NO. 19-2690

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LITTLE ROCK FAMILY PLANNING SERVICES, *et al.*,

Plaintiffs-Appellees,

v.

LESLIE RUTLEDGE, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Arkansas
No. 4:19-CV-00449-KGB, Hon. Kristine G. Baker

BRIEF OF AMICUS CURIAE JUSTIN BUCKLEY DYER, PH.D., IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF AMICUS

Amicus curiae, Professor Justin Buckley Dyer, is a scholar of constitutional law, political science, and history, who researches, teaches, and writes about the history of abortion law. Amicus is committed to preserving the correct jurisprudential principles underpinning abortion law and the United States Constitution, and to reconciling aberrant caselaw to the nation's historic commitment to recognizing and legally protecting unborn human life.[1]

STATEMENT OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus curiae states that (i) no party's counsel authored the brief in whole or in part, (ii) no party or party's counsel contributed money to fund preparing or submitting this brief, and (iii) no person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

INTRODUCTION

"Who controls the past controls the future. Who controls the present controls the past."[2] Around 1970, a law professor named Cyril Means set out to do just that: to write a new legislative history of abortion statutes that would reveal "for the first time" that the true purpose of these laws was only to protect pregnant women and

[1] Counsel for Appellants and Appellees consent to the filing of this brief.
[2] GEORGE ORWELL, *1984* 33 (1949).

not to protect the lives of unborn human beings.[3] Means, who also served as legal counsel for the National Association for the Repeal of Abortion Laws (NARAL), touted his "original contribution" to the legal history of abortion and soon published another article relaying a "story, untold now for nearly a century," that English and American common law had for centuries recognized a right to elective abortion.[4] The upshot of Means's history was clear: the U.S. Supreme Court should hold in the percolating cases of *Doe v. Bolton* and *Roe v. Wade* that elective abortion was a common-law liberty and therefore the government may not restrict abortion to protect unborn human life.

Means's revised history was wrong; but it took root. The Supreme Court cited Means's writings seven times in its opinion in *Roe*. *Roe v. Wade*, 410 U.S. 113, 132 n.21, 134 n.22, 135 n.26, 139 n.33, 148 n.42, 151 n.47 (1973). The Supreme Court's takeaway from Means's legal history was that abortion before "quickening"—the point at which a mother can feel her unborn baby's movement—historically was not an indictable offence at common law, but that it was questionable whether abortion after quickening had ever been established as a crime at common law. *Roe*, 410 U.S. at 132-33. Blackmun summarized: "At least with respect to the early stage of pregnancy, and very possibly without such limitation, the opportunity to make this choice [to

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[3] JUSTIN BUCKLEY DYER, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING 107 (2013).

[4] Justin Dyer, *Roe v. History: How the U.S. Supreme Court Falsified the Record of Legislation Protecting Life*, Touchstone Magazine, Jan.–Feb. 2014.

procure an elective abortion] was present in this country well into the 19th century." *Roe*, 410 U.S. at 140-41. The *Roe* opinion then set forth a quickening-inspired trimester framework for abortion regulations, which the Court later modified in *Planned Parenthood v. Casey* and the Court adopted a new "viability" framework. Cyril Means's flawed historical foundation for a new constitutional abortion regime laid the legal groundwork for these developments.

The errors in Means's account were egregious. No court in England or America had ever considered abortion to be a common-law liberty. And when the Fourteenth Amendment, protecting fundamental personal liberties from deprivation by the states, was ratified, 36 states and territories had statutes prohibiting abortion—many from the onset of pregnancy and several classifying abortion as manslaughter or murder. Protection for unborn human beings was thus undoubtedly recognized in 1868, at the time of the Fourteenth Amendment's ratification, in which a right to abortion is purportedly found.

This mistake has pervaded abortion cases, preventing states from enacting sensible legal protections for unborn life. The district court's decision below shows the absurdity of the caselaw creep: the "viability" framework derived from "quickening" is now, ironically, being used to strike down Arkansas's 18-week law, even though *Roe* itself recognized that quickening "appear[s] usually from the 16th to the 18th week of pregnancy." *Roe*, 410 U.S. at 132, *modified by Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). It is past time for courts to correct the

pseudohistory and permit states to enact measures protecting unborn life, which can now be confirmed far earlier by advances in embryology and medical technology, such as ultrasounds. Protecting unborn life was always in principle part of English and American common law—regardless of scientific tools available—as an accurate legal history makes clear.

This brief serves to provide this Court with the accurate legal history necessary for correcting the record and restoring abortion jurisprudence to the proper understanding of common law and fundamental liberties. Because the injunction on Arkansas's 18-week law rests on an erroneous prop that has been further distorted over time, it should be vacated.

ARGUMENT

I. The district court relied on a flawed historical account to wrongly conclude that states may not protect unborn life before viability.

