

No. AP-75,634

In the Court of Criminal Appeals of Texas at Austin

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Adrian Estrada,	)	
	)	
Defendant-Appellant,	)	On Appeal from Cause No. 2006CR2079
	)	in the 226th Judicial District Court,
vs.	)	Bexar County, Texas
	)	Hon. Sid Harle,
The State of Texas,	)	Judge Presiding
	)	
Plaintiff-Appellee.	)	

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Brief *Amicus Curiae* of Texas Alliance for Life Trust Fund  
in Support of Plaintiff-Appellee

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## **Statement of the Interest of the *Amicus***

*Amicus curiae* is the Texas Alliance for Life Trust Fund, the 501(c)(3) component of Texas Alliance for Life, Inc., a nonprofit, nonpartisan, nonsectarian 501(c)(4) organization. Texas Alliance for Life Trust Fund is committed to the preservation and protection of unborn human life through appropriate litigation, public education and promoting compassionate alternatives to abortion. Attorneys associated with the Trust Fund represented more than one-third of the Texas Legislature in an *amicus* brief defending the State's restrictions on public funding of abortion in *Bell v. Low Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002).

Texas Alliance for Life, Inc., is a recognized state leader in promoting protective, pro-life public policies including requiring abortion providers to obtain the consent of parents before performing abortions on their minor daughters, mandating informed consent for all women contemplating abortion and limiting public funding of abortion. Apropos of the law which is the subject of this appeal, Texas Alliance for Life, Inc., was the principal lobbying organization supporting the Prenatal Protection Act, 2003 Tex. Gen. Laws ch. 822, which extends the protection of the criminal law and the civil law to unborn children at every stage of gestation. Texas Alliance for Life Trust Fund submitted an *amicus* brief defending the constitutionality of the Prenatal Protection Act in each of the two

prior challenges to the Act. *See Lawrence v. State*, 240 S.W.3d 912 (Tex. Crim. App. 2007), and *Flores v. State*, 245 S.W.3d 432 (Tex. Crim. App. 2008). To assist the Court in addressing the constitutional issues presented in the case at bar, Texas Alliance for Life Trust Fund now submits this brief, which has been paid for by the *amicus*.

### **Statement of the Case**

Following a jury trial, defendant, Adrian Estrada, was found guilty of capital murder and was sentenced to death. The murder victims were Stephanie Sanchez and her three-month-old unborn child. Defendant has appealed to this Court as a matter of right.

### **Statement of the Issues Presented for Review**

Whether *Roe v. Wade*, 410 U.S. 113 (1973), precludes States from protecting unborn children throughout pregnancy from the criminal acts of third persons (Defendant's Thirty-Third Assignment of Error).

Whether the Prenatal Protection Act violates the Establishment Clause of the First Amendment or the Freedom of Worship Clause of art. I, § 6, of the Texas Constitution (Defendant's Thirty-Fourth Assignment of Error).

Whether the Prenatal Protection Act contains an arbitrary classification of when human life begins in violation of the Equal Protection Clause of the

Fourteenth Amendment (Defendant's Thirty-Fifth Assignment of Error).

Whether imposition of the death penalty for the murder of a pregnant woman and her unborn child constitutes cruel and unusual punishment under the Eighth Amendment (Defendant's Thirty-Sixth Assignment of Error).

Whether the Prenatal Protection Act impermissibly discriminates on the basis of gender in violation of the Equal Protection Clause of the Fourteenth Amendment or art. I, § 3a, of the Texas Constitution (Defendant's Thirty-Seventh and Thirty-Eighth Assignments of Error).

Whether the Prenatal Protection Act provides adequate notice of the conduct that is prohibited by the Act (Defendant's Thirty-Ninth Assignment of Error).

## Summary of the Argument

In this brief, *amicus curiae*, Texas Alliance for Life Trust Fund, responds to defendant's challenges to the constitutionality of the Prenatal Protection Act.

First, nothing in *Roe v. Wade*, 410 U.S. 113 (1973), precludes States from defining as criminal the acts of a third party causing injury to or death of an unborn child, outside the context of a legal abortion performed by a licensed health care provider with the consent of the pregnant woman. *Roe* is concerned exclusively with the pregnant woman's liberty interest in choosing abortion, and has no bearing on the authority of the States to protect unborn children throughout pregnancy from the criminal acts of third persons.

Second, the Prenatal Protection Act does not violate the Establishment Clause of the First Amendment or the Freedom of Worship Clause (art. I, § 6) of the Texas Constitution. The Act has a valid secular purpose, to protect unborn human life from the criminal acts of third parties; it does not have a principal or primary effect of advancing or inhibiting religion; and it does not foster excessive government entanglement with religion.

Third, defendant lacks standing to challenge the Prenatal Protection Act on the ground that it contains an arbitrary classification of when human life begins in violation of the Equal Protection Clause of the Fourteenth Amendment.

Defendant's argument, that the Act improperly allows a person to be punished "for the 'killing' of a non-implanted fertilized egg that medical authorities agree is not 'human life,'" has no application to the case at bar where the expert evidence presented at trial showed that Ms. Sanchez was three months pregnant at the time defendant stabbed and killed her and her unborn child.

Fourth, defendant lacks standing to challenge the Prenatal Protection Act on the ground that it violates the Eighth Amendment's prohibition of cruel and unusual punishment. Defendant notes that the only aggravating factor found by the jury that sentenced him to death was that he killed more than one person in a single transaction (Ms. Sanchez and her unborn child). "This finding," the defendant argues, "depends on the statute [the Prenatal Protection Act] calling non-implanted eggs individuals," which, defendant submits, is an unconstitutional aggravating factor. This argument, however, has no application to the case at bar where, as noted above, the evidence presented at trial showed that Ms. Sanchez was three months pregnant when the defendant killed her and her unborn child.

Fifth, the Prenatal Protection Act does not discriminate on the basis of gender in violation of the Equal Protection Clause of the Fourteenth Amendment or the Equal Rights Amendment of the Texas Constitution (art. I, § 3a) in exempting from the scope of the Act "conduct committed by the mother of the

unborn child.” There is no “gender classification” in exempting the mother because both male and female offenders (other than the mother) are treated identically under the Act. The pregnant woman is not “similarly situated” to anyone else and the exemption for her own conduct is reasonably related to the purposes of the Act.

Sixth, the Prenatal Protection Act provides adequate notice of what conduct is prohibited by the Act. The definition of “individual” in the Act as “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth,” TEX. PENAL CODE § 1.07(a)(26) (Vernon Supp. 2008), leaves no doubt that, subject to the exceptions set forth in § 19.06(1)-(4), the killing of an unborn child at any stage of pregnancy is a crime. *Lawrence v. State*, 240 S.W.3d 912, 917 (Tex. Crim. App. 2007).

## Introduction

At common law, the killing of an unborn child was not considered homicide unless the child was first born alive, then died as the result of its prenatal injuries. This rule was adopted because, given the state of medical science at the time, it was difficult to know whether an unborn child was alive at the time of injury to the mother and, if so, whether that injury caused its death, unless the child was first born alive, then died as the result of the injury it suffered before birth. Although the evidentiary basis for the common law “born-alive” rule has long since disappeared and the requirement of a live birth in a homicide prosecution has been modified by a few state courts,<sup>1</sup> most American courts continue to follow the born-alive rule in the absence of reform legislation.<sup>2</sup>

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<sup>1</sup> Four States, by judicial decision, have abrogated the born-alive rule, at least with respect to the killing of a *viable* unborn child. *Kentucky: Commonwealth v. Morris*, 142 S.W.3d 654 (Ky. 2005) (homicide); *Massachusetts: Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989) (involuntary manslaughter); *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984) (vehicular homicide); *Oklahoma: McCarty v. State*, 41 P.3d 981 (Okla. Crim App. 2002) (homicide); *South Carolina: State v. Horne*, 319 S.E.2d 703 (S.C. 1984) (homicide); *State v. Ard*, 505 S.E.2d 328 (S.C. 1998) (same). Apart from the foregoing decisions, Kentucky, Oklahoma and South Carolina have enacted comprehensive fetal homicide statutes. *See* n. 8, *infra*.

<sup>2</sup> The operation of the born-alive rule may be seen in the following five pairs of cases from several representative jurisdictions, the first case in each pair recognizing that homicide charges may be brought for criminally inflicted injuries to a child *in utero*, where death occurs after live birth, the second case holding that such charges may not be brought where the injuries inflicted *in utero* cause death before birth: *State v. Cotton*, 5 P.3d 918 (Ariz. Ct. App. 2000), and *Vo v. Superior Court*, 836 P.2d 408 (Ariz. Ct. App.

