No. 19-1392

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**IN THE SUPREME COURT OF THE UNITED STATES**

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Thomas E. Dobbs, *et al.*,

*Petitioners,*

v.

Jackson Women's Health Organization, *et al.*,

*Respondents*

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

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# BRIEF OF AMICI CURIAE __ MEMBERS OF __ STATE LEGISLATURES IN SUPPORT OF PETITIONERS

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## INTERESTS OF AMICI[1]

*Amici curiae* (listed in the Appendix hereto) are ___ duly elected members of state legislative bodies representing ____ states. They have a strong interest in explaining the duty constitutionally incumbent on them to secure to all persons within the legal protection of their respective states the fundamental common law right to life, as being among the "other rights retained by the people" under the Ninth Amendment and further protected by the Fourteenth Amendment Due Process Clause. They also have an interest in how the viability threshold, which the Fifth Circuit employed below, impedes their efforts to discharge that duty.

## SUMMARY OF THE ARGUMENT

A state legislature's first duty is to declare and secure the civil rights of all persons who are within the protection of its laws. A legislator's job description is defined foremost by his or her oath to uphold the Constitution of the United States and the constitution of the particular state in which he or she serves. A viability prerequisite to abortion regulations prevents state legislatures from doing that job, because it arbitrarily immunizes abortionists from liability when they infringe others' civil rights prior to viability. This Court should abandon the viability threshold and liberate state legislatures to legislate in favor of all civil rights belonging to all persons.

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[1] Pursuant to Rule 37.6, the undersigned certifies that no counsel for a party authored any part of this brief, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. *Amici curiae* timely provided notice of intent to file this brief to all parties, and all parties have consented to the filing of this brief.

## ARGUMENT

I. State legislatures have the power and duty to declare and secure to all persons those rights that are part of the fundamental law on which the Constitution is predicated.

### *A. Legislatures must declare and secure all the civil rights of fundamental law.*

State legislators have the constitutional duty, and therefore the power, to protect the fundamental, civil rights of persons. The fundamental law in which those fundamental rights are found is the common law, which consists of both natural duties and those ancient, customary rights and immunities that are foundational to ordered liberty. Thus, a state legislature must declare and secure to all persons within the protection of its laws the rights that those persons have by natural and customary law. *See Washington v. Glucksberg*, 521 U.S. 702, 721-22 (1997) *quoting Moore* v. *E. Cleveland,* 431 U. S. 494, 503 (1977) (upholding state legislation that prohibited assisted suicide and reasoning that the Fourteenth Amendment's "Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'.").

The Founders took for granted Blackstone's teaching that legislatures have compelling reasons to secure fundamental rights because they have an obligation to do so. Blackstone remonstrated that

> the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities.

1 William Blackstone, *Commentaries on the Laws of England* 124 (1765) (hereinafter "Blackstone's *Commentaries*"). "Hence," he said, "it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals." *Id*. Blackstone taught that the legislative power is to declare existing common-law rights and duties and to remedy any defects in the legal security for those rights. *Id*. at *42-43, 52-58, 86-87.

The Founders echoed this view in the Declaration of Independence, declaring that governments are instituted among men in order to secure the inalienable rights with which human beings are endowed by nature and nature's God. They also accused the crown and Parliament of infringing the rights of "our constitution," which in 1776 could only have been a reference to the common-law constitution of British North America. This view predicated the Constitution of the United States, which expressly secures natural rights, such as life and religious liberty, and common-law rights, such as jury trials and freedom from the quartering of soldiers in one's home, and expressly disclaims any intent to disparage the other rights of the fundamental law.

Indeed, the point of having legislatures, executives, and courts is to secure the rights that Americans already have. Neither state legislatures nor the Constitution of the United States create those rights. *See District of Columbia v. Heller*, 554, U.S. 570, 592 (2008) (stating that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right," that it "is not a right granted by the Constitution," and is not "in any manner dependent upon that instrument for its existence."). Some, but not all, of the rights

of natural persons are enumerated in the Constitution of the United States and its amendments. U.S. Const. art. I § 8 cl. 8, art. IV §2, amends. I - VIII. Others are enumerated in state constitutions. See, e.g., *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 766 (C.C.D.N.H. 1814) (No. 13,156). Still others are declared in American constitutions but not enumerated. U.S. Const. amend. IX ("The enumeration of certain rights herein shall not be construed to deny or disparage *other rights* retained by the people.") (emphasis added). State legislatures have a duty to declare and secure all fundamental rights, both enumerated and unenumerated.