The district court, bound by *Roe v. Wade*, fixated on *Roe*'s discussion of viability, but took it further than even *Roe* requires. Seven times, the district court cited *Roe* to insist that states' concerns for the unborn life are constitutionally invalid. *See Roe*, 410 U.S. at 84, 85, 87, 92, 95, 100, 103. This singular focus on "viability" as the spontaneous (though ambiguous) point at which a state may protect unborn life misreads centuries of English and American common law, which protected unborn life—to the point of criminalizing abortion—from the first instance of reliable

evidence ("quickening") that a woman was pregnant. Even *Roe* put quickening at around 16 or 18 weeks of pregnancy. *Id.* at 132.

Over the decades, quickening's significance has been muddled. *Roe* posited that, in contrast to the historic marker of quickening, viability may occur around "seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id.* at 160. *Casey* acknowledged that "advances in neonatal care have advanced viability to a point somewhat earlier." *Casey,* 505 U.S. at 860. Neither of those references takes into account that fetal movement—historically the evidence of life—occurs much earlier than viability.

Much of this confusion stems from flawed historical references that made their way into *Roe*. In constitutional law, courts should "look[] to history for guidance." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019). If the Establishment Clause "must be interpreted 'by reference to historical practices and understandings,' " the Fourteenth Amendment should be as well. *Id.* (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 566 (2014)). But the history courts look to must, of course, be accurate. The history the district court relies on is not: it omits extensive legislative history, common-law understanding, and scientific consensus.

A. Means's historical research was used, in part, to find a right to abortion in *Roe v. Wade*, though the Court questioned its validity.

The Supreme Court's opinion in *Roe* included a lengthy discussion of history. The Court "inquired into, and . . . place[d] some emphasis upon, medical and

medical–legal history" as well as "what that history reveals about man's attitudes toward the abortion procedure over the centuries." *Roe*, 410 U.S. at 117. Cyril Means was the most cited historian of all, the Court referencing his work seven times. *Id.* at 132 n.21, 134 n.22, 135 n.26, 139 n.33, 148 n.42, 151 n.47. He also served as legal counsel for NARAL.[5] Means's stated goal in developing this scholarship was to cast a new vision for a constitutional abortion regime.[6]

Means's scholarship began with a 1968 article published in the *New York Law Forum* arguing that the only historically demonstrable purpose of state anti-abortion statutes in the nineteenth century was to protect the lives and health of pregnant women and not to protect the lives of unborn human beings.[7] Means later described this article as an "original contribution" to the historical discussion.[8]

In 1971, Means published another article in the *New York Law Forum*, arguing that abortion was a traditional common-law liberty in Anglo-American jurisprudence until its prohibition by state statutes in the mid-nineteenth century.[9] He proclaimed that the article made "a *different* contribution to the history of this subject."[10] And he

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[5] DYER, *supra* note 4, at 107.
[6] *See id.* at 106–09.
[7] Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1958: A Case of Cessation of Constitutionality*, 14 N.Y. L. FORUM 411 (1968).
[8] Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral Right or Ninth Amendment Right About to Rise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?* 17 N.Y. L. FORUM 335–36 (1971).
[9] *Id.* at 335–410.
[10] *Id.* at 336.

purported to "reveal[] the story, untold now for nearly a century, of the long period which English and American women enjoyed a common-law liberty to terminate at will an unwanted pregnancy."[11] This liberty of elective abortions, Means claimed, persevered "from the reign of Edward III to that of George III . . . . in England, from 1327 to 1803; in America from 1607 to 1830."[12] It was only when states began enacting abortion statutes in the mid-1800s, Means argued, that suddenly this longstanding common-law right purportedly was forgotten or ignored.[13] In reality, no court in England or America ever considered abortion (even when not indictable) to be a common-law liberty.[14]

The two novel (and erroneous) tenets of Means's narrative—that abortion was a common-law liberty and that the sole purpose of abortion restrictions was to protect women and not unborn human life—appeared to rest on, if anything, the fact that laws against abortion historically did not punish abortions prior to the fetus becoming "quick"—or at least did not prosecute to the same extent as with post-quickening abortions. This distinction, Means argued, indicated that the "demonstrable legislative purpose behind these statutes was the protection of pregnant women from the danger to their lives posed by surgical or potional abortion, under medical conditions then

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[11] *Id.*
[12] *Id.*
[13] *See generally* Means, *supra* note 10.
[14] DYER, *supra* note 5.

obtaining."[15] In other words, according to Means, the dividing line at "quickening" was used to separate the less risky early abortions from the more medically dangerous abortions later in pregnancy. Either way, under this theory, the historic legal restrictions on abortion only ever turned on concerns about safety of the abortion procedure for women, not concern for fetal life.

Counsel for Norma McCorvey cited this particular theory and Means's research at oral argument in *Roe*.[16] The Supreme Court relied on this account, concluding that at our nation's founding "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today." *Roe*, 410 U.S. at 140. Oddly enough, at the same time, the Court recognized weakness in this historical account, noting only that there was "*some* scholarly support" for the view that the "original purpose" of state anti-abortion statutes was solely to protect women. *Id.* at 151 (emphasis added). The *Roe* majority called it a "claim"—but did not purport to accept—the idea that the quickening distinction "tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception." *Id.* at 151–52. The Court was right to be wary and wrong to countenance Means's flawed research.