Prior to enactment of the Prenatal Protection Act,<sup>3</sup> an even more antiquated rule was applied in Texas—that there could be no homicide of an unborn child at all, even if the child was born alive, then died as a result of prenatal injuries inflicted by criminal agency. In a series of cases dating back more than 120 years, this Court (formerly the Texas Court of Appeals) held that an infant could not be the subject of a homicide unless it was first born alive, then suffered injuries causing its death.<sup>4</sup> In *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935), *overruled on other grounds*, *Leal v. C.C. Pitts Sand and Gravel, Inc.*, 419 S.W.2d 820, 822 (Tex. 1967), the Texas Supreme Court, after

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1992); *State v. Courchesne*, 757 A.2d 699 (Conn. Super. Ct. 1999), and *State v. Anonymous*, 516 A.2d 156 (Conn. Super. Ct. 1986); *Knighton v. State*, 603 So.2d 71 (Fla. Dist. Ct. 1992), and *State v. McCall*, 458 So.2d 875 (Fla. Dist Ct. App. 1984); *State v. Anderson*, 343 A.2d 505 (N.J. Super. Ct. Law Div. 1975), *holding approved but reversed on other grounds*, 413 A.2d 611, 616 (N.J. Super Ct. App. Div. 1980), and *State v. A.W.S.*, 440 A.2d 1144 (N.J. Super Ct. App. Div. 1981); *People v. Hall*, 557 N.Y.S.2d 879 (N.Y. App. Div. 1990), and *People v. Hayner*, 90 N.E.2d 23 (N.Y. 1949).

<sup>3</sup> 2003 Tex. Gen. Laws ch. 822 (S.B. 319). S.B. 319 is commonly known as the Prenatal Protection Act and will be so referred to in this brief.

<sup>4</sup> See *Wallace v. State*, 10 Tex. Ct. App. 255, 270 (1881) (under Texas Penal Code, an infant cannot be the subject of a homicide until its complete expulsion, alive, from the body of its mother) (“[b]eing thus expelled, and living, it is then, and not till then the subject of homicide”); *Shepard v. State*, 17 Tex. Ct. App. 74, 81 (1884) (following *Wallace*); *Harris v. State*, 28 Tex. Ct. App. 308, 12 S.W. 1102, 1103 (1889) (“[t]o warrant a conviction [of a mother prosecuted for killing her infant] it was necessary for the state to prove that the child was born alive; that it had an existence independent of the mother; and that afterwards its life was destroyed by the act, agency, or procurement of its mother, this defendant”); *Cordes v. State*, 54 Tex. Crim. App. 204, 212, 112 S.W. 943, 947 (1908) (following earlier cases).

reviewing the applicable statutes and the foregoing authorities, observed that Texas “has not brought unborn children within the protection of its penal statutes defining and prescribing penalties for homicide. In other words, in its laws with respect to homicide it treats the unborn child as having no independent existence as a human being until it has been actually and completely born.” *Id.* at 357, 78 S.W.2d at 948 (dictum). *But see Cuellar v. State*, 957 S.W.2d 134 (Tex. App.–Corpus Christi 1994, *pet. ref’d*) (applying the born-alive rule).

Two-thirds of the States have enacted reform legislation that defines the killing of an unborn child as a form of homicide. Some States have included gestational requirements, *e.g.*, viability,<sup>5</sup> which is that stage of pregnancy, normally twenty-three to twenty-four weeks gestation, but sometimes earlier, when

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<sup>5</sup> *Florida*: FLA. STAT. ANN. §§ 782.09 (homicide), 782.071 (vehicular homicide) (West 2007); *Indiana*: IND. CODE ANN. §§ 35-42-1-1(4) (murder), 35-42-1-3(a)(2) (voluntary manslaughter), 35-42-1-4(b), (d) (involuntary manslaughter) (West 2004 & Supp. 2008) (*see also* the Indiana feticide statute cited in n. 8, *infra*). *Maryland*: MD. CODE ANN., CRIM. LAW § 2-103 (Supp. 2008) (murder or manslaughter of a viable fetus). *Michigan*: MICH. COMP. LAWS ANN. § 750.322 (West 2004), a “quickening” manslaughter statute which the Michigan Supreme Court, after *Roe v. Wade*, 410 U.S. 113 (1973), limited to post-viability criminal acts, *see Larkin v. Cahalan*, 208 N.W.2d 176 (Mich. 1973) (*see also* the Michigan statutes cited in n. 8, *infra*). *Rhode Island*: R.I. GEN. LAWS § 11-23-5 (2002) (defining “quickening” in terms of viability); *Tennessee*: TENN CODE ANN. § 39-13-214 (2006) (the terms “another” and “another person,” when referring to the victim of criminal homicide, include a viable fetus).

the child is capable of surviving outside the mother, “quickening,”<sup>6</sup> that stage of pregnancy when the woman first detects fetal movement, usually sixteen to eighteen weeks gestation, or some other stage of pregnancy.<sup>7</sup> But the most common approach, the one taken by twenty-four States (including Texas), has been to make the killing of an unborn child a crime without regard to *any* arbitrary gestational age.<sup>8</sup> This is the approach the Prenatal Protection Act adopts. With

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<sup>6</sup> *Nevada*: NEV. REV. STAT. ANN. § 200.210 (Michie 2006) (manslaughter).  
*Washington*: WASH. REV. CODE ANN. § 91.32.060(1)(b) (West 2000) (manslaughter).  
*Wisconsin*: WIS. STAT. ANN. § 940.04(2)(a) (West 2005) (intentional destruction of the life of a “quick unborn child”) (*see also* the Wisconsin statutes cited in n. 8, *infra*).

<sup>7</sup> *Arkansas*: Arkansas draws the line at twelve weeks gestation. *See* ARK. CODE ANN. §§ 5-1-102(13)(B)(i)(a), (b) (Michie Supp. 2007) (cross-referencing homicide offenses). *California*: Under California law, homicide includes the unlawful killing of a “fetus,” *see* CAL. PENAL CODE § 187(a) (West 2008), which has been interpreted to mean “post-embryonic,” *i.e.*, seven to eight weeks gestation. *People v. Davis*, 872 P.2d 591, 599 (Cal. 1994). *See also* VA. CODE ANN. § 18.2-32.2 (Michie 2004) (“[k]illing a fetus”).

<sup>8</sup> *Alabama*: ALA. CODE § 13A-6-1(a)(3) (Supp. 2007) (amending the definition of “person,” when referring to the victim of a criminal homicide or assault, to mean “a human being, including an unborn child in utero at any stage of development, regardless of viability”). *Alaska*: ALASKA STAT. §§ 11.41.150 (murder of an unborn child), 11.41.160 (manslaughter of an unborn child), 11.41.170 (criminally negligent homicide of an unborn child), 11.81.900(b)(62) (defining “unborn child” as “a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb”) (Michie 2006). *Arizona*: ARIZ. REV. STAT. ANN. §§ 13-1102(A), (B) (negligent homicide), 13-1103(A)(5), (B) (manslaughter); 13-1104(A), (B) (second degree murder), 13-1105(A)(1), (C) (first degree murder) (West Supp. 2008). *Georgia*: GA. CODE ANN. §§ 16-5-80 (feticide); 40-7-393.1 (feticide by vehicle); 52-7-12.3 (feticide by vessel) (2007 & Supp. 2008). *Idaho*: IDAHO CODE §§ 18-4016 (defining human embryo and fetus), 18-4001 (definition of murder), 18-4006 (definition of manslaughter) (2004 & Supp. 2008). *Illinois*: 720 ILL. COMP. STAT. ANN. §§ 5/9-1.2 (intentional homicide of an unborn child), 5/9-2.1 (voluntary manslaughter of an unborn child), 5/9-3.2 (involuntary manslaughter or

