No. 05-380

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LEROY CARHART, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Brief of *Amicus Curiae* Foundation for Moral Law, Inc., Suggesting Reversal

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the constitutionality of the Partial-Birth Abortion Ban Act of 2003 should be determined solely by the text of the Constitution.

2. Whether the Equal Protection Clause of the Fourteenth Amendment grants Congress the authority to enact the Partial-Birth Abortion Ban Act of 2003.

3. Whether the Partial-Birth Abortion Ban Act of 2003 violates the Due Process Clause of the Fourteenth Amendment or any other provision of the Constitution.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed amicus briefs, in several cases concerning the public display of the Ten Commandments and other public acknowledgments of God.

The Foundation has an interest in this case because it believes, as our Founders did, that we are "endowed by [our] Creator with certain unalienable Rights," among them "Life, Liberty, and the Pursuit of Happiness." *Declaration of Independence*. The mistreatment and killing of those not yet born undermines the basic fabric of our law by devaluing the very thing law should promote and protect: life; and that a plain reading of the Constitution permits Congress to "secure these Rights." *Id.* This brief primarily focuses on whether the text of the Constitution should be determinative in this case; and whether the Partial-Birth Abortion Act of 2003 violates any provision of the Constitution.

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[1] *Amicus curiae* Foundation for Moral Law, Inc., files this brief with letters of consent by counsel for both Petitioner and Respondents. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to decide cases and controversies based on the text of the document from which that authority is derived. A court forsakes its oath-bound duty when it rules based upon decisions that bear no resemblance to or take the focus away from the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and once again to embrace the plain and original text of the Constitution to guide its judgment of the Partial-Birth Abortion Act of 2003, 18 U.S.C. § 1531.

The Fourteenth Amendment's Equal Protection Clause gives Congress the constitutional authority to enact the Partial-Birth Abortion Ban Act of 2003. Babies that are partially born are viable "persons" entitled to equal protection of the laws as much as those fully born. Because states are not currently exercising their police powers through homicide statutes to equally protect persons fully delivered from the womb and those partially born, Congress has exercised its constitutional authority with the Act to remedy the inequity.

The Act does not violate a "right to abortion" because the Constitution guarantees no such right. The court of appeals below based its decision that the Act is unconstitutional not upon the Constitution's text, but solely upon this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which was, in turn, based upon *Roe v. Wade*, 410 U.S.113 (1973), and its progeny. This Court's entire abortion jurisprudence has no basis in the Constitution and, like the court of appeals' decision below, it should be reversed and abandoned.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE PARTIAL-BIRTH ABORTION BAN ACT SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE CONSTITUTION, NOT JUDICIALLY FABRICATED TESTS.

"The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). In contrast to this Court's amorphous and *ad hoc* abortion precedents, the "written instrument" has remained unchanged from its original, ratified, and popularly approved form. It is time for this Court to return to the words of the United States Constitution in deciding abortion cases.

Our Constitution dictates that *the Constitution itself* and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oath of office to support *the Constitution*—not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that the words of this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Id.* at 179-80.

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

Thus, "[i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is

evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). Instead of heeding these truths, the court of appeals below evaluated the partial-birth abortion statute under the guise of a judicially fabricated "right to abortion."

II. THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE GIVES CONGRESS THE AUTHORITY TO ENACT A BAN ON PARTIAL-BIRTH ABORTION.[2]

Congress possesses the legitimate constitutional authority to enact the Partial–Birth Abortion Ban Act of 2003 (hereafter "the Act"), 18 U.S.C. § 1531, by virtue of its responsibility to enforce the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

A. The states bear an obligation under their police powers to protect innocent human life which they exercise through homicide statutes.