Fundamental rights are those that persons enjoy by fundamental law—natural law and common law—with or without any written constitution. Because the common law includes natural rights, to understand the fundamental rights declared and secured by the Constitution, it is sufficient to look to the common law, especially as explained by William Blackstone. Established common-law doctrines constitute the best evidence of the existence and meaning of both enumerated and unenumerated, fundamental rights. Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 Okla. L. Rev. 167 (2010) (explaining why the unenumerated rights referred to in the Ninth Amendment should be understood with reference to a common law baseline, especially as specified in Blackstone's Commentaries); Adam J. MacLeod, *Our Universal and Particular Constitution*, Public Discourse (October 4, 2018). "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law,

and are to be read in the light of its history." *Smith v. Alabama*, 124 U.S. 465, 478 (1888). The terms and concepts of the common law provided the "the nomenclature of which the framers of the Constitution were familiar." *Minor v. Happersett*, 88 U.S. 162, 167 (1875). *Accord* JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 9-29 (2003).

American constitutional rights are not philosophical abstractions. They are described in detail in common law treatises, such as those by Coke and Hale, and especially Blackstone's *Commentaries*. The framers crafted American constitutions—state and federal—in common law terms. And Blackstone was their teacher and lexicographer. Morris L. Cohen, *Thomas Jefferson Recommends a Course of Law Study*, 1119 U. Pa. L. Rev. 823 (1971); ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1 (1996); R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 131–41 (2015). As this Court has rightly acknowledged, Blackstone's "works constituted the preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 706, 715 (1999). Blackstone retained his influence through the adoption of the Civil War Amendments. James M. Ogden, *Lincoln's Early Impressions of the Law in Indiana*, 7 Notre Dame L. Rev. 325, 328 (1932). And this Court continues to turn to Blackstone today.[2]

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[2] A few examples from recent years include *Gamble v. United* States, __ U.S. __, 139 S. Ct. 1960 (2019) (the Court's opinion, the concurrence, and one dissent citing Blackstone multiple times to determine the meaning of the phrase "the same offense" in the Fifth Amendment's double jeopardy clause); *Department of Homeland Security v. Thuraissigiam*, __ U.S. __, 140 S. Ct. 1959, 1969 (2020) (calling Blackstone's *Commentaries* a "satisfactory exposition of the common law of England"); *Ramos v. Louisiana*, __ U.S. __, 140 S. Ct. 1390, 1395 (2020) (citing Blackstone in explanation of the holding that the requirement of juror unanimity is "a vital right protected by the common law" and therefore

B. *It is the province of state legislatures to declare and specify rights.*

It is the province of state legislatures to declare and specify those fundamental rights that the U.S. Constitution leaves unspecified. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are *reserved to the states respectively, or to the people*.") (emphasis added). The legislature's particular duty to declare and secure the natural and customary rights of America's fundamental common law can be seen clearly by reading together the Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States. The Bill of Rights marks off certain rights as beyond the competence of Congress (and now, by incorporation, the states) to alter or abolish. It immunizes those rights by enumerating them and by stating in particular terms the official duties with which they correlate. But as the Ninth Amendment makes clear, the enumeration of certain common-law rights does not deny or disparage all the other rights that the American people enjoy by virtue of natural law and their ancient customs. The Ninth Amendment expressly reserves to the people those civil and fundamental rights that they enjoyed prior to ratification, which are their natural rights, other common-law rights and liberties, and some privileges enumerated in state constitutions.

Significantly, this Court declined in *Roe v. Wade* to speak on behalf of the Ninth Amendment. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Though the District Court in *Roe* attempted to locate an abortion privilege in the Ninth Amendment's reservation of

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the Constitution's jury trial guarantee); *Torres v. Madrid*, __ U.S. __, 141 S. Ct. 989, 996, 997, 998, 1000 (2021) (citing Blackstone multiple times to determine meaning of Fourth Amendment "seizure").

rights to the people, *Roe*, 410 U.S. at 122, this Court did not, instead locating it in substantive due process doctrine. *Roe*, 410 U.S. at 153. Thus, the *Roe* Court did not intend to disrupt the power of state legislatures to articulate the rights secured by the Ninth Amendment and the limitations on those rights. This makes sense in light of the historic role that parliaments and legislatures played in protecting rights against infringement by the crown, the crown's courts, and other officials.