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reckless homicide of an unborn child) (West 2002). *Indiana*: IND. CODE ANN. § 35-42-1-6 (West 2004) (feticide) (*see also* the Indiana statutes cited in n. 5, *supra*). *Kentucky*: KY. REV. STAT. § 507A.010 *et seq.* (Michie 2008) (fetal homicide). *Louisiana*: LA. REV. STAT. ANN. §§ 14:2(A)(11) (defining “unborn child”), 14:32.5 (definition of feticide), 14:32.6 (first degree feticide), 14:32.7 (second degree feticide), 14:32.8 (third degree feticide) (West 2007). *Michigan*: Michigan has enacted a series of statutes providing criminal penalties for offenses against a pregnant person resulting in miscarriage or stillbirth by that person, or death or great bodily harm, or serious or aggravated injury to the embryo or fetus, *see* MICH. COMP. LAWS ANN. § 750.90a *et seq.* (West 2004) (*see also* the Michigan statute cited in n. 5, *supra*). *Minnesota*: MINN. STAT. ANN. §§ 609.266 (definition of unborn child), 609.2661 (first degree murder of an unborn child), 609.2662 (second degree murder of an unborn child), 609.2663 (third degree murder of an unborn child), 609.2664 (manslaughter of an unborn child in the first degree), 609.2665 (manslaughter of an unborn child in the second degree), 609.268(1) (felony murder of an unborn child), 609.21 subd. 3 (vehicular homicide of an unborn child) (West 2003 & Supp. 2008). *Mississippi*: MISS. CODE § 97-3-37(1) (2005) (homicide and assaultive offenses). *Missouri*: MO. ANN. STAT. §§ 565.020 subd. 1 (first degree murder), 565.021 subd. 1(2) (second degree felony murder), and 565.024 subd. 1 (involuntary manslaughter) (West 1999 & Supp. 2008), interpreted in light of § 1.205 (West 2000); *see State v. Knapp*, 843 S.W.2d 345 (Mo. 1992); *State v. Holcomb*, 956 S.W.2d 286 (Mo. Ct. App. 1997); *State v. Rollen*, 133 S.W.3d 57 (Mo. Ct. App. 2003). *Nebraska*: NEB. REV. STAT. ANN. § 28-388 *et seq.* (Michie 2003). *North Dakota*: N.D. CENT. CODE § 12.1-17.1-01 *et seq.* (1997). *Ohio*: Under Ohio law, “the unlawful termination of another’s pregnancy” may be punished as aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, negligent homicide or aggravated vehicular homicide, vehicular homicide or vehicular manslaughter, *see* OHIO REV. CODE ANN. §§ 2903.01(A), (B), 2903.02(A), 2903.03(A), 2903.04(A), (B), 2903.041(A), 2903.05(A), 2903.06(A) (Anderson 2006 & Supp. 2008). “Unlawful termination of another’s pregnancy” is defined as “causing the death of an unborn member of the species homo sapiens, who is or was carried in the womb of another, as a result of injuries inflicted during the period that begins with fertilization and that continues unless and until live birth occurs.” OHIO REV. CODE ANN. § 2903.09(A), (B) (Anderson 2006). *Oklahoma*: OKLA. STAT. ANN. tit. 21, § 691 (West Supp. 2009) (defining homicide to include an unborn child), interpreted in light of the definition of “unborn child” in tit. 63, § 1-730(2) (West Supp. 2009). *Pennsylvania*: 18 PA. CONST. STAT. ANN. § 2601 *et seq.* (West 1998) (homicide). *South Carolina*: S.C. CODE ANN. § 16-3-1083 (Supp. 2007) (enacting the “Unborn Victims of Violence Act of 2006”). *South Dakota*: S.D. CODIFIED LAWS §§ 22-17-6 (intentional killing of a human fetus), 22-16-1 (defining homicide), 22-16-1.1 (fetal

this background in mind, *amicus* turns to an analysis of defendant’s arguments.

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homicide) (Michie 1998), read in conjunction with §§ 22-1-2(31) (defining “person”), and 22-1-2(50A) (defining “unborn child”) (Michie 1998). *Texas*: TEX. PENAL CODE § 1.07(a)(26) (Vernon Supp. 2008) (defining the term “individual,” as used in the Texas Penal Code, to mean “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth”). *Utah*: UTAH CODE ANN. § 76-5-201(1)(a) (2003) (when referring to the victim of a criminal homicide, the term “another human being” includes “an unborn child at any stage of its development”). *West Virginia*: W. VA. CODE § 61-2-30 (2007) (recognizing an embryo or fetus as a distinct victim of certain crimes against the person, including homicide). *Wisconsin*: WIS. STAT. ANN. §§ 939.75(1) (defining “unborn child” as “any individual of the human species from fertilization until birth that is gestating inside a woman”), 940.01(1)(b) (first degree intentional homicide), 940.02(1m) (first degree reckless homicide), 940.05(2g) (second degree intentional homicide), 940.06(2) (second degree reckless homicide), 940.08(2) (homicide by negligent handling of a dangerous weapon, explosive or fire), 940.09(1)(c), (1)(cm), (1)(d), (1)(e) (homicide by intoxicated use of a vehicle), 940.09(1g)(c), (1g)(cm), (1g)(d) (homicide by intoxicated use of a firearm), 940.10(2) (homicide by negligent operation of a vehicle), 940.04(1) (intentional destruction of the life of an unborn child) (West 2005) (*see also* the Wisconsin statute cited in n. 6, *supra*).

## ARGUMENT

### I.

#### **NOTHING IN *ROE V. WADE*, 410 U.S. 113 (1973), PRECLUDES STATES FROM PROTECTING UNBORN CHILDREN THROUGHOUT PREGNANCY FROM THE CRIMINAL ACTS OF THIRD PERSONS.**

(Response to Defendant's Thirty-Third Assignment of Error)

In his first challenge to the Prenatal Protection Act, defendant contends that the State may not define as homicide conduct causing the death of a nonviable unborn child. Br. at 137-42. Defendant submits that, under *Roe v. Wade*, 410 U.S. 113 (1973), the State has no authority to treat “an embryo or fetus [as] a person,” Br. at 142, and thus may not classify the killing of an embryo or fetus (at least before viability) as a form of homicide (or at least not as murder). *Id.* at 139.<sup>9</sup>

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<sup>9</sup> Defendant argues that to treat the killing of an unborn child as a form of homicide “violates . . . deeply rooted principles of justice stretching back for centuries.” Br. at 137. Defendant never articulates what those “principles of justice” are. Moreover, his brief repeatedly misstates the history of abortion regulation, specifically, that abortion before quickening was never regarded as a crime at common law; that pre-quickening abortions were not generally criminal under statutes that had been enacted by the time the Fourteenth Amendment was adopted; and that the killing of an unborn child was never classified as a form of homicide (or at least not as murder) at common law or under the early statutes. *Id.* at 137-42. All these statements are demonstrably false. *See generally* Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (2006). *See also* Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, XIII ST. LOUIS UNIVERSITY PUBLIC LAW REVIEW 15, 103-19 (1993). Defendant's statements that the majority of modern fetal homicide statutes use viability as the “touchstone” of criminal liability, Br. at 139, and that Texas is in “a minority” of States that have extended liability to the killing of nonviable fetuses, *id.* at 139 & n. 281, are also false. Twenty-four of the thirty-three States that have enacted fetal homicide statutes have abolished *any* gestational requirements. *See* n. 8, *supra*.

*Amicus* responds that defendant’s conclusion does not follow from his premise. Moreover, he has misread *Roe* and has given it an unwarranted interpretation.

As an initial matter, nothing in the Prenatal Protection Act purports to define when an unborn child becomes a “person,” as that term is used in § 1 of the Fourteenth Amendment. Indeed, the Act’s redefinition of the term “individual” does not even use the word “person.”<sup>10</sup> More significantly, as this Court held in *Lawrence v. State*, 240 S.W.3d 912, 917 (Tex. Crim. App. 2007), defendant misapprehends the scope of the Supreme Court’s decision in *Roe*.

*Roe v. Wade* is concerned with a pregnant woman’s “liberty interest” under § 1 of the Fourteenth Amendment, U.S. CONST. AMEND. XIV, § 1, in obtaining an abortion. *Roe* limits the State’s authority to prohibit induced abortion (subject to exceptions for the woman’s life and health) to the stage of pregnancy when the unborn child is “viable,” *i.e.*, capable of sustained survival outside the womb, with or without artificial assistance. 410 U.S. at 163-64, 165. *Roe* does not address, and does not purport to address, the authority of the States to protect unborn children outside the context of a lawful abortion to which the pregnant woman has consented (or for which her consent is implied by law), as this Court recognized in

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<sup>10</sup> “‘Individual’ means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.” TEX. PENAL CODE § 1.07(26) (Vernon Supp. 2008).

*Lawrence*, 240 S.W.3d at 917 (“the *Roe* framework . . . has no application to a case that does not involve the pregnant woman’s liberty interest in choosing to have an abortion”). Defendant’s argument—that *Roe* allows a State to protect unborn children from the criminal acts of third persons only after viability—has been rejected in every state and federal case in which it has been raised.

In *People v. Davis*, 872 P.2d 591 (Cal. 1994), the California Supreme Court held that the “criminalization of the killing of a fetus [outside the context of abortion] without regard to viability is not violative of either privacy principles, equal protection, or due process considerations.” *Id.* at 599, citing *People v. Ford*, 581 N.E.2d 1189, 1199 (Ill. App. Ct. 1991) (fetal homicide statute “simply protects the mother and unborn child from the intentional wrongdoing of a third party”) (affirming conviction for the intentional homicide of an unborn child), and *State v. Merrill*, 450 N.W.2d 318, 322 (Minn. 1990) (“the state’s interest in protecting the ‘potentiality of human life’ includes protection of the unborn child, whether an embryo or a nonviable or viable fetus”) (upholding indictment charging defendant with first and second degree murder of his girlfriend’s unborn child). Contrary to defendant’s argument, “*Roe v. Wade* . . . does *not* hold that the state has no legitimate interest in protecting the fetus until viability.” *Davis*, 872 P.2d at 597 (emphasis added). Rather, “when the mother’s privacy interests are

not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide." *Id.* at 599.

