IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, *et al.* *Petitioners,* v. JOHN M. O'CONNOR, *in his official capacity as* OKLAHOMA ATTORNEY GENERAL, *et al.* *Respondents.*	No: 120,543

RESPONDENTS' ANSWER TO BRIEF OF AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

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October 3, 2022

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INTRODUCTION

In a routine abortion procedure—the "D&E"—abortionists "use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portions out of the uterus . . . ." *Stenberg v. Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting). "[T]he traction created by the opening between the uterus and vagina" is relied upon "to dismember the fetus, tearing the grasped portion away from the remainder of the body." *Id.* "The fetus, in many cases ... bleeds to death as it is torn limb from limb." *Id.* at 958-59. The fetus, unfortunately, "can survive for a time while its limbs are being torn off." *Id.* at 959. Indeed, at times a heartbeat can still be detected even with "extensive parts of the fetus removed . . . ." *Id.*

Amici "medical" organizations claim Oklahoma's Constitution contains a *right* to have this procedure performed—a fundamental right, throughout pregnancy, to dismember a living human and let him or her bleed to death. Astonishingly, the *amici* make this argument in the name of "do[ing] no harm" without even *once* mentioning the second patient who is undeniably harmed in every single abortion. Their brief should be discarded on that basis alone. For all the many faults of *Roe v. Wade* and *Planned Parenthood v. Casey*, at least those decisions recognized the unborn. *See, e.g.*, *Casey*, 505 U.S. 833, 869 (1992) ("The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn . . . ."). *Amici* embrace a much more radical approach, where the unborn aren't just sub-human, but utterly non-existent.

This Court should reject *amici*'s efforts to erase an entire class of human beings. Opposing abortion has a long, storied history in the medical community, tracing back to the Hippocratic Oath itself. And this Court has recognized the duty of care owed to the unborn. The Legislature is in no way required to stand aside when innocent human lives are at stake. Quite the opposite: If some in the medical community now recklessly insist on exposing the most vulnerable humans among us to destruction, it is the State's *duty* to intervene.

I. THE STATE IS NOT REQUIRED TO DEFER TO RADICAL PRO-ABORTION GROUPS WHO DEHUMANIZE AND DISREGARD THE LIFE OF THE UNBORN CHILD.

Amici rely heavily on their own materials and supposed medical authority. They claim, for example, that the American College of Obstetricians and Gynecologists (ACOG) has "been cited by numerous authorities, including the U.S. Supreme Court, as a leading provider of authoritative scientific data regarding childbirth and abortion." ACOG Br. at 1 & n.1. But the three cases listed as relying on ACOG were all abrogated by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). In *Dobbs,* ACOG and others made many of the same extreme pro-abortion arguments that they are making here, and the U.S. Supreme Court disregarded them entirely. ACOG's brief in *Dobbs* was only cited by a dissent, in a footnote. *See id.* at 2344 n.22 (Breyer, J., dissenting).

It is eye-opening, moreover, that *amici* tout ACOG's influence in *Stenberg.* ACOG Br. at 1 n.1. There, ACOG threw its alleged authority behind partial-birth abortion, a "method of killing a human child ... so horrible that the most clinical description of it evokes a shudder of revulsion." *Stenberg*, 530 U.S. at 953 (Scalia, J., dissenting). For this barbaric procedure, the "fetus' arms and legs are delivered outside the uterus while the fetus is alive . . . ." *Id.* at 959 (Kennedy, J., dissenting). "With only the head of the fetus remaining in utero, the abortionist tears open the skull" with a pair of scissors. *Id.* at 959-60. "The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull." *Id.* at 960.[1] One nurse described:

> The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. ... The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.

Id. at 1007 (Thomas, J., dissenting). This "closely borders on infanticide" and "threatens to

[1] Variations on this method include squeezing "the skull after it has been pierced 'so that enough brain tissue exudes to allow the head to pass through[,]'" using forceps to "crush[] the fetus' skull[,]" and "in effect decapitating" the fetus. *Gonzales v. Carhart*, 550 U.S. 124, 139 (2007).

dehumanize the fetus." *Id.* at 983, 1002 (Thomas, J., dissenting); *see also id. at* 963 (Kennedy, J., dissenting) (noting "stronger resemblance to infanticide").