"'The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable.'" *Washington v. Glucksberg*, 521 U.S. 702, 715 (1997) (*quoting Martin v. Commonwealth*, 184 Va. 1009, 1018-1019, 37 S.E. 2d 43, 47 (1946)). Traditionally the states

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[2] "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). While the basis of Congress's cited authority for passing the act in question—the Commerce Clause—was not challenged below, *amicus* does not believe that a faithful reading of *that* clause provides the authority for the Act's near total ban. *See, e.g., United States v. Lopez*, 514 U.S. 549, 585-89 (1995) (Thomas, J., concurring); Therefore, *amicus* believes it is necessary to demonstrate why Congress has the authority to act at all before explaining that this particular act is consistent with the law.

have employed their police powers to protect this right. "By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights." *Patterson v. State of Kentucky*, 97 U.S. 501, 504 (1878).

At the core of the police power is the state's protection of the lives of its citizens from crime, especially violent crimes such as murder. "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000).

Thus, the states have a recognized and fundamental duty to protect life in accordance with their police powers.

B. A viable fetus not yet fully born is a living human being capable, with assistance, of living outside the mother's womb.

Although this Court reached a wrong and heavily criticized decision in *Roe v. Wade*, 410 U.S. 113 (1973), as discussed *infra.* at III.C., even *Roe* conceded that the states have "an important and legitimate interest in protecting the potentiality of human life." *Id.* at 162. In the instances in which the procedure of partial-birth abortion is employed—19 weeks and later—the fetus has matured to a point well beyond what the *Roe* Court referred to as a *potential* human life: it is a living human being that simply has not been fully delivered from the womb.

The Act states that a "partial-birth abortion" is one in which the physician "partially deliver[s]" "a *living* fetus" "for the purpose of performing an overt act that . . . will *kill* the partially delivered *living* fetus." (Emphasis added). The

Eighth Circuit below stated that, "The procedures in question in this case are used during *late-term abortions* . . . ." *Carhart v. Gonzales*, 413 F.3d 791, 793 (2005) (emphasis added). All descriptions of the procedure concede and the timing of the procedure indicates that the fetuses in question are alive when the procedure is used. Moreover, most of the doctors who testified to the subject concluded that such fetuses are capable of feeling pain during a partial-birth abortion. *See Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 912-914 (D. Neb. 2004). This further closes any perceived gap in humanity between a child that is born and one whose life is taken through partial-birth abortion. All of these facts point to the inescapable conclusion that the fetuses subjected to the procedure banned by the Act are living human beings who are viable and, therefore, capable of living outside the mother's womb with proper assistance.

While the district court below limited its declaration of unconstitutionality concerning the statute to "all circumstances where the fetus is either not viable or where there is a doubt about the viability of the fetus in the appropriate medical judgment of the doctor performing the abortion," *id.* at 1003-04, the Eighth Circuit did not so confine its ruling. Therefore, the Act protects viable living human beings who are in the process of being born.

C. The Equal Protection Clause of the Fourteenth Amendment protects "any person," regardless of whether they are fully delivered from the womb.

The Fourteenth Amendment to the United States Constitution defines "citizens of the United States" to be "[a]ll persons *born* or naturalized in the United States . . . ." U.S. Const. amend XIV, § 1 (emphasis added). However, the language of the Equal Protection Clause of the Amendment expressly applies to "any *person*" within a state's jurisdiction, not just "citizens." *Id.* (emphasis added). This language

implies that personhood—and therefore the protection of the Equal Protection Clause—is not dependent upon being born or naturalized. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth Amendment to the constitution is not confined to the protection of citizens"); *Civil Rights Cases*, 109 U.S. 3, 31 (1883) ("The fourteenth Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to *any individual*, the equal protection of the laws." (emphasis added)). A plain reading of the Equal Protection Clause indicates that the unborn and those persons in the process of being born enjoy the protection of the laws as much as born human beings.

The Fourteenth Amendment's protection of the unborn is hardly surprising given that the Common Law recognized an unborn child—especially one that is well along in development—to be a person in several instances:

> For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was the ancient law homicide or manslaughter. . . . An infant *in ventre fa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born.

1 William Blackstone, *Commentaries on the Laws of England* 126 (Univ. of Chi. Facs. Ed. 1765). Currently, criminal codes in 32 states[3] and the federal code[4] recognize the killing of a

[3] States with such laws on the books: Alabama, Arkansas, Arizona, California, Florida, Georgia, Idaho, Indiana, Illinois, Kentucky, Louisiana,

child in a mother's womb during a homicide or assault of the mother to be murder or manslaughter, thus giving personhood status to the unborn victim for that purpose.