In *Brinkley v. State*, 322 S.E.2d 49 (Ga. 1984), the Georgia Supreme Court stated that "here we deal with the interest of the state in protecting both the mother and the fetus from the intentional wrongdoing of a third party who can claim no right for his actions." *Id.* at 53 (affirming feticide conviction under former quickening statute). In *State v. Alfieri*, 724 N.E.2d 477 (Ohio Ct. App. 1998), the Ohio Court of Appeals held that "the state's interest in protecting pregnant women and unborn children outweighs a third party's right to terminate another's pregnancy by specifically defined conduct that is deemed to be criminal." *Id.* at 483 (affirming conviction for aggravated vehicular homicide).<sup>11</sup> In *State v. Holcomb*, 956 S.W.2d 286 (Mo. Ct. App. 1997), the Missouri Court of Appeals explained that "[t]he fact that a mother of a pre-born child may have been granted certain legal rights to terminate the pregnancy does not preclude the prosecution of a third party for murder in the case of a killing of a child not consented to by the mother." *Id.* at 291 (affirming defendant's convictions for murder of pregnant

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<sup>11</sup> See also *State v. Coleman*, 705 N.E.2d 419, 421 (Ohio Ct. App. 1997) ("there never has been any notion that a third party . . . has a fundamental liberty interest in terminating another's pregnancy") (affirming conviction for manslaughter of an unborn child).

woman and her unborn son). And in *Commonwealth v. Bullock*, 913 A.2d 207 (Pa. 2006), the Pennsylvania Supreme Court rejected the defendant’s argument that the Pennsylvania Crimes Against Unborn Child Act, 18 PA. CONS. STAT. ANN. § 2601 *et seq.* (West 1998) violates *Roe v. Wade* because “it fails to ‘distinguish between viable or living organisms and nonviable or nonliving organisms.’” *Id.* at 214 (quoting defendant’s brief). In affirming the defendant’s conviction for voluntary manslaughter of an unborn child, the state supreme court noted that defendant “does not reference any authority for the position that he has a right to unilaterally kill the unborn child carried by another person.” *Id.* And neither does the defendant here.<sup>12</sup>

Federal courts also recognize that *Roe* has no bearing on the authority of the States to protect unborn children from the criminal acts of third parties causing their death. In *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987), the Eleventh Circuit Court of Appeals held that *Roe* “is simply immaterial . . . to whether a state can prohibit the destruction of a fetus [outside the context of abortion].” *Id.* at 1388 (denying *habeas corpus* relief to defendant convicted under the Georgia feticide law which, at the time, applied after quickening). The court noted that

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<sup>12</sup> Given the nature of defendant’s challenge to the Act, it must be noted that *Davis, Ford, Merrill* and *Holcomb*, as well as *State v. MacGuire*, 84 P.3d 1171 (Utah 2004), all involved prosecutions for *murder*, not lesser forms of homicide.

“[t]he constitutional limitations upon a state’s right to prohibit the destruction of a fetus come into play when the state’s interest conflicts with certain constitutional interests of the mother [citing *Roe*]. A mother’s interests are in no way infringed upon by the statute in question.” *Id.* at 1388 n. 2. And in *Coleman v. DeWitt*, 282 F.3d 908 (6th Cir. 2002), the Sixth Circuit held that nothing in *Roe* precludes the States from extending the protection of the criminal law to unborn children before viability (outside the context of abortion). *Id.* at 911-13 (affirming denial of *habeas corpus* relief).<sup>13</sup> “The substantive due process right in *Roe* is a decisional right against governmental interference, which is meaningless when a private party terminates a woman’s pregnancy without her consent.” *Id.* at 913.

In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Supreme Court held that nothing in *Roe v. Wade* prevents the States from extending the protection of the law to unborn children outside the context of abortion. *Id.* at 504-07. This is precisely what the State of Texas has done in enacting the Prenatal Protection Act. Defendant’s second challenge to the constitutionality of the Act should be rejected.

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<sup>13</sup> See also *Coe v. County of Cook*, 162 F.3d 491, 497 (7th Cir. 1998) (“States remain free to punish feticide so long as they don’t try to punish a woman who exercised her constitutional right to abort her fetus, the physician who performs the abortion, or the hospital or other facility, even if public, in which the abortion is performed”).

## II.

### **THE TEXAS PRENATAL PROTECTION ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OR THE FREEDOM OF WORSHIP CLAUSE OF THE TEXAS CONSTITUTION.**

(Response to Defendant’s Thirty-Fourth Assignment of Error)

In his second challenge to the Prenatal Protection Act, defendant contends that, in defining 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 § 1.07(a)(26) (Vernon Supp. 2008), “the Texas legislature [has] defined life in a manner that can only be justified on religious grounds and thus violates the Establishment Clause of the First Amendment to the United States Constitution and the Freedom of Worship Clause of the Texas Constitution.” Br. at 142.<sup>14</sup> *Amicus* responds, first, that defendant lacks standing to challenge the Act on Establishment Clause and Freedom of Worship Clause grounds; second, assuming he has standing, that his challenge is foreclosed by this Court’s decision in *Flores v. State*, 245 S.W.3d 432 (Tex. Crim. App. 2008); and, third, assuming he has standing and that *Flores* is not controlling, that his argument is meritless.

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<sup>14</sup> Defendant does not suggest that analysis under the Freedom of Worship guarantee, TEX. CONST. art. I, § 6 (Vernon 2007), differs from that under the Establishment Clause of the First Amendment, U.S. CONST. AMEND. I. Accordingly, *amicus* shall limit its discussion to an analysis of the Establishment Clause claim.

### *Standing*

Defendant lacks standing to challenge the Prenatal Protection Act on Establishment Clause and Freedom of Worship Clause grounds. In his brief, defendant complains that the Act “fixes the beginning of life at fertilization,” which, he claims, is a “religious position.” Br. at 143. The “belief” that life begins at fertilization, defendant argues, “contrasts sharply with the medical consensus that pregnancy begins days later, at implantation.” *Id.*<sup>15</sup> Defendant, apparently, would not have objected (at least on Establishment Clause or Freedom of Worship Clause grounds) to a statute that would have created criminal liability only for those acts that cause the death of an unborn child *after* implantation. The difficulty with this argument, however, is that the defendant was not charged with causing the death of an unborn child *after* fertilization and *before* implantation. The expert evidence presented at trial indicated that Stephanie Sanchez was three months pregnant at the time defendant killed her and her unborn child. Whether application of the Act to conduct causing the death of an unborn child after fertilization and before implantation would violate the Establishment Clause or the Freedom of Worship Clause is thus an issue not presented by this record. Accordingly, defendant lacks standing to challenge the Act on these grounds.

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<sup>15</sup> As *amicus* shows in the third part of this argument, there is no such “consensus.”

### *Flores*

Assuming that defendant has the standing necessary to challenge the Act's application to him on Establishment Clause and Freedom of Worship Clause grounds, that challenge is foreclosed by this Court's decision in *Flores v. State*, 245 S.W.3d 432 (Tex. Crim. App. 2008). In *Flores*, the Court rejected an Establishment Clause argument that is indistinguishable from the one defendant advances here. Applying the three-prong test from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court held that the Act has a valid secular purpose ("to protect a fetus from being killed"); that its principal effect is not to advance religion; and that it does not "entangle government with religion merely by evincing a respect for fetal life that might find approval among many religious adherents." *Flores*, 245 S.W.3d at 438. *Flores* is dispositive of defendant's Establishment Clause claim.

### *The Merits*

Assuming that defendant has the requisite standing to challenge the Prenatal Protection Act on Establishment Clause and Freedom of Worship Clause grounds and that this Court's decision in *Flores* is not controlling, his challenge to the Act should be rejected as meritless. As noted above, to withstand an Establishment Clause challenge, the Supreme Court has held that a law must have a valid secular

purpose; it must have a principal or primary effect that neither advances nor inhibits religion; and it must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. at 612-13. Defendant argues that by defining the word “individual” as “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth,” TEX. PENAL CODE § 1.07(a)(26), the Act fails all three prongs of the *Lemon* test. Br. at 143-44.

The Act “lacks a secular purpose,” defendant submits, because “it fixes the beginning of life at fertilization,” which, in his view, is a “religious position.” Br. at 143. The “belief” that life begins at fertilization “contrasts sharply with the medical consensus that pregnancy begins days later, at implantation.” *Id.* The Act “obviously has the effect of advancing religion,” defendant explains, because “the belief that life begins at fertilization is the belief of only some faiths.” *Id.* at 144. Finally, by “advanc[ing] the religious agenda of [some religious] groups,” the Act “becomes excessively entangled with those religious groups.” *Id.* None of these arguments has any merit.