Because many states refused to remedy infringements of fundamental rights prior to the Civil War, the Fourteenth Amendment was necessary to ensure to all persons due process of law and the equal protection of the laws, and to empower Congress to remedy infringements of those rights. It bears emphasis that the Fourteenth Amendment was necessary to recall state legislatures to their original task. Far from repealing the people's retention of fundamental rights declared by the Ninth Amendment, the Fourteenth Amendment strengthened it. And far from abrogating the duty of state legislatures to declare and secure unenumerated rights, the Fourteenth Amendment reinforced that duty.

Legislatures are equipped to deliberate about and secure the rights of all persons as they identify and specify the boundaries between rights. *See* GRÉGOIRE WEBBER ET AL, LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION (2018). Many of the great civil rights achievements in American history have been legislative achievements. *See*, *e.g.*, the Civil Rights Act of 1866, Civil Rights Act of 1875, and the Civil Rights Act of 1964. And these include state statutes that declare and secure common law rights against unreasonable discrimination. *See*, *e.g.*, Ferguson v. Gies,

46 NW 718, 719, 720 (Mich. 1890) (explaining that the Michigan Civil Rights Act of 1885 declared and provided new remedies to vindicate the common-law right against discrimination because of race in public accommodations); Mississippi Code § 43-33-723 (prohibiting racial and other unlawful discrimination in housing finance).

This Court has never denied that state legislatures have the power and duty to declare and specify the boundaries of fundamental rights in the abortion context. To the contrary, this Court has ratified the legislative province to identify, specify, and secure the rights of our fundamental law. Often using the term "interests" or "state interests," in *Connecticut v. Menillo*, 423 U.S. 9 (1975), *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), *Mazurek v. Armstrong*, 520 U.S. 968 (1997), *Gonzales v. Carhart*, 550 U.S. 124 (2007), and on other occasions, this Court has acknowledged the power of legislatures to regulate abortion to protect fundamental rights such as life, health, equal protection of the laws, and the integrity of the medical profession, a crucial condition for the right of bodily integrity.

Legislatures have primary responsibility to declare and give specific form to civil rights because the liberties of each must be defined and limited to respect the rights of all. The settlement of the boundaries between civil liberties must be fair to all, not just to powerful special interest groups who use their special standing privileges to file facial challenges to abortion laws in federal court.

In many respects, legislatures are better equipped for this task than courts, whose job is to secure the rights of the litigants who happen to appear in any case or controversy. The job of a court is to specify a right in a legal judgment resolving a

dispute between two parties. To generalize that particular judgment, to make that right universal and absolute for all persons, carries the risk that the tribunal will unintentionally invite infringement of the rights of persons who are not parties to the litigation. Significantly, most constitutional abortion cases proceed without any involvement of the persons who are most interested in, and affected by, the outcome: expectant mothers, fathers, grandparents, physicians and other health care professionals who are called to deal with the fallout of abortions, and, critically, unborn human beings. By contrast, legislatures hear evidence and find facts about the rights of *all* interested persons.

Legislatures must give specific form and content to rights as they define, secure, and vindicate them. Rights are defined by their legal limitations. Even absolute rights have limits. And not all rights are absolute. That a right is absolute (e.g. the right to life) does not entail that it means the same thing for all persons in all contexts. It is the duty of a legislature to discern different meanings of rights and to fashion remedies and sanctions for deprivation of those rights.

For one thing, not all natural persons are similarly situated with respect to all civil rights. For example, a member of the armed forces may lawfully be ordered to take actions that place his or her life in jeopardy, actions that a civilian may not be lawfully ordered to undertake. Closer to the issue in this case, unborn persons possess rights of inheritance but not powers of disposition of private property. 1 Blackstone's Commentaries, at *126, 453. They have the right to live but lack the legal capacity to sue or be sued on their own behalf. 1 Blackstone's Commentaries, at *125-26, 452.

Thus, they enjoy rights of "life" and "property" within the meaning of the due process clauses, though they do not possess all of the powers that often attend those rights.

Furthermore, a lawmaker must fashion remedies and sanctions for rights infringements that are commensurate and responsive to the particular wrong. Because not all persons who contribute to a person's death are equally culpable, legislatures justly distinguish between them. The sanction for reckless acts that cause death need not be as severe as the sanction for intentional homicide. Legislatures also reasonably take into account the circumstances of the person whose life is lost. For example, remedies for wrongful death may take into account a person's stage of development and relationship to any dependents.