The Supreme Court relied extensively on ACOG to hold that a Nebraska law prohibiting partial-birth abortion was unconstitutional, at one point even hiding behind ACOG's "sanitized description" of the process. *Compare Stenberg*, 142 S. Ct. at 928, *with id.* at 957-58 (Kennedy, J., dissenting) (accusing majority of viewing "the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked" and of using words that "may obscure matters" for lay persons), *and id.* at 983 (Thomas, J., dissenting) ("From reading the majority's sanitized description, one would think that this case involves state regulation of a widely accepted routine medical procedure. Nothing could be further from the truth."). In *Stenberg*, ACOG made the same types of arguments it makes here: the law against quasi-infanticide interfered "with a physician's ability to exercise his or her best medical judgment to determine the appropriate care for each patient," it prevented women "from obtaining the most medically appropriate abortion procedure for their particular health circumstances," and it thwarted the "development of safe, effective medical procedures." *Amici* Br. of ACOG et al., *Stenberg*, 2000 WL 340117, at * 1, 9.

The four *Stenberg* dissenters—later to be vindicated—rejected as absurd the argument that the "State has no legitimate interest in forbidding" partial-birth abortion, 530 U.S. at 960 (Kennedy, J., dissenting); *id.* at 1007-08 (Thomas, J., dissenting), and they rebutted the contention that the State must defer to the views of physicians. States, instead, "have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus." *Id.* at 961 (Kennedy, J., dissenting); *see also id.* at 962 ("A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life

which cannot survive without the assistance of others.").

Even *Casey*, Justice Kennedy pointed out, did "not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure." *Id.* at 965. As such, the "State may regulate based on matters beyond 'what various medical organizations have to say ....'" *Id.* at 967 (citation omitted). The majority, Justice Kennedy observed, had improperly "exalt[ed] the right of a physician to practice medicine with unfettered discretion . . . " *Id.* at 969. In doing so, it failed "to acknowledge substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature." *Id.* at 970. In reality, "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude." *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997)).

Seven years later, echoing these principles, the U.S. Supreme Court switched gears in *Gonzales v. Carhart*, 550 U.S. 124 (2007), upholding the federal partial-birth abortion ban. "There can be no doubt," Justice Kennedy wrote for the Court, that "the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Id.* at 157 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)).[2] In particular, "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Id.* State legislatures, the Court emphasized, have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Id.* at 163. Moreover, "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational

[2] *Glucksberg* held that a State could prohibit physician-assisted suicide. Oklahoma physicians are bound by an assisted-suicide prohibition, as well as numerous other laws that would be threatened if *amici*'s reasoning were to be accepted here. Physicians are subject to malpractice lawsuits, for instance, and they can be disciplined by medical boards for various statutory infractions even if they claim to be acting in their patient's best interests. If a doctor believes having consensual sex with a patient is in that patient's best interests, for example, or that providing the patient with an illegal narcotic is in the patient's best interests, it is still sanctionable. *See, e.g.*, 59 O.S. §§ 509, 637.

and in pursuit of legitimate ends." *Id.* at 166. Although *Gonzales* did not expressly overrule *Stenberg*, any final vestiges of *Stenberg* were assuredly dissolved in *Dobbs*. *See, e.g.*, 142 S. Ct. at 2276 n.64.[3]

ACOG filed an amicus in *Gonzales* fully supporting the partial-birth procedure that Congress labeled "gruesome and inhumane." *Gonzales*, 550 U.S. at 141. In it, ACOG emphasized that it "has consistently opposed [partial-birth abortion] bans ... because they endanger women's health." Br. of ACOG, *Gonzales*, 2006 WL 2867888, at *1. As far as Respondents can tell, ACOG has never supported *any* abortion regulation, of any stripe. This view is part and parcel with the abortionists in this case: they all appear to believe elective abortion should be unrestricted throughout nine months of pregnancy, apparently to the extent that the State would be precluded from barring abortionists from sucking the brains out of living children partially delivered. (Why else would *amici* tout their *Stenberg* participation here?) These grotesque demands go far beyond even *Roe* and *Casey*, and neither Oklahoma nor this Court is required to accept them.[4]

II. OKLAHOMA'S ABORTION PROHIBITION IS BASED ON AN OBVIOUS AND RATIONAL STATE INTEREST: THE UNBORN ARE HUMAN BEINGS WHO DESERVE TO LIVE.