With respect to the *purpose* of the Act, the view that human life, in biological terms, begins at conception (understood as fertilization) is supported by a wealth of scientific and medical evidence. After reviewing many authorities and hearing testimony from world-renowned geneticists, biologists and physicians, the

Subcommittee on Separation of Powers of the Senate Judiciary Committee stated:

“[C]ontemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception, the time when the process of fertilization is complete.” *Report of the Subcommittee on Separation of Powers*, Senate Judiciary Committee, on S. 158, the Human Life Bill, 97th Congress, 1st Sess, at 7 (1991). “Physicians, biologists, and other scientists agree that conception [understood as fertilization] marks the beginning of the life of a human being—of a being that is alive and a member of the human species.” *Id.* That scientific consensus continues to the present day.

In their widely used embryology text, *The Developing Human, Clinically Oriented Embryology* (8th ed. 2008), Keith L. Moore and T.V.N. Persaud state that “[h]uman development begins at fertilization when a male gamete or sperm unites with a female gamete or oocyte to form a single cell, a **zygote**. This highly specialized, totipotent cell marks the beginning of each of us as a unique individual.” *Id.* at 15 (emphasis in original). This understanding of when human life begins is reflected in many other embryology texts. *See, e.g.*, M.J.T. Fitzgerald and M. Fitzgerald, *Human Embryology* 1 (1994) (“[t]he prenatal period of life commences at the moment of fertilization, and terminates at birth”); R. O’Rahilly and F. Muller, *Human Embryology & Teratology* 8 (3rd ed. 1996)

("[a]lthough life is a continuous process, fertilization . . . is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is formed when the chromosomes of the male and female pronuclei blend in the oocyte"); F.J. Dye, *Human Life Before Birth* 53 (2000) ("[t]wo cells on the verge of death are the participant in fertilization, one of the most thought-provoking events in biology. If these two cells undergo fertilization, a new individual may result"); Wm. Larsen, *Human Embryology* 1 (3rd ed. 2001) ("we begin our description of the developing human with the formation and differentiation of the male and female sex cells or gametes, which will unite at fertilization to initiate the embryonic development of a new individual").<sup>16</sup>

Both legislatures and courts have recognized this scientific and medical reality. After a review of the current medical and scientific evidence on human development, a special task force created by the South Dakota Legislature found that "the new recombinant DNA technologies indisputably prove that the unborn child is a whole human being from the moment of fertilization . . . ." *Report of the South Dakota Task Force to Study Abortion* 31 (December 2005). More recently, the Eighth Circuit considered the constitutionality of an informed consent statute

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<sup>16</sup> Additional authorities may be found in R. George and C. Tollefsen, *Embryo: A Defense of Human Life* (2008).

that requires a physician to advise a woman seeking an abortion that the procedure “will terminate the life of a whole, separate, unique, living human being.” S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (Michie Supp. 2008). “Human being,” in turn, is defined as “an individual living member of the species of *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages *from fertilization to full gestation*.” *Id.* § 34-23A-1(4) (emphasis added). The court of appeals held that, taking into account the definition of “human being” set forth in § 34-23A-1(4), the disclosure required by § 34-23A-10.1(1)(b) is neither “untruthful [n]or misleading.” *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 737 (8th Cir. 2008) (*en banc*). Rather, the statute simply requires the physician “to disclose truthful and non-misleading information as part of obtaining informed consent to a procedure.” *Id.*

In light of the foregoing authorities, none of which is cited in his brief, defendant’s assertion that “only certain religious groups, and not the medical community, believe that life begins as early as fertilization,” Br. at 143-44, is simply wrong. Equally mistaken is his claim that the definition of “individual” in the Prenatal Protection Act conflicts with the “medical consensus that pregnancy begins . . . at implantation.” *Id.* at 166. In fact, there is no such consensus.

The American College of Obstetricians & Gynecologists (ACOG) *has*

adopted the position that pregnancy begins with implantation, not fertilization,<sup>17</sup> but their position is not widely shared in the medical and scientific communities.<sup>18</sup> The American Medical Association defines “[p]regnancy” as “[t]he process of carrying a developing embryo or fetus in the uterus from conception on.” *AMA Complete Medical Encyclopedia* 1011 (2003). “Conception,” in turn, is defined as “[t]he fertilization of an egg by a sperm *that initiates pregnancy.*” *Id.* at 392 (emphasis added).<sup>19</sup> The AMA’s terminology is supported by a wealth of medical and scientific sources, including standard medical texts,<sup>20</sup> obstetrics texts,<sup>21</sup> and

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<sup>17</sup> ACOG’s position dates back more than forty years and may be viewed, in part, as an effort to evade the strictures of the pre-*Roe* laws prohibiting abortion (with respect to drugs or procedures that would prevent implantation of a fertilized ovum), and, in part, as an attempt to avoid compliance with post-*Roe* laws (*e.g.*, parental consent or notice, informed consent and waiting periods) regulating abortion.

<sup>18</sup> Some medical associations refer to the implantation of the embryo in the uterine wall as an “*established* pregnancy,” but, as indicated in the text and notes that follow, that is different from determining when “pregnancy,” as such, begins.

<sup>19</sup> This usage continues in the *AMA’s Concise Medical Encyclopedia* 184, 565 (2006).

<sup>20</sup> R. Jones and K. Lopez, *Human Reproductive Biology* 565 (3rd ed. 2006) (defining “pregnancy” as “[t]he condition of carrying a developing preembryo, embryo, or fetus in the uterus; gestation”), *id.* at 253 (stating that “pregnancy begins at conception”), *id.* at 231 (defining “conception” in terms of “fertilization”); G. Thibodeau and K. Patton, *Anatomy and Physiology* 1167 (6th ed. 2007) (same).

<sup>21</sup> Scott, DiSaia, Hammond and Spellacy, *Danforth’s Obstetrics and Gynecology* 29 (8th ed. 1999); Cunningham, Gant, Leveno, Gilstrap, Hauth and Wenstrom, *Williams Obstetrics* 86-87 & Figure 2-1 (21st ed. 2001) (defining conception in terms of fertilization and distinguishing conception from implantation); *see also* Cunningham,

medical dictionaries.<sup>22</sup> Although two medical dictionaries define conception *solely* in terms of implantation,<sup>23</sup> the majority of medical dictionaries and medical encyclopedias now in use agree with the AMA in defining conception as “[t]he fertilization of an egg by a sperm that initiates pregnancy.” In addition to the definitions from *Melloni’s*, *Mosby’s*, *Dye* and *Barron’s*, quoted in n. 17, *supra*, the following dictionary and encyclopedia definitions may be cited:

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Leveno, Bloom, Hauth, Gilstrap and Wenstrom, *Williams Obstetrics* 92 & Figure 4-1 (22nd ed. 2005) (equating conception with fertilization).

<sup>22</sup> *Melloni’s Illustrated Medical Dictionary* 526 (4th ed. 2002) (defining “pregnancy” as the “[c]ondition of the female from conception to delivery of the fetus or embryo”), *id.* at 138 (defining “conception” in terms of fertilization); *Mosby’s Dictionary of Medicine, Nursing & Health Professions* 1512 (7th ed. 2006) (defining “pregnancy” as “the gestational process, comprising the growth and development within a woman of a new individual from conception through the embryonic and fetal periods to birth”), *id.* at 436 (defining “conception” as “the beginning of pregnancy, usually taken to be the instant that a spermatozoon enters an ovum and forms a viable zygote,” or, alternatively, “[f]ertilization of [an] oocyte by a sperm”); F.J. Dye, *Dictionary of Developmental Biology and Embryology* 124 (2002) (defining “pregnancy” as “[t]he condition of a woman who is carrying a conceptus (the product of conception or fertilization)”), *id.* at 31 (defining “conceptus” as “[t]hat which results from conception (*fertilization*), i.e., the embryo or fetus and its associated membranes”) (emphasis added); Mikel A. Rothenberg and Charles E. Chapman, *Barron’s Dictionary of Medical Terms* 471 (5th ed. 2006) (defining “pregnancy” as “the period during which a woman carries a developing fetus in the uterus, from the time of conception to the birth of the child”), *id.* (“[p]regnancy lasts 266 days from the day of fertilization”), *id.* at 137 (defining “conception” as the “fertilization of the female egg cell (ovum) by a male spermatozoon, *the beginning of pregnancy*”) (emphasis added).

<sup>23</sup> Joseph C. Segan, *Concise Dictionary of Modern Medicine* 159 (2006), and *Taber’s Cyclopedic Medical Dictionary* 464 (20th ed. 2005).

Conception signifies the complex set of changes which occur in the OVUM and in the body of the mother at the beginning of pregnancy. The precise moment of conception is that at which the male element, or spermatozoon, and the female element, or ovum, fuse together.