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352 (1918) (quoted in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). The Equal Protection Clause was ratified to prevent states from defining whole classes of persons as "subhuman" or inferior "nonpersons" before the law and therefore subject to discrimination. The states' discriminatory failure to apply its homicide statutes to an entire class of unborn or nearly born persons violates the Equal Protection Clause and provides Congress with legitimate incentive and authority to remedy the deadly inequality.

This Court's decision in *Roe* that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," 410 U.S. at 158, ought to be revisited and reversed. However, even if *Roe*'s cursory textual analysis of "person" precluded the "unborn" from the protections of the Fourteenth Amendment, the Amendment would still cover those partially

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Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Washington. *See* National Right to Life Committee, "State Homicide Laws that Recognize Unborn Victims," (April 28, 2006), *at* http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html (summarizing each state's fetal homicide law).

[4] 18 U.S.C. § 1841 & 10 U.S.C. § 919a (2005).

born persons protected by the Act because their designation as "unborn" is a hyper-technicality. In fact, they may be just as much "born" as they are "unborn," if not more so. As the Congressional findings for the Act state, "Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a 'person.'" Pub. L. No. 108-105 § 2, 117 Stat. 1201(14)(H).

The line between partial-birth abortion and infanticide is elastic and artificial. *Roe* itself stated that the governmental interest in protecting potential life increases to the point of becoming a "compelling" interest once the fetus is "viable" because after that point "the fetus then presumably has the capability of meaningful life outside the mother's womb." *See Roe*, 410 U.S. at 163-64. In other words, a partially born and viable fetus has become a "person" who merits constitutional protection.

D. By failing to protect partially born persons as much as the fully born, the states are denying the former the "equal protection of the laws" due them under the Fourteenth Amendment.

Because the states have the responsibility of protecting the lives of their citizens through the police power, and because the persons subjected to the procedure of partial-birth abortion are living human beings, the states are denying the fetuses equal protection of the law under the Fourteenth Amendment by failing to protect them in the same manner the states protect other living human beings. As such, Congress is empowered through the Equal Protection Clause to intervene and provide protection to this neglected class of persons.

> The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a

> denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.

Dobbins v. City of Los Angeles. 195 U.S. 223, 237 (1904). In the instant case, the states are not providing for the safety of a class of persons that merits protection, *i.e*., fetuses killed by partial-birth abortion.

The fetuses in question are virtually the same as newborn infants: by 20 weeks they have full organ system functions, nerves for feeling pain, complete circulation systems, skeletal structure, and fully functioning hearts. *See* National Right to Life Committee, "Diary of an Unborn Baby," *at* http://www.nrlc.org/abortion/facts/fetusdevelopment.html. The Equal Protection clause "secures equal protection to all in the enjoyment of their rights under like circumstances." *Terrace v. Thompson*, 263 U.S. 197, 218 (1923). The only difference between these fetuses and newborn infants is that during the partial-birth abortion procedure "the head of the fetus remain[s] in utero [while] the abortionist tears open the skull." *Stenberg v. Carhart*, 530 U.S. 914, 959 (2000) (Kennedy, J., dissenting). Thus, because the head of the fetus remains inside the woman's body, the partially born are accorded less legal protection than other living human beings.

This is not a rational distinction upon which to base unequal application of the state laws protecting the right to life. "The guaranty [of equal protection] was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process." *Truax v. Corrigan*, 257 U.S. 312, 332-33 (1921). The inequality which the Act seeks to remedy is the worst kind of oppression imaginable: the destruction of a life as it is just beginning and

at its most dependent and vulnerable age. There should be no doubt that Congress has the authority to remedy this "oppression of inequality" against these living human beings.

