioner and Wife, CAROLINE MICHELLE ANTOUN, for findings of fact and conclusions of law with respect to the Final Decree of Divorce rendered by this Court on August 19, 2022, the Court makes and files the following original findings of fact and conclusions of law in accordance with Rules 296 and 297 of the Texas Rules of Civil Procedure.

A. Findings of Fact-Divorce

1. On May 16, 2022, the parties entered into a Mediated Settlement Agreement in which the parties agree to settle only the child-related issues in the case and left all property division matters, as well as all matters related to the party's embryos, to be tried to the Court.

2. On June 29, 2022, the 367th District Court of Denton County, Texas held a final trial in this matter.

3 On June 29, 2022, the 367th District Court of Denton County, Texas orally pronounced and rendered the parties' divorce in open court.

4. On August 19, 2022, the 367th District Court of Denton County, Texas signed and rendered the parties' *Final Decree of Divorce.*

B. Findings of Fact-Property Division Matters, as well as all matters related to the party's Embryos

5. The embryos, now frozen, were created during the marriage using the sperm of Respondent and Husband, GABY ELIAS ANTOUN and the eggs of Petitioner and Wife, CAROLINE MICHELLE ANTOUN and are in the possession of Dallas Fertility Center ARTS Program.

6. The parties signed a mediation agreement addressing all issues involving the child-related issues in the case and left all property division matters, as well as all matters related to the party's embryos, to be tried to the Court.

7. During the marriage, Petitioner and Wife, CAROLINE MICHELLE ANTOUN and Respondent and Husband, GABY ELIAS ANTOUN signed an Agreement entitled Consent Form Cryopreservation of Embryos on May 10, 2019.

8. Petitioner and Wife, CAROLINE MICHELLE ANTOUN and Respondent and Husband, GABY ELIAS ANTOUN signed an Agreement entitled Consent Form Cryopreservation of Embryos voluntarily.

9. The Court finds that the Agreement entitled Consent Form Cryopreservation of Embryos was admitted into evidence at the Final Trial.

10. The Court finds that the Agreement entitled Consent Form Cryopreservation of Embryos contained a provision that in the event a of divorce between Petitioner and Wife, CAROLINE MICHELLE ANTOUN and Respondent and Husband, GABY ELIAS ANTOUN, which spouse was given the dispositional authority of the remaining frozen embryos with Dallas Fertility ARTS Program.

11. The Court finds that the Agreement entitled Consent Form Cryopreservation of Embryos regarding the disposition of the embryos if in the event of divorce, directed the Dallas Fertility Center ARTS Program to place the frozen embryos at the disposal of Respondent and

Husband, GABY ELIAS ANTOUN.

12. The Court finds that in the Agreement entitled Consent Form Cryopreservation of Embryos the parties agreed that in the event of a divorce, that the frozen embryos would be at the disposal of the Husband and Husband, GABY ELIAS ANTOUN, subject to the 5-year storage period.

13. The Court finds that remaining frozen embryos stored at Dallas Fertility Center are awarded to Respondent and Husband, GABY ELIAS ANTOUN.

14. The Court finds that Respondent and Husband, GABY ELIAS ANTOUN shall be responsible for all charges due or to become due in relation to the frozen embryos stored at Dallas Fertility Center.

15. The Court finds that Petitioner and Wife, CAROLINE MICHELLE ANTOUN is divested of all right, title, interest, and claim in and to the remaining frozen embryos stored at Dallas Fertility Center which have been awarded to Respondent and Husband, GABY ELIAS ANTOUN.

16. Any finding of fact that is a conclusion of law shall be deemed a conclusion of law.

Conclusions of Law

1. The Original Petition for Divorce filed by Petitioner, CAROLINE MICHELLE ANTOUN and the counterclaim for divorce filed by Respondent, GABY ELIAS ANTOUN are in due form and contain all the allegations required by law.

2. This Court has jurisdiction of the parties, Petitioner, CAROLINE MICHELLE ANTOUN and Respondent, GABY ELIAS ANTOUN, of the children, and of the subject matter of this case.

3. All legal prerequisites to granting a divorce have been met.

4. The divorce is granted on the ground of insupportability.

5. The Agreement entitled Consent Form Cryopreservation of Embryos executed by Petitioner and Wife, CAROLINE MICHELLE ANTOUN and Respondent and Husband, GABY ELIAS ANTOUN on May 10, 2019, is a valid and enforceable agreement as to the frozen embryos in the possession of Dallas Fertility ARTS Program.

6. The Court finds that the disposition of the frozen embryos is based upon the evidence presented at final trial.

7. The Court considered the Agreement of the parties, all evidence and testimony in balancing the rights of both parties in making the award of the frozen embryos to Respondent and Husband, GABY ELIAS ANTOUN.

8. The Court considered all evidence and testimony regarding the Agreement entitled Consent Form Cryopreservation of Embryos executed by Petitioner and Wife, CAROLINE MICHELLE ANTOUN and Respondent and Husband, GABY ELIAS ANTOUN on May 10, 2019.

9. The award of the frozen embryos to Respondent and Husband, GABY ELIAS ANTOUN is part of a disposition of the remaining issues of the parties' divorce having due regard for the rights of each party.

10. The remaining frozen embryos stored at Dallas Fertility Center are awarded to GABY ELIAS ANTOUN.

11. GABY ELIAS ANTOUN shall be responsible for all charges due or to become due in relation to the frozen embryos stored at Dallas Fertility Center.

12. CAROLINE MICHELLE ANTOUN is divested of all right, title, interest, and claim in and to the remaining frozen embryos stored at Dallas Fertility Center.

13. The property division contained in the Final Decree is a just and right division of the estate based upon evidence presented at final trial.

14. Any conclusion of law that is a finding of fact shall be deemed a finding of fact.

SIGNED on 9-28-2022.

Margaret E. Barnes
JUDGE PRESIDING

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Allison Martin on behalf of Patrick Wright
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Filing Code Description: Brief on the Merits (all briefs)
Filing Description: Merit Brief for Respondent
Status as of 3/7/2024 7:24 AM CST

Associated Case Party: Caroline Antoun

Name	BarNumber	Email	TimestampSubmitted	Status
Jason E.Niehaus		jason@BNDjlegal.com	3/6/2024 7:19:34 PM	SENT
Kristi Edwards		kristi@bndjlegal.com	3/6/2024 7:19:34 PM	SENT

Case Contacts

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Brad Horton		brad@jameshorton.attorney	3/6/2024 7:19:34 PM	SENT
Patrick Wright		patrick@thewrightlawyers.com	3/6/2024 7:19:34 PM	SENT

Associated Case Party: Hannah, John and MarleneStrege

Name	BarNumber	Email	TimestampSubmitted	Status
Hannah, John and Marlene Strege		nseltzer@thejusticefoundation.org	3/6/2024 7:19:34 PM	SENT