Amici claim that there is no "medical or scientific justification" for prohibiting abortion, *Amici* Br. at 2, and no "rational or legitimate basis for interfering with a physician's ability to provide an abortion," *id.* at 5. But *amici* completely ignore the justification that has been proffered by Oklahoma and countless others for the past century or more, and that was front and center in

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[3] Justice Scalia was "optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside Korematsu and Dred Scott." *Stenberg*, 530 U.S. at 953 (Scalia, J., dissenting). His optimism, thankfully, was not unwarranted.

[4] Of note, there are plenty in the medical community who do not support unregulated abortion on demand, much less it being enshrined as a constitutional right. Respondents have included four affidavits from physicians with their answer, for example. Still others, from Oklahoma, have filed an amicus brief opposing *amici*. And just perusing the *amici* submissions in *Dobbs* reveals briefs from, among others, the Catholic Medical Association, the National Association of Catholic Nurses, the American Association of Pro-Life Obstetricians and Gynecologists, the Christian Medical and Dentist Associations, the American College of Pediatricians, and the Association of American Physicians & Surgeons that reject the assertions made by *amici* ACOG et al.

Dobbs: the life of the unborn child. In *Dobbs*, the Supreme Court held that a State's "legitimate interests include respect for and preservation of prenatal life at all stages of development," "the elimination of particularly gruesome or barbaric medical procedures[,]" "the preservation of the integrity of the medical profession[,]" and "the mitigation of fetal pain." *Dobbs*, 142 S. Ct. at 2284.

Given all of this, *amici*'s failure to even *mention* the unborn life involved in abortion is incredible—and incredibly discrediting to any claim to be a medical authority. *Amici* claim that abortion bans are "out of touch with the reality of contemporary medical practice and have no grounding in science or medicine[,]" *Amici* Br. at 5-6, but they make no attempt to demonstrate the unborn are not human beings, or that abortion is, medically or scientifically, something other than the intentional killing of a human being. It is *amici*'s statements, in other words, that are out of touch with reality. *Amici* offer an anti-scientific ideological screed, not a medical opinion.

Once unborn children are included in the discussion of abortion, as they obviously must be, *amici*'s arguments fall apart. For example, *amici* argue that "state laws that criminalize and effectively ban abortion impermissibly interfere with individuals' fundamental right to bodily autonomy and integrity, which includes the right to make decisions about their own health care." *Amici* Br. at 2. But why aren't the unborn considered "individuals" who have a right to bodily autonomy and integrity, as well as health care? They are undeniably unique human beings, after all. *Amici* don't explain.

Amici's claim that abortion is "safe" likewise falls apart once the unborn child is noticed, as every single successful abortion involves in the death of a living human being. Nothing could be more unsafe for human life. And after *Dobbs*, the State is finally entitled to regulate based on the scientific truth that every single abortion is unsafe for the unborn child involved. Using that rubric, abortion has a zero percent safety rating, and the State's prohibitions are perfectly legitimate. When *amici*'s casually mentioned abortion statistics are viewed from the perspective of

the unborn patient killed in the procedure, they take on a decidedly horrific tone. *See Amici* Br. at 5 n.9 ("More than 3,600 abortions were performed in Oklahoma in 2021."). The Oklahoma Constitution does not require the State to ignore these thousands of human lives or their potential to contribute to Oklahoma's communities, economy, and society. Why any "medical organization" would claim otherwise is as perplexing and as it is disconcerting.

III. ADVANCEMENTS IN FETAL MEDICINE AND SCIENCE FURTHER SHOW THAT THE FETUS SHOULD BE TREATED AS A PATIENT, NOT A DISCARDABLE OBJECT.