Some features of the law governing infants are immutable, while others are subject to variation. 1 Blackstone's Commentaries at * 452-54. They are, in the words of common-law jurists, matters of indifference. *Id.* at *54-55; MATTHEW HALE, OF THE LAW OF NATURE 192-93 (David S. Sytsma, ed. 2015). This Court has sometimes failed to distinguish between them. Criminal penalties and civil remedies associated with abortion may vary, though the right to life itself is not negotiable. This is because the *law securing* an absolute right may vary quite a lot concerning whom it reaches and in what ways.

For example, the right to life remains inviolable and absolute though a legislature may choose to sanction those who are most culpable for its deprivation and not others. For example, law prohibiting physicians from assisting a suicide secure the right to life though they impose no criminal sanctions on the deceased or his family. See

*Glucksberg*, 521 U.S. at 713 (noting that "the movement away from the common law's harsh sanctions did not represent an acceptance of suicide; rather, as Chief Justice Swift observed, this change reflected the growing consensus that it was unfair to punish *the suicide's family* for his wrongdoing.") (emphasis added).

Similarly, state legislatures have long recognized that abortionists are the true, culpable parties in an abortion. Mothers are often victims of coercion. And mothers suffer the consequences of the abortion procedure itself. For these and other reasons, it is reasonable for legislatures not to impose legal sanctions on them, notwithstanding that their unborn children have a right to live.

The *Roe* Court failed to understand this. The Court looked to state laws that impose criminal sanctions on abortionists, rather than on the mothers themselves, and then erroneously inferred that the law is indifferent to the lives of the unborn. Roe, 410 U.S. at 157 n.54. But that is to equate inequality of sanctions with legality of the conduct. That not all wrongdoers are equally culpable or equally subject to criminal sanction does not make a legal wrong into a right.

## II. State legislatures must declare and secure all the rights of all persons.

### *A. Legislatures must declare and define the boundaries of the fundamental rights of life, limb, and liberty.*

Among the fundamental rights enjoyed by persons prior to the U.S. Constitution's ratification, and retained by the people expressly through the Fifth, Ninth, and Fourteenth Amendments, are the rights of life, limb, and liberty. Legislatures must be free to secure all of those fundamental rights by defining the limitations of each and by fashioning remedies and sanctions for their infringement or deprivation.

Chief among the fundamental rights are the absolute rights, namely the rights of life, limb, health, liberty from enslavement and unjust confinement, and property. 1 Blackstone's *Commentaries* at *117-41. An absolute right is not a right without any limitations. It is instead a right that a person enjoys prior to government, vested in him or her by the laws of nature, simply by virtue of being human, which governments are incompetent to take away. *Id*. at *119 ("By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.").

The absolute rights are not abstract licenses or liberty interests. To the contrary, the common-law jurists all made very clear that liberty is bounded and constrained by natural law, the ancient customary rights and duties of the common law, and those civil laws that are necessary to secure the rights of others. 1 Blackstone's Commentaries at *121-22. That a right is absolute means simply that it is vested—in jurisprudential terms, that it has built into it an immunity from retrospective or retroactive abrogation—so that governments are powerless to deprive any person of the right unless and until the person has been proven to have forfeited the right by committing some wrong, and that the wrong has been established in some proceeding that satisfies the requirements of due process, or until the person dies a natural death. *Id*. at *125, 128-30.

The notion that certain rights become vested, and so immunized against retrospective abrogation, is not that rights have no limitations but rather that they

have already built into them those limitations that are part of fundamental law and so require no further limitation or abrogation. Wilson, at 1055-56; Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 255 (1914); Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J.L. & PUB. POL'Y 253 (2017). That concept of vested rights is foundational to the whole project of American constitutionalism. THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 357-413 (1868); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1398–99, AT 272–274 (5TH ED. 1891); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 780–82 (1936); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421 (1999).

The right to limbs means that no one may "wantonly destroy or disable" another person's members. *Id*. at *126. Similarly, the right to life is a right not to be *intentionally killed*. It is not a guarantee against death. The rights to life and limb are universal and absolute because they correlate with the universal duty not to act with a purpose to end another person's life or maim them. Though state legislatures may and do regulate risky activities, the rights themselves do not guarantee against all risks of death or injury.