III. THE UNITED STATES CONSTITUTION DOES NOT PROTECT A RIGHT TO ABORTION, PARTIAL-BIRTH OR OTHERWISE.

The United States Constitution does not guarantee or even mention a right to an abortion of any type. Indeed, the word "abortion" is nowhere to be found in the Constitution. In striking down Congress's ban on partial-birth abortion, the Court of Appeals for the Eighth Circuit fundamentally erred by ignoring the text of the Constitution. Instead, the court below based its decision upon a line of abortion cases that began with *Roe v. Wade*, 410 U.S. 113 (1973), none of which are themselves based upon the text of the Constitution. The court of appeals' conclusions, like the abortion cases it relied upon, are therefore fundamentally flawed because they are based upon a court-devised right to abortion that is not now, nor has ever been, guaranteed by the Constitution.

Sir William Blackstone wrote in his *Commentaries* that "*the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law." I Blackstone, *Commentaries*, *supra*, at 71. *Stare decisis*, or "abid[ing] by former precedents," is not an absolute command: "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." *Id.* at 69, 70.

A. The court of appeals based its decision on *Stenberg v. Carhart* instead of the text of the Constitution.

The Eighth Circuit's wrong decision resulted directly from its wrong premise: that "if the Act fails the *Stenberg* test, it

must be held facially unconstitutional." *Carhart v. Gonzales*, 413 F.3d 791, 795 (8th Cir. 2005). The *Stenberg* test, according to the court of appeals, is "a per se constitutional rule" required by this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000); namely, "that the constitutional requirement of a health exception applies to all abortion statutes . . . ." *Id.* at 796. The court of appeals, therefore, held that the Act is "unconstitutional" because it "does not contain a health exception." *Id.* at 803.

Despite the frequent use of such phrases as "per se constitutional" or "constitutional requirement," the court of appeals never applied or even considered any part of the Constitution. Instead, said the court below, "[w]e *begin* our analysis with the Supreme Court's decision in *Stenberg*," the "baseline" for evaluating this case. *Id.* at 795, 801 (emphasis added). Since the court considered the *Stenberg* rule to be "a per se constitutional rule," the court's analysis also *ended* with *Stenberg*. *See id.* at 803 ("[t]he record in this case and the record in *Stenberg* are similar in all significant respects," and thus "we are bound by the Supreme Court's conclusion" in *Stenberg*).

Any act of Congress, however, is "facially unconstitutional" only if it actually violates the Constitution's text—the baseline for determining what is "per se constitutional." The Eighth Circuit's reliance on *Stenberg* alone is only as legitimate as *Stenberg*'s faithfulness to the Constitution.

B. *Stenberg v. Carhart* was not based upon the text of the Constitution.

For its part, this Court's decision in *Stenberg v. Carhart*, like the court of appeals' decision below, stood not upon the text of the Constitution, but rather upon this Court's most infamous abortion cases: "The question before us is whether

Nebraska's statute, making criminal the performance of a 'partial birth abortion,' violates the Federal Constitution, *as interpreted in Planned Parenthood of Southeastern Pa. v. Casey*, . . . and *Roe v. Wade* . . . ." *Stenberg*, 530 U.S. at 929-30 (citations omitted) (emphasis added). This Court held Nebraska's partial-birth abortion statute to be unconstitutional for "two independent reasons," both of which were based upon *Casey*'s affirmation of *Roe*:

> First, the law lacks any exception "'for the preservation of the . . . health of the mother.'" *Casey*, 505 U.S., at 879, 112 S. Ct. 2791 (plurality opinion). Second, it "imposes an undue burden on a woman's ability" to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself. *Id.*, at 874, 112 S. Ct. 2791.

530 U.S. at 930. As Justice Scalia noted in his *Stenberg* dissent, the majority's decision to strike down Nebraska's partial-birth abortion ban had nothing to do with the Constitution's text:

> There is no cause for anyone who believes in *Casey* to feel betrayed by this outcome. *It has been arrived at by precisely the process* Casey *promised—a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not)*; nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is "undue"—*i.e.*, goes too far.

Id. at 955 (Scalia, J., dissenting) (emphasis added). *See also id.* at 956 (stating that this Court is "armed with neither constitutional text nor accepted tradition" sufficient to resolve America's abortion controversy) (Scalia, J., dissenting).