Amici claim that "[s]tatutes that prohibit physicians from performing abortions profoundly intrude upon the patient-physician relationship." *Amici* Br. at 6. But this assumes, wrongly, that there is only one patient involved. Thankfully, unlike *amici*, many in scientific and medical fields do not ignore unborn children or treat them as worthless. To the contrary, technology has led to a "perinatal revolution" in which "fetal therapy and surgical interventions have made it possible for fetuses with previously life-limiting or life-threatening diagnoses to not only survive to birth, but also to experience marked increases in quality of life and lifespan." Colleen Malloy, M.D., et al., *The Perinatal Revolution*, 34 Issues L. & Med. 15, 24 (Spring 2019).[5]

The list of possibilities is amazing: the unborn child may now be a candidate for fetal surgery *in utero* for various ailments, including cardiac problems, spina bifida, tumors, and hernias. *See id.* at 20-23; Kenneth J. Moise, Jr., M.D., *The History of Fetal Therapy*, 31 Am. J. of Perinatology 557, 561-64 (2014).[6] Moreover, during surgery physicians often administer anesthesia or analgesia to the unborn child, much like any other patient, because the "fetus can feel pain." Carlo V.

[5] Respondents can provide full copies of secondary sources cited herein upon request of the Court.

[6] *See also* Charles J.H. Stolar, M.D., et al., *Fetal Surgery for Severe Left Diaphragmatic Hernia*, 385 N Engl. J. Med. 2111 (Nov. 25, 2021); Denise A.L. Pedreira, et al., *Endoscopic surgery for the antenatal treatment of myelomeningocele: the CECAM trial*, 214 Am J. Obstet. Gynecol. 111.e1 (Jan. 2016); *New Evidence Uncovered That Fetal Membranes Can Repair Themselves After Injury*, SCIENCEDAILY (Aug. 18, 2021), available at https://www.sciencedaily.com/releases/2021/08/210818083913.htm.

Bellieni, *Analgesia for fetal pain during prenatal surgery: 10 years of progress*, 89 Pediatric Res. 1612, 1612 (Sept. 24, 2020).[7] In line with these trends, many children's hospitals have now established fetal treatment centers. The Oklahoma Children's Hospital, for example, promotes a "Fetal Heart Program" for "treating heart abnormalities before or immediately after your baby's birth . . . ."[8] And the Children's Hospital of Philadelphia states that, since 1995, its physicians have "performed more than 2,104 fetal surgeries."[9] The progress is not abating, either: "several novel techniques are being investigated that show real promise of augmenting fetal repair, serving as alternatives for specific prenatal conditions, and even expanding the breadth of conditions treated *in utero*." Malloy, *supra*, at 29. None of this is mentioned by *amici*.

In the past, before many of these advances, "physicians conceptualized the maternal-fetal dyad as one complex patient." MaryJo Ludwig, M.D., *Maternal/Fetal Conflict*, Univ. of Wash. Sch. of Med. Dep't of Bioethics and Humanities.[10] But "[o]ver time, the medical model for the maternal-fetal relationship has shifted from unity to duality. When there are two individual patients, the physician must decide what is medically best for each patient separately." *Id.* In short, the unborn child "has truly become a patient" apart from her pregnant mother. *Moise*, *supra*, at 564. Some, nevertheless, contend that "the previable fetus is a fetal patient only when the pregnant woman confers such status on it." Frank A. Chervenak, M.D., & Laurence B. McCullough, Ph.D., *The fetus as a patient: An essential ethical concept for maternal-fetal medicine*, 5 J. Matern. Fetal Med., 115 (1996). But in a post-*Roe* world, as science increasingly sheds light on the fetus, a State is surely

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[7] *See also Researchers advise the use of anesthesia in fetuses from 21 weeks of gestation*, SCIENCEDAILY (Mar. 16, 2018), available at https://www.sciencedaily.com/releases/2018/03/180316111413.htm.