For example, the rights do not prohibit all actions by an expectant mother that may pose risks to the health or life of her unborn child. This is why many state legislatures reasonably exclude from abortion prohibitions all procedures that are

intended to save the life of the mother. An action undertaken to save a human life, accepting but not intending that a death may result, is not an intentional killing. *Vacco v. Quill*, 521 U.S. 793, 802 (1997) (distinguishing assisted suicide from medical procedures that risk death, explaining that "[t]he law has long used actors' intent or purposes to distinguish between two acts that may have the same result," and citing criminal cases); JOHN FINNIS, INTENTION AND IDENTITY: COLLECTED ESSAYS: VOLUME II 173-97 (2011) (explaining the distinction between intended results and foreseen side effects and its foundational role in tort and criminal law).

The *Roe* Court, failing to understand this, mistakenly concluded that the Fourteenth Amendment must not secure the right of the unborn to live as long as the law excepts procedures intended to save the lives of mothers. *Roe*, 410 U.S. at 157 n.54. The Court ignored the fact that the right to life (like rights generally) is marked out as much by its variable boundaries as by its substantive content. As James Wilson explained, "With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law," but the question "how different degrees" of aggression toward human lives "may be justified, excused, alleviated, aggravated, redressed, or punished, will appear both in the criminal and in the civil code of our municipal law." 2 Collected Works of James Wilson 1068 (Kermit L. Hall and Mark David Hall, eds. 2007) (hereinafter "Wilson").

Similarly, the absolute right of liberty is defined by the limitations that the other rights of fundamental law place around it. The absolute right of liberty in common law is freedom from confinement or imprisonment without due course of law. 1

Blackstone's Commentaries at *130-33. The right of liberty is a corollary of the presumption of innocence (and vice versa), and is a meaningful right just insofar as it secures to the bearer his freedom unless and until he is proven to have injured another person in an act of criminal wrongdoing. 1 Wilson at 638-39. See also David S. Sytsma, *Matthew Hale as Theologian and Natural Law Theorist*, in GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY 163, 178 (Mark Hill QC and R.H. Helmholz, eds. 2017) (explaining how Matthew Hale derived the presumption of innocence from natural and divine law). Liberty is thus limited by the law of public wrongs. Its boundaries are the public rights of others.

One of those boundaries is the right to life. The duty not to murder, and the duty of states to respond to violence with criminal sanctions, are natural obligations. So, the right to life defines an inherent, pre-positive law limitation on the liberty of citizens and officials.

The common law is amenable to quite a lot of variation, but it has some important, fixed rights which limit liberty. It contains a small number of absolute rights and inherent wrongs. All of them constrain liberty. In addition to the right to life, these rights include the right not to be enslaved, and the right to keep one's limbs; while the inherent wrongs include intentional killing and maiming. 1 Blackstone's Commentaries, at *117-30. This means that no person can ever lawfully be at liberty to kill, maim, or enslave.

The relationship between liberty, on one hand, and life and limb, on the other, is not symmetrical. Liberty does not constrain life and limb in the same way that they

limit liberty, and state legislatures are duty-bound to constrain the liberty of those who murder and maim. States have especially compelling interests to secure those fundamental rights that are unalienable, which are of interest to the whole community and which no one—not even the person whose life is at stake—has the power to waive or give away. *Hopt v. People of the Territory of Utah*, 110 U.S. 574, 579 (1884) ("The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty."). No state has just laws if it does not secure absolute rights and prohibit inherent wrongs. And because state legislatures have an obligation to declare and secure absolute rights and to remedy inherent wrongs, they also have the power to do so.

C. *A legislature must declare and secure the rights of all persons.*

The point of the law is to protect the rights of all persons. THE DIGEST OF JUSTINIAN, 1.5.2 ("So, since all law is made for the sake of human beings, we should speak first of the status of persons."); THE DECLARATION OF INDEPENDENCE (1776); PREAMBLE TO THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948) ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,… Now, therefore, The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples

and all nations."); JOHN FINNIS, INTENTION AND IDENTITY: COLLECTED ESSAYS: VOLUME II 19-35 (2011).

Rights-bearing persons include not only artificial persons, such as corporations, but also natural persons. Natural persons are human beings at all stages of human development. This is not only a biological fact and moral premise, it is also the law of the Constitution.