The court of appeals decision below is thus based upon another case (*Stenberg*) that is itself anchored to two other cases in which the right to abortion was "determined and then redetermined," respectively. *Id.* at 921. Those two cases, *Roe* and *Casey*, are themselves only as legitimate as their fidelity to the Constitution.

C. The right to abortion purportedly discovered in *Roe v. Wade* and affirmed in *Planned Parenthood v. Casey* is not protected anywhere in the text of the Constitution.

The court of appeals' decision below relies not just upon the legitimacy of *Stenberg v. Carhart*, but upon the very cases that purported to find in the Constitution a right to abortion. *Stenberg* and now *Gonzales* below are simply an application of this so-called constitutional right to the gruesome practice of partial-birth abortion. If *Roe* and *Casey* are themselves unconstitutional, then the progeny of those cases, including *Stenberg*, and the judicially-protected right to abortion, ought to fall with them.

In *Roe v. Wade*, the Court correctly determined that its task was "to resolve the issue by constitutional measurement," but the Court did no such thing. 410 U.S. at 116. The *Roe* Court held that a Texas criminal statute prohibiting abortions (except to save the life of the mother) was "violative of the Due Process Clause of the Fourteenth Amendment," specifically the "right of personal privacy." *Id.* at 164, 154. Unfortunately, the Constitution's text was never the "measurement" for the Court's analysis in *Roe*.

The *Roe* Court began its legal analysis by admitting that "[t]he Constitution *does not explicitly mention any right of privacy*." *Id.* at 152 (emphasis added). Nevertheless, the Court listed a smorgasbord of cases that have, "[i]n varying contexts," conjured "at least the root of that right" in the First,

Fourth, Fifth, and Ninth Amendments, "in the penumbras of the Bill of Rights," "*or* in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." *Id.* at 152 (citations omitted) (emphasis added). The Court's use of the conjunctive "or" preceding the last potential "root" of the right to privacy indicates that the *Roe* Court did not even know where precisely in the Constitution the right to privacy—and therefore, the right to abortion—resides. Apparently, it did not matter:

> 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. [5]

Roe, 410 U.S. at 153 (emphasis added). The *Roe* Court "felt" that the right to abortion was protected by the "broad" right to privacy, which was *somewhere* in the Constitution—or at least its "penumbras"—ultimately pinning its new abortion right on the Due Process Clause of the Fourteenth Amendment. *See id.* at 153.

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[5] The *Roe* Court's ambiguous and bifurcated legal conclusion reflect the appellant's "shotgun" approach to her muddled legal arguments.

> The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant *would discover this right* in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; *or* in the personal marital, familial, and sexual privacy said to be protected by the Bill of Rights *or its penumbras*; *or* among those rights reserved to the people by the Ninth Amendment.

410 U.S. at 129 (citations omitted) (emphasis added).

The Due Process Clause at issue provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, sec. 1. There is no mention of abortion anywhere in the Fourteenth Amendment, leaving the *Roe* Court to instead "find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment."[6] *Id.* at 174 (Rehnquist, J., dissenting); *see also Doe v. Bolton*, 410 U.S. 179, 763 (1973) (finding "nothing in the language or history of the Constitution to support the Court's . . . new constitutional right") (White, J., dissenting). *Roe* exalted its own concept of "liberty" beyond the plain text of the Constitution.

This Court, incredibly, went even further 19 years later in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). In *Casey*, a small plurality of this Court reaffirmed the essential holding in *Roe* while it technically upheld some abortion regulations in the Pennsylvania Abortion Control Act of 1982 (such as the informed consent and parental consent requirements), but struck down others (such as the husband notification provision). The *Casey* plurality rejected the trimester framework of *Roe* in favor of a fetal viability standard to determine when a State's right to regulate abortion begins, and that regulations on abortion performed on viable fetuses could not be an "undue burden" on the woman's choice. *Id.* at 873-879.