[8] Available at https://www.ouhealth.com/oklahoma-childrens-hospital/childrens-services/heart-care-for-children/childrens-heart-treatments-programs/fetal-heart-program/

[9] Available at https://www.chop.edu/centers-programs/center-fetal-diagnosis-and-treatment

[10] Available at https://depts.washington.edu/bhdept/ethics-medicine/bioethics-topics/detail/69.

not required to make an individual's humanity and humane treatment contingent upon the decision of another. Rather, a State arguably has a *duty* to protect and defend the unborn much as they would any other human being.

Oklahoma has long believed this. This Court's precedent recognizes—like most jurisdictions—that a distinct duty of care is owed toward unborn children. *See Nealis v. Baird*, 1999 OK 98, ¶ 22 n. 34, 996 P.2d 438, 448. In *Nealis*, this Court held this duty applies *regardless* of whether the injury occurs before or after viability, and it applied the duty in a case involving a suit against physicians. *Id.* at ¶ 40. This Court emphasized: "The traditional common-law notion that a nonviable fetus and its mother are a single entity rests upon *outmoded scientific information* and is no longer persuasive." *Id.* ¶ 36 (emphasis added). A fetus, therefore, "is a person for purposes of [Oklahoma's wrongful death statute] even if it has never drawn an independent breath." *Id.* ¶ 35. This Court has also recognized the distinct duty of care that health care professionals owe to unborn children to avoid injury through medical malpractice. *See Jennings v. Badgett*, 2010 OK 7, ¶ 7, 230 P.3d 861, 866 (citing *Graham v. Keuchel*, 1993 OK 6, 847 P.2d 342). *Amici* don't just ignore scientific and medical advances; they ignore existing Oklahoma and federal law.

IV. PROHIBITING ABORTION DOES NOT VIOLATE MEDICAL ETHICS.

Amici claim that "[s]tatutes banning abortion violate long-established and widely accepted principles of medical ethics . . . ." *Amici* Br. at 4. But as the Supreme Court explained in *Dobbs*, there is "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." 142 S. Ct. at 2254. 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." *Id.* at 2248. Following that, virtually every State criminalized abortion in statutory law, including Oklahoma. *Id.* And in interpreting Oklahoma's laws, the Oklahoma Court of Criminal Appeals in 1927 wrote

that the "medical practitioner who performs abortions . . . is a menace to society." *Wilson v. State*, 1927 OK CR 42, 252 P. 1106, 1107. In 1933, the same court indicated that an abortionist was "not entitled to be considered a reputable physician." *Thacker v. State*, 1933 OK CR 119, 26 P.2d 770, 775. So what exactly *amici* mean by "long-established" here is anyone's guess.

Remarkably, *amici* cite the "Hippocratic traditions" beginning "nearly 2,500 years ago" and the "very core of the Hippocratic Oath" in their support of unregulated abortion-on-demand. *Amici* Br. at 6-7. As even *Roe* observed, however, the original oath expressly *prohibited* doctors from performing abortions—a critical point *amici* studiously avoid mentioning. *See* 410 U.S. at 131 (acknowledging that the original oath, which "represents the apex of the development of strict ethical concepts in medicine," says "I will not give to a woman an abortive remedy" (citation omitted)). Consequentially, what *amici* are essentially arguing here is that the Hippocratic Oath, as originally constituted, is itself irrational and illegitimate as it pertains to abortion. This is not a position to be taken seriously.

Even putting all that aside, the modern version of the Hippocratic Oath typically calls on medical professionals to remember that they have "special obligations to all [their] fellow human beings." Allan S. Brett, *Physicians Have a Responsibility to Meet the Health Care Needs of Society*, 40 J.L. Med. & Ethics 526, 529 (2012). That language, combined with the "Do no harm" motto, cannot possibly be construed to mean that an entire class of human beings may be killed without restriction. Rather, physicians should "do no harm" by refusing to tear apart the most vulnerable humans among us. "Do no harm" and "harm the unborn with impunity" are not reconcilable.

CONCLUSION

Given that *amici* ignore the unborn patient, medical and legal history, and fetal science, this Court should give their arguments no weight whatsoever.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of October, 2022, a true and correct copy of the above instrument was transmitted, postage prepaid to the following:

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