*Black's Medical Dictionary* 156 (41st ed. 2006). *Dorland's* defines an "embryo" (in humans) as "the developing organism from fertilization to the end of the eighth week [of pregnancy]." *Dorland's Illustrated Medical Dictionary* 614 (31st ed. 2007). And "pregnancy" is defined as "the condition of having a developing embryo or fetus in the body, *after union of an oocyte and spermatozoon.*" *Id.* at 1531 (emphasis added). *Stedman's* defines an "embryo" (in humans) as "the developing organism from conception until approximately the end of the second month [of pregnancy]." *Stedman's Medical Dictionary* 627 (28th ed. 2006). And "conception" is defined as "[f]ertilization of [an] oocyte by a sperm." *Id.* at 425. *See also Bantam Medical Dictionary* 146 (5th ed. 2004) (same).<sup>24</sup> One medical encyclopedia defines "pregnancy" as "[t]he period from conception to birth," *Gale*

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<sup>24</sup> Two other medical dictionaries define "conception" as *either fertilization or implantation* *See Merriam-Webster's Medical Dictionary* 163 (rev. ed. 2005) (defining "conception" as "the process or becoming pregnant involving fertilization or implantation or both"); Miller-Keane, *Encyclopedia and Dictionary of Medicine, Nursing and Allied Health* 406 (7th ed. 2003) (defining "conception" as "the onset of pregnancy, marked by implantation of the BLASTOCYST; the formation of a viable ZYGOTE"), *id.* at 662-63 (fertilization occurs when the head of the sperm unites with the oocyte to form the zygote).

*Encyclopedia of Medicine*, Vol. 4, p. 3005 (3rd ed. 2006), “conception” being understood as *fertilization*. Further, pregnancy is described as “a state in which a woman carries a fertilized egg inside or her body.” *Id.*, vol. 4, p. 3006. The understanding of “conception” as “fertilization” is also reflected in standard English language dictionaries.<sup>25</sup>

In light of the foregoing, it is apparent that, contrary to the defendant’s understanding, as well as Justice Stevens’ view in *Webster v. Reproductive Health Services*, 492 U.S. 490, 563 (1989) (Stevens, J., concurring in part and dissenting in part) (“standard medical texts equate ‘conception’ with implantation in the uterus, occurring about six days after fertilization”),<sup>26</sup> there is no “medical consensus that pregnancy begins . . . at implantation.” Br. at 143. If anything, the consensus is that pregnancy begins with fertilization *in utero*.

Nothing in the Establishment Clause of the First Amendment (or the Freedom of Worship Clause in art. I, § 6) precludes the State of Texas from

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<sup>25</sup> See, e.g., *Webster’s Third New International Dictionary* (unabridged) 469 (2002) (defining “conception” as the “act of becoming pregnant; formation of a viable zygote”); *Funk and Wagnalls New International Dictionary of the English Language* 270 (2003) (defining “conception,” in biological terms, as “[t]he impregnation of an ovum”); *Random House Webster’s Unabridged Dictionary* 422 (2nd ed. 1998) (defining “conception” as “fertilization; inception of pregnancy”).

<sup>26</sup> The only text cited by Justice Stevens, 492 U.S. at 563 n. 6, does not support this statement. See Pritchard, MacDonald & Gant, *Williams Obstetrics* 89 & Figure 5-7 (17th ed. 1985). See also n. 16, *supra*, for more recent editions of *Williams Obstetrics*.

determining, consistent with the scientific and medical evidence, that human life begins with fertilization. In *Webster*, the Supreme Court considered the constitutionality of the preamble to a Missouri statute that contains legislative findings that “[t]he life of each human being begins at conception,”<sup>27</sup> that “[u]nborn children have protectable interests in life, health, and well being,” and that “[t]he natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child,” MO. ANN. STAT. §§ 1.205.1(1)-(3) (West 2000); and that mandates that the laws of Missouri be “interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.” *Id.* § 1.205.2. The Court declined to opine on the constitutionality of the preamble, *Webster*, 492 U.S. at 504-07, because, by its own terms, it did not “regulate abortion or any other aspect of appellees’ medical practice.” *Id.* at 506. In refusing to reach the constitutionality of the preamble, the Court tacitly rejected

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<sup>27</sup> “Conception,” in turn, is defined elsewhere in Missouri law as “the fertilization of the ovum of a female by a sperm of a male.” MO. ANN. STAT. § 188.015(3) (West 2004).

Justice Stevens’ view, *see id.* at 566-71 (Stevens, J., concurring in part and dissenting in part), on which defendant relies, that the legislative finding that “[t]he life of each human being begins at conception,” defined as fertilization, violated the Establishment Clause.<sup>28</sup> The definition of the term “individual” in the Prenatal Protection Act does not violate the Establishment Clause (or the Freedom of Worship Clause), either.

Defendant’s argument that the Prenatal Protection Act has no valid secular purpose is based, as this Court held with respect to a similar argument in *Flores*, “on the faulty assumption that only religious views could motivate the legislature to protect a fetus from being killed.” 245 S.W.3d at 438. That argument should be rejected here for the same reason it was rejected in *Flores*:

While some may indeed view a fetus as a human being out of religious convictions, others may reach the same conclusion through secular reasoning or moral intuition unconnected to religion. Moreover, even those who do not view the fetus itself as a person may still want to protect fetal life simply because it represents *potential* human life.

*Id.* (emphasis in original). The purpose of the Act is to protect unborn children

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<sup>28</sup> In his brief, defendant misleadingly states that in *Webster*, “Justice Stevens declared [§ 1.205.1(1)] unconstitutional as ‘an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths’ that ‘serves no identifiable secular purpose.’” Br. at 143 (quoting *Webster*, 492 U.S. at 566-67 (Stevens, J., concurring in part and dissenting in part)) (emphasis added). Of course, in *dissenting* on this point, Justice Stevens was not “declar[ing]” anything unconstitutional.

from being injured or killed at any stage of gestation by another person’s criminal conduct. That purpose is a valid secular one, even though it may have been motivated in part by religious considerations. *See State v. Bauer*, 471 N.W.2d 363, 365 (Minn. Ct. App. 1991) (“[t]he purpose of the fetal homicide statutes . . . is to rectify a perceived gap in the criminal code” which is “a secular purpose”); *State v. Alfieri*, 724 N.E.2d 477, 484 (Ohio Ct. App. 1998) (“statute has a legitimate secular purpose”).<sup>29</sup>

Defendant’s analysis of the other two prongs of the *Lemon* test are no more persuasive. With respect to the second prong (the primary or principal effect of the law), defendant asserts that the Act “obviously has the effect of advancing religion.” Br. at 144.<sup>30</sup> This assertion is based upon defendant’s view that, because “only some faiths” believe that “life begins at fertilization,” the Act “advances the religious agenda” of these faiths “by enshrining [their] creed” into law. *Id.* But the “belief” that “life begins at fertilization” is not exclusively

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<sup>29</sup> In *Webster*, Justice Stevens acknowledged that a statute does not violate the Establishment Clause merely because it “happens to coincide with the tenets of certain religions,” or because “the legislators who voted to enact it may have been motivated by religious considerations, . . .” 492 U.S. at 566 (Stevens, J., concurring in part and dissenting in part).

<sup>30</sup> Significantly, defendant does not identify this as the “principal” or “primary” effect of the Act, which is the proper formulation of the second prong of the *Lemon* test.

religious in nature. Rather, it represents the consensus of contemporary scientific and medical thought. “The principal or primary effect” of the Act, the Court of Appeals has noted, is not to advance or inhibit religion, but “to impose criminal responsibility on one who by criminal conduct intentionally or knowingly kills an unborn child.” *Flores v. State*, 215 S.W.3d 520, 528 (Tex. App.–Beaumont 2007), *aff’d*, 245 S.W.2d 432 (Tex. Crim. App. 2008). *See also Alfieri*, 724 N.E.2d at 484 (“impos[ing] liability upon persons who, by their own criminal conduct, terminate another person’s pregnancy . . . neither advances nor inhibits religion”).

With respect to the third prong of the *Lemon* test (excessive entanglement), defendant asserts without explanation that the Prenatal Protection Act entangles the State with religious groups. Br. at 144. But, in *Flores*, this Court held that “the [Act] does not entangle government with religion merely by evincing a respect for fetal life that might find approval among many religious adherents.” 245 S.W.3d at 438. *See also Alfieri*, 724 N.E.2d at 484 (“the law does not foster to any degree, government entanglement with religion; it creates no supervision or oversight of religions practices”). Defendant’s Establishment Clause challenge to the Prenatal Protection Act is meritless and should be rejected.<sup>31</sup>

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<sup>31</sup> Defendant, *amicus* notes, fails to cite a single decision from *any* state or federal court holding that a law recognizing that an unborn child may be the victim of a homicide violates the Establishment Clause of the First Amendment (or a state equivalent thereof).