Yet even in the midst of what is a decidedly *un*clear case, the *Casey* plurality made it clear that the "right to abortion" did not have its basis in the text of the Constitution, but rather in the Court's philosophical—and ever-expanding—notions of "liberty." To the extent it could be considered a real definition, the *Casey* decision offered this infamous formulation of

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[6] Of course, a right to abortion is completely unknown to any *reader* of the Fourteenth Amendment, as well.

"liberty": "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." *Id.* at 851.

The *Casey* Court accurately determined that "[t]he controlling word in the cases before us is 'liberty.'" *Id.* at 846. However, the *Casey* plurality simply demonstrated its contempt for the constitutional text by expanding upon its interpretations of other opinions that interpreted "liberty" in the Due Process Clause—despite admitting that "a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty." *Id.* at 846. Thus, *Casey* recognized the limited, textual definition of "liberty," but blatantly chose to disregard and redefine it.

To continue to uphold the "right to abortion," however, the *Casey* Court had no choice but to continue to jettison an original, *limited* reading of "liberty" in the Fourteenth Amendment. Blackstone defined "personal liberty of individuals" as "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."[7] Blackstone, *Commentaries*, *supra*, at 130. In his 1828 American Dictionary, Noah Webster defined liberty with a similar emphasis on *physical* restraint:

> Freedom from restraint, in a general sense, and applicable to the body, or to the will or mind. The body is at liberty,

[7] John Locke, the great legal philosopher, offered a similarly limited definition of liberty: "[F]or liberty is to be free from restraint and violence from others; which cannot be where there is not law: but freedom is not, as we are told, 'a liberty for every man to do what he lists:' (for who could be free, when every other man's humour might domineer over him?) . . . ." John Locke, *Two Treatises of Government and A Letter Concerning Toleration* 124 (Chap. VI, § 57) (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

> when not confined; the will or mind is at liberty, when not checked or controlled. A man enjoys liberty, when no physical force operates to restrain his actions or volitions.

Noah Webster, *American Dictionary of the English Language* (Found. for Am. Christian Educ. 2002) (1828). Indeed, even this Court has recognized the correct "heart of liberty," the same year it decided *Casey*: "*Freedom from bodily restraint* has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (emphasis added).

Unfortunately, the *Casey* Court used no restraint in re-interpreting the "liberty" protected by the Fourteenth Amendment. Combining its infinitely autonomous version of liberty with a similar expansion of *stare decisis*, the *Casey* plurality concluded that the Court's own need for self-preservation and preservation of *Roe* outweighed its oath to preserve *the Constitution*:

> A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.

Id. at 869. In the name of the "rule of law," the rule of law was abandoned; in the name of judicial "legitimacy," a facially unconstitutional case was reaffirmed.

According to Justice Thomas,

> the *Casey* joint opinion was constructed by its authors out of whole cloth. The [undue burden] standard set forth in the *Casey* plurality has no historical or doctrinal pedigree. The standard is a product of its authors' own philosophical views about abortion, and it should go without saying that

> *it has no origins in or relationship to the Constitution* and is, consequently, as illegitimate as the standard it purported to replace.

Stenberg, 530 U.S. at 982 (Thomas, J., dissenting) (emphasis added).

It is only upon this sordid history of constitutional subversion in *Roe* and *Casey* that any "right to abortion" ultimately stands. The Court's manufactured right was simply extended to cover the partially-born in *Stenberg*. Justice Curtis's warning in the *Dred Scott* case is chillingly pertinent to this Court's abortion jurisprudence.

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Dred Scott v. Sandford, 60 U.S. 393, 621 (1857) (Curtis, J., dissenting). When compared to what the text of the Constitution says, and not what members of this Court believe it *ought* to mean, the "right to abortion" house-of-cards should no longer stand.

CONCLUSION

For the reasons stated, this Honorable Court should not only reverse the decision of the Eighth Circuit Court of Appeals and uphold the constitutionality of the Partial-Birth Abortion Ban Act of 2003, it should also reverse *Roe v. Wade* and its illegitimate progeny for being so contrary to the text of the United States Constitution.

Respectfully submitted,

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