Blackstone explained the difference between natural and artificial persons: "Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." 1 Blackstone's COMMENTARIES at *119. A natural person—a person who enjoys the absolute right to life—is therefore any person who is formed as a person without the assistance of law. Obviously, this includes infants, born and unborn. 2 Wilson at 1068. Though a minor person does not yet enjoy all the rights and privileges that human law confers upon persons—she cannot yet vote, for example—she is nevertheless already formed as a bearer of the absolute rights conferred on her by the laws of nature. A minor person, like an adult person, possesses the rights not to be enslaved, defamed, maimed and (yes) intentionally killed.

In case there were any doubt as to whether absolute rights extend to unborn persons, Blackstone expressly mentioned them in his chapter on absolute rights—chapter 1 of the first volume of the *Commentaries*—and he made it clear that unborn human beings are among the persons who possess such rights:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. 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 by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor. An infant *in ventre sa 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 a 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.

Because all persons are bearers of fundamental rights, all persons are entitled to the equal protection of the laws. 1 Wilson at 638-39. This includes the right not to be discriminated against unjustly, for example because of race or sex. This right is also fundamental in our common law and constitutional tradition, and has long been declared by state constitutions, public accommodation statutes, and other state laws. The right is placed in jeopardy when abortionists selectively terminate an unborn person because she is female or disabled, or for some similarly-illegitimate reason.

The right to life remains among the most fundamental of the fundamental rights of all persons. *Glucksberg*, 521 U.S. at 714-15. It is not merely a privilege or immunity of citizenship, but is also among those ancient, natural, and customary rights that belong to human beings as human beings. Equally fundamental is the right of equal protection of the laws. Both rights belong to all natural persons, which is to say, human beings, male and female, able and disabled, born and unborn. Compare *Glucksberg*, 521 U.S. at 741. (Stephens, J., concurring) ("The State has an interest in preserving and fostering the benefits that every human being may provide to the

community."); 1 Blackstone's Commentaries at *125-26; Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harv. J.L. Pub. Pol'y 539 (2017) (demonstrating that "person" in the Fourteenth Amendment includes pre-born human beings).

III. <u>The viability threshold prevents legislatures from securing the rights of all persons.</u>

A viability threshold prevents legislatures from declaring and securing fundamental, constitutional rights. It deprives legislatures of their necessary power to declare and secure some fundamental rights, such as the right to life and the right not to be discriminated against for unjust reasons. It falsely characterizes one, particular liberty – the artificial immunity of the abortionist to perform an abortion before an arbitrary moment in pregnancy[3] – as without legal limit and leaves other fundamental rights – the rights of life and equal protection – without protection. It prevents legislatures from specifying the boundaries of rights and liberties, and from extending to all persons the equal protection of the laws.

In our Constitution, as in the common law which our Constitution declares, the right to life cannot be taken away, only voluntarily forfeited in an act of criminal wrongdoing that has been proven in a proceeding which satisfies the requirements of due process. Not even the sovereign can lawfully deprive any natural person of her right to life, and certainly not a fellow citizen. By conferring on abortionists an

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[3] See *Akron,* 462 U.S. at 461 (1983) (O'Connor, J., concurring) (stating "[t]he choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.")

absolute immunity during the early stages of pregnancy, the viability threshold gives them a free hand to deprive small human beings of the most fundamental right of all.

The Constitution provides no warrant for such a sweeping immunity. To the contrary, this Court has insisted that the state has legitimate and powerful interests to protect the health of the mother and the life of her child "from the outset of pregnancy." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992). Those interests are "compelling," and they become more compelling as a pregnancy progresses. *Roe v. Wade*, 410 U.S. 113, 154 (1973). Therefore, the privacy interest of the abortionist-patient relationship "cannot be said to be absolute." *Id*.

Furthermore, the Court has ruled that a legislature may lawfully establish a presumption of viability at some benchmark and impose on physicians the burden of proving non-viability. *Webster*, 492 U.S. at 513-20. Viability is a fact question, not a question of constitutional law. If it is to play a role in abortion jurisprudence, legislatures are best equipped to define that role in a way that accounts for the rights and interests of everyone.

## CONCLUSION

To arbitrarily disparage some rights by inventing liberties for abortionists to infringe absolute rights of life and limb is to exceed the purposes of government, and thus to act contrary to law. For these reasons, this Court should make clear that abortionists are not immune from criminal and civil liability for actions taken before viability.

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**CERTIFICATE OF SERVICE**