### III.

#### **DEFENDANT LACKS STANDING TO CHALLENGE THE PRENATAL PROTECTION ACT ON THE GROUND THAT IT CONTAINS AN ARBITRARY CLASSIFICATION OF WHEN HUMAN LIFE BEGINS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.**

(Response to Defendant’s Thirty-Fifth Assignment of Error)

In his third challenge to the constitutionality of the Prenatal Protection Act, defendant contends that the Act contains an arbitrary classification of when human life begins in violation of the Equal Protection Clause of the Fourteenth Amendment, U.S. CONST. AMEND. XIV, § 1. Br. at. 144-45. In his one-paragraph argument, defendant states that by “[a]llowing criminal punishment for the ‘killing’ of non-implanted fertilized egg that medical authorities agree is not a ‘human life,’ . . . this criminal statute’s classification fails to meet Texas’s interest in protecting human life. The statute impermissibly reflects the concerns of a handful of religions, instead of a legitimate state interest.” *Id.* at 145.

*Amicus* responds that defendant lacks standing to challenge the application of the Act to the killing of a “non-implanted fertilized egg” because the expert evidence presented at trial showed that Ms. Sanchez was three months pregnant when defendant stabbed and killed her and her unborn child. Moreover, for the reasons set forth in Argument II, *supra*, defendant’s argument that the State does not have an interest in protecting the life of an unborn child after fertilization and

before implantation is meritless. That human life, in biological terms, begins with fertilization, not implantation, reflects the predominant contemporary scientific and medical understanding of human development. Furthermore, as this Court noted in *Flores*, “even those who do not view the fetus itself as a person may still want to protect fetal life simply because it represents potential human life.” 245 S.W.3d at 438 (emphasis in original). Defendant’s third challenge to the constitutionality of the Prenatal Protection Act should be rejected.

#### IV.

#### **DEFENDANT LACKS STANDING TO CHALLENGE THE PRENATAL PROTECTION ACT ON THE GROUND THAT IT VIOLATES THE EIGHTH AMENDMENT’S PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT.**

(Response to Defendant’s Thirty-Sixth Assignment of Error)

In his fourth challenge to the constitutionality of the Prenatal Protection Act, defendant contends that the Act violates the Eighth Amendment’s prohibition of cruel and unusual punishment. U.S. CONST. AMEND. VIII. Br. at 145-46. Defendant notes that the only aggravating factor found by the jury that sentenced him to death was that he killed more than one person in a single transaction (Ms. Sanchez and her unborn child). *Id.* at 146. “This finding,” the defendant asserts, “depends on the statute calling non-implanted fertilized eggs individuals.” *Id.* “Because no death sentence would be available in this case without this

unconstitutional aggravating factor, the sentence violates the Eighth Amendment and must be vacated.” *Id.*

Defendant, *amicus* notes, does not explain *why* the killing of an unborn child is an “unconstitutional aggravating factor,” other than repeating his argument that Texas has no legitimate interest in “protecting what some religions consider human life but what medical authorities agree is not.” Br. at 145.<sup>32</sup> But, as *amicus* has demonstrated in Argument I, *supra*, the State *has* a legitimate, nonsectarian interest in preserving human life at all stages of development, an interest which, contrary to defendant’s understanding, is supported by the scientific and medical understanding of when human life begins.

More significantly, defendant lacks standing to raise his cruel and unusual punishment argument. Defendant was convicted of stabbing and killing both Ms. Sanchez and her three-month-old unborn child. Whether the death penalty could be imposed in a case where the only aggravating factor was that he killed two individuals, one of whom was an unborn child after fertilization and before

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<sup>32</sup> In his fourth challenge to the constitutionality of the Prenatal Protection Act, defendant also argues that to impose the death penalty in the circumstances of this case violates the “fundamental rights” recognized in *Roe v. Wade*. Br. at 145. But “the ‘right’ to unilaterally kill the unborn child that another person is carrying, is neither fundamental nor important—indeed, it does not exist.” *Commonwealth v. Bullock*, 913 A.2d 207, 215 (Pa. 2006). *See* Argument I, *supra*.

implantation (a “non-implanted fertilized egg” in defendant’s lexicon) is a question not presented by this appeal. Accordingly, defendant lacks standing to challenge the imposition of the death penalty on this basis. His fourth challenge to the constitutionality of the Prenatal Protection Act should be rejected.<sup>33</sup>

V.

**THE PRENATAL PROTECTION ACT DOES NOT DISCRIMINATE ON THE BASIS OF GENDER IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OR THE EQUAL RIGHTS AMENDMENT OF THE TEXAS CONSTITUTION.**  
(Response to Defendant’s Thirty-Seventh and Thirty-Eighth Assignments of Error)

In his fifth and sixth challenges to the constitutionality of the Prenatal Protection Act, defendant contends that the Act discriminates on the basis of gender in violation of the Equal Protection Clause of the Fourteenth Amendment, Br. at 146-50, and the Equal Rights Amendment of the Texas Constitution, TEX. CONST. art. I, § 3a (Vernon 2007), Br. at 150-51. Both challenges are based upon language in the Prenatal Protection Act exempting from the scope of the Act “conduct committed by the mother of the unborn child.” TEX. PENAL CODE

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<sup>33</sup> *Amicus* notes in passing that Eighth Amendment challenges to sentences imposed for the unlawful killing of an unborn child have been uniformly rejected. See *State v. Moore*, Ohio Ct. App. (Second District), Oct. 30, 1998, 1998 WL 754603, at 3-4; *State v. Alfieri*, 724 N.E.2d 477, 483-84 (Ohio Ct. App. 1998); *State v. Coleman*, 705 N.E.2d 419, 421-22 (Ohio Ct. App. 1997); *Coleman v. DeWitt*, 282 F.3d 908, 915 (6th Cir. 2002). *Amicus* acknowledges, however, that none of these cases involved a sentence of death.

§ 19.06(1) (Vernon Supp. 2008).<sup>34</sup> This exemption, defendant claims, contains, “an impermissible gender classification that violates the Equal Protection Clause,” Br. at 146-47, as well as the Texas Equal Rights Amendment, *id.* at 150-51.

*Amicus* responds that the exemption for the conduct of the mother does not discriminate on the basis of gender. Accordingly, neither the heightened scrutiny mandated by the Supreme Court for gender-based classifications under the Equal Protection Clause, *see Craig v. Boren*, 429 U.S. 190, 197 (1976), nor the strict scrutiny required by the Texas Supreme Court for gender-based classifications under the state Equal Rights Amendment, *see Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 257 (Tex. 2002), applies.

Defendant’s equal protection and equal rights challenges are based on the assumption that the exemption in the Act for “conduct committed by the mother of the unborn child” is a gender-based classification. That assumption, however, is mistaken. In rejecting a similar challenge to the exemptions in the state Crimes

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<sup>34</sup> The Act also exempts “a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure,” “a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code,” or “the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.” TEX. PENAL CODE §§ 19.06(2), (3), (4). Defendant expressly does *not* challenge the constitutionality of these exemptions. Br. at 146.

Against the Unborn Child Act, 18 PA. CONS. STAT. ANN. § 2601 *et seq.* (West 1998), the Pennsylvania Supreme Court described the “challenged distinction” as “the mother versus everyone else.” *Commonwealth v. Bullock*, 913 A.2d 207, 215 (Pa. 2006). “This classification is neither suspect nor quasi-suspect . . . .” *Id.*<sup>35</sup> “Notably,” the court added, “this is not a gender classification, as male and female perpetrators (other than the mother) are treated identically under the Act.” *Id.* n. 7. Nor does the Prenatal Protection Act contain a gender-based classification. Under the Act, “prosecution for murder of unborn children is not limited to . . . males. Anyone, male or female, . . . whose conduct is not exempted by section 19.06, is subject to prosecution.” *Flores v. State*, 215 S.W.3d 520, 526 (Tex. App.—Beaumont 2007), *aff’d*, 245 S.W.2d 432 (Tex. Crim. App. 2008).

In *Bullock*, the court held that “the General Assembly had a legitimate basis for distinguishing between the mother and everyone else.” 913 A.2d at 216:

Simply put, the mother is not similarly situated to everyone else, as she alone is carrying the unborn child. Under prevailing jurisprudence of the United States Supreme Court, the fact of her pregnancy gives her (and only her) certain liberty interests in relation to the termination of that pregnancy that the Legislature could reasonably have sought to avoid infringing by exempting her from criminal conduct under this particular statute.

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<sup>35</sup>*See also People v. Ford*, 581 N.E.2d 1189, 1200 (Ill. App. Ct. 1991) (classification in fetal homicide statute “neither affects a fundamental right nor does it discriminate against a suspect class”).

*Id.* The court recognized that, in addition to an exemption for voluntary abortion, the Crimes Against the Unborn Child Act, like the Prenatal Protection Act, contained a separate exemption for the mother’s conduct. *Id.*, citing 18 PA. CONS. STAT. ANN. § 2608(a)(3). But there was a rational basis for that exemption.

[B]ecause of the mother’s unique connection to the fetus there are various situations even outside of the abortion context (such as those pertaining to drug addiction or attempted suicide) in which she alone might bear an increased risk of criminal prosecution were it not for the (a)(3) exemption. The Legislature could rationally have taken this into account and sought to place the mother on a similar footing to all other persons as respects these types of situations. While this does result in the mother being treated more leniently under the Act as regards crimes against her unborn child, such a result would only be constitutionally problematic if it stemmed from an arbitrary classification, which, as we have noted, it does not.

*Id.* Exempting the mother from prosecution under these circumstances “is not arbitrary, but is based on the Legislature’s recognition that the mother is differently situated from everyone else in relation to her unborn child.” *Id.* n. 8. The Illinois Appellate Court reached the same result in rejecting a similar equal protection challenge to the exemptions in the state fetal homicide statute:

[T]here is a valid legislative purpose in protecting the potentiality of human life. The classifications created by the statute (*i.e.*, *acts of pregnant women* or in certain medical practices, as distinct from acts of third parties which fall within the statutory proscriptions) must, and do, bear a rational relationship to this valid legislative purpose.

*People v. Ford*, 581 N.E.2d at 1200 (emphasis added).

The exemption in the Prenatal Protection Act for “conduct committed by the mother of the unborn child” does not discriminate on the basis of sex. Defendant’s fifth and sixth constitutional challenges to the Act should be rejected.

## VI.

### **THE PRENATAL PROTECTION ACT PROVIDES ADEQUATE NOTICE OF THE CONDUCT THAT IS PROHIBITED BY THE ACT.**

(Response to Defendant’s Thirty-Ninth Assignment of Error)

In his seventh challenge to the constitutionality of the Prenatal Protection Act, defendant contends that the Act is “void for vagueness” under the Eighth and Fourteenth Amendments because it does not provide adequate notice of the conduct that is prohibited by the Act. Br. at 151-55. *Amicus* responds that this argument is foreclosed by this Court’s decision in *Lawrence v. State*, 240 S.W.3d 912 (Tex. Crim. App. 2007). To the extent defendant’s argument raises issues not considered in *Lawrence*, those issues lack merit and should be rejected.

Under the Texas Penal Code, a person commits capital murder if he intentionally or knowingly causes the death of “more than one person . . . during the same criminal transaction.” TEX. PENAL CODE §§ 19.02(b)(1), 19.03(a)(7)(A) (Vernon 2007). A “person” includes an “individual.” *Id.* § 1.07(a)(38). And an “individual,” in turn, is defined as “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.” *Id.* §

1.07(a)(26). “It follow from these provisions,” this Court explained in *Lawrence*, “that a person who intentionally or knowingly causes the death of a woman and her unborn child, at any stage of gestation, commits capital murder.” 240 S.W.3d at 915. The Prenatal Protection Act provides adequate notice of what conduct is prohibited by the Act:

By expressly defining capital murder such that one of the victims may be any unborn child from fertilization throughout all stages of gestation, the statute leaves no ambiguity as to what conduct is proscribed. In particular, the plain language of the statute prohibits the intentional or knowing killing of *any* unborn human, regardless of age. No ordinary person reading the statute would have any doubt as to whether it encompasses victims at all stages of gestation.

*Lawrence*, 240 S.W.3d at 915-16 (emphasis in original).<sup>36</sup> The opinion in *Lawrence* regarding the adequacy of notice of what conduct is prohibited by the Act is supported by a wealth of authorities from other jurisdictions interpreting similar statutes.<sup>37</sup>

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<sup>36</sup> Because there is no conflict between the liberty interest recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and the conduct prohibited by the Prenatal Protection Act, see *Lawrence*, 240 S.W.3d at 917-18, and Argument I, *supra*, defendant’s professed concern that “[t]he ambiguity in the law created by [the Act] would cause a person of ordinary intelligence to wonder whether Texas’s statute or the United States Constitution, as interpreted by the Supreme Court, controls,” Br. at 155, cannot be taken seriously.

<sup>37</sup> See, e.g., *People v. Ford*, 581 N.E.2d 1198, 1201-02 (Ill App. Ct. 1991); *State v. Merrill*, 450 N.W.2d 318, 323 (Minn. 1990); *State v. Alfieri*, 724 N.E.2d 477, 483 (Ohio Ct. App. 1998) (statutes “provide definite notice to ordinary persons that the unborn are protected from the moment of fertilization”); *Commonwealth v. Bullock*, 913 A.2d 207, 212-13 (Pa. 2006).

Defendant, however, argues further that there is no way of knowing whether “an accused ‘caused’ the ‘death’ of an embryo or non-viable fetus that may or may not have matured to [a] living person . . . .” Br. at 153. “[B]efore viability,” he submits, “the [S]tate cannot show that the pregnancy that was terminated would or could have resulted in a fetus capable of life independent of the woman.” *Id.*

The Prenatal Protection Act, like the Pennsylvania Crimes Against the Unborn Child Act, “imposes criminal liability for the destruction of a human embryo or fetus that is biologically alive.” *Commonwealth v. Bullock*, 913 A.2d at 213. “In this context, death occurs when the embryo or fetus ceases to have the properties of life,” *i.e.*, when “the embryo or fetus no longer has the capacity to thrive or grow.” *Id.* (citations and internal quotation marks omitted).<sup>38</sup> In *Bullock*, the Pennsylvania Supreme Court noted that “the concepts of life and its cessation are readily understandable to persons of ordinary intelligence relative to biological life forms beginning at the cellular level—as noted, the concept of biological life extends to organisms that retain vital functions and the capacity to grow and thrive.” *Id.* Here, as in *Bullock*, defendant “offers no example of a circumstance in which an actor who causes the permanent cessation of all of the vital functions of

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<sup>38</sup> With respect to an unborn child, “death” means “the failure to be born alive.” TEX. PENAL CODE § 1.07(a)(49) (Vernon Supp. 2008).

an embryo or fetus would not conventionally understand that his conduct has caused the death of the embryo or fetus.” *Id.* “Moreover, to accept that a fetus is not biologically alive until it can survive outside of the womb would be illogical, as such a concept would define fetal life in terms that depend upon external conditions, namely, the existing state of medical technology (which, of course, tends to improve over time).” *Id.* In sum,

viability outside of the womb is immaterial to the question of whether the defendant’s actions have caused a cessation of the biological life of the fetus, and hence, to the question of whether the statute is vague in proscribing the killing of an unborn child. We find that individuals of ordinary intelligence are readily capable of discerning the conduct prohibited by the Act . . . .

*Id.* See also *People v. Ford*, 581 N.E.2d at 1201 (same); *State v. Merrill*, 450 N.W.2d at 323-24 (same).

Whether a victim of a homicide would have “survived” were it not for the criminal act of a third party has no bearing on that party’s liability for causing the victim’s death. One may not defend against a charge of homicide by arguing that the victim was terminally ill and was in imminent danger of death from natural causes at the time he was killed. So, too, one may not defend against a charge of homicide of an unborn child by arguing that the child might not have attained viability. See *State v. Coleman*, 705 N.E.2d 419, 421 (Ohio Ct. App. 1997) (in

prosecution for causing the death of a nonviable unborn child, it makes no difference whether the child would have reached viability had it not been killed).

Throughout his final argument challenging the constitutionality of the Prenatal Protection Act, defendant expresses concern that the Act “allows a jury to impose a death sentence even where neither the defendant nor the woman knew that she was pregnant and even if the defendant did not know [that] his actions would kill the embryo or fetus.” Br. at 153.<sup>39</sup> In light of the evidence presented at defendant’s trial, these concerns are entirely hypothetical. The State presented evidence from which the jury reasonably could have concluded that defendant knew that Ms. Sanchez was pregnant when he stabbed and killed her. Any person of “ordinary intelligence” would understand that killing a woman who is known to be pregnant will cause the death of her unborn child, as well. Defendant’s seventh challenge to the constitutionality of the Prenatal Protection Act should be rejected.

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<sup>39</sup> See also, *id.*, at 153-54 (“a lay person will not always know that his or her conduct is going to harm an embryo or fetus or terminate a pregnancy, creating an additional dearth of guidance for a capital jury. Just as a defendant may not know that a woman is pregnant, he or she may not know that certain conduct will harm the embryo or fetus”); *id.* at 154 (“[t]he fact that experts were allowed to testify at [defendant’s] trial regarding whether the fetus was alive and whether the [defendant’s] alleged actions caused its death shows that these matters are outside the knowledge of normal lay people”); *id.* at 155 (“a lay person would not necessarily know what conduct would knowingly or intentionally cause the death of an embryo or pre-viable fetus”). This is also the focus of defendant’s nineteenth assignment of error. Br. at 104-06.

## PRAYER

For the foregoing reasons, *amicus curiae*, Texas Alliance for Life Trust Fund, respectfully requests that this Honorable Court uphold the constitutionality of the Prenatal Protection Act.

Respectfully submitted,

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