[15] Means, *supra* note 10, at 335.
[16] Transcript of Oral Argument, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

B. Means's research was incorrect and intentionally incomplete, omitting significant legislative history and medical consensus.

Means's "original contribution" and never-before-told "story" were demonstrably false.[17] Means's articles are betrayed by both historical evidence of common law on abortion, and historical evidence of the scientific understanding of human life.[18] Even Means conceded in his 1968 article that it was a "common assumption" that the unborn child's life was also an object of protection.[19] The principles underlying common law on abortion were actually: (i) after a human being comes into existence, his or her willful destruction is a grave crime, and (ii) evidence of the grave crime—including evidence that the human being was alive at the time of the abortive act—is required.[20] Both of those principles value and depend on the protection of unborn human life.

Both legislative history and historical medical understanding betray Means's two propositions. The contemporaneous enactment of abortion restrictions by most states around the same time they ratified the Fourteenth Amendment's guarantees of personal liberties shows that the prevalent understanding of common law was decidedly *not* that it included liberty to terminate life in the womb. The contemporaneous focus on embryonic science and maternal-fetal medicine shows that

[17] Means, *supra* note 10, at 335–36.
[18] DYER, *supra* note 4, at 116–17.
[19] *Id.* at 107.
[20] *Id.* at 115.

nineteenth-century laws restricting abortion *were* motivated, at least in part, by a desire to protect fetal life.

1. States throughout the nineteenth century intentionally passed laws protecting unborn life, and saw no conflict with the Fourteenth Amendment.

Throughout the nineteenth century, states passed statutes codifying common-law restrictions on abortion, showing in the laws themselves and the legislative history a desire to protect unborn children. Ohio, for example, in 1867, enacted legislation eliminating the distinction based on quickening and attaching criminal penalties to elective abortion from any point of embryonic or fetal development.[21] A key legislative report described abortion as "child-murder" and noted that the best available scientific evidence—from an American Medical Association publication—suggested that a "foetus in utero is alive from the very moment of conception."[22] The legislature also cited the 1803 treatise *Medical Ethics* by English physician Thomas Percival, noting that "To extinguish the first spark of life . . . is a crime of that same nature, both against our Maker and society, as to destroy an infant, a child, or a man."[23] This evidence leaves no doubt that states regarded unborn life as such and intentionally moved to protect it.

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[21] DYER, *supra* note 4, at 106 (internal citations omitted).
[22] *Id.* at 111 (internal quotation marks omitted).
[23] *Id.* (internal quotation marks omitted).

In the same legislative session, Ohio ratified the Fourteenth Amendment, in which *Roe* later grounded the abortion right of privacy. A district court considering a legal challenge to Ohio's abortion restrictions a century later noted the implausibility of legislators ratifying an amendment protecting fundamental rights of personal liberty in the Fourteenth Amendment while, at the same time, enacting abortion restrictions that violated those essential rights. *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970). The logical conclusion is that Ohio recognized no common-law liberty to elective abortion in the first place. *See id.* Going one step further, the district court noted that "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it." *Id.* at 746–47. In other words, *Roe*'s discovery (or "rediscovery") of a fundamental abortion liberty could not have been validly rooted in the Fourteenth Amendment, because the Fourteenth Amendment was well understood at the time of ratification to coexist with widespread statutes outlawing elective abortion.

Indeed, Ohio was by no means an outlier. In a comprehensive analysis of nineteenth-century abortion statutes, Professor James Witherspoon concluded that, "[a]t the end of 1868, the year in which the [F]ourteenth [A]mendment was ratified, thirty of the thirty-seven states had such statutes [putting common-law rules about abortion into statutory form], including twenty-five of the thirty ratifying states, along

with six territories."[24] Twenty-seven of those states prohibited abortion attempts before quickening, eight of the states classified abortion as manslaughter, and the New Mexico territory deemed successful abortion to be murder.[25] *See also Casey*, 505 U.S. at 952 (Rehnquist, C.J., dissenting) ("[I]n 1868, at least 28 of the then–37 States and 8 Territories had statutes banning or limiting abortion") (citing J. MOHR, ABORTION IN AMERICA 200 (1978)). When states affirmed equal liberties to all persons in the United States by ratifying the Fourteenth Amendment, they very much considered unborn lives to be deserving of legal protections—even from conception.

2. Widespread medical consensus during the nineteenth century confirmed the existence of human life from conception.

There is more. Many of the first statutory abortion laws aimed at protecting unborn children were lobbied for by physicians and medical experts. In 1857, the American Medical Association appointed a Committee on Criminal Abortion, which lamented a prevalent "belief, even among mothers themselves, that the foetus is not alive til after the period of quickening."[26] Concerned that the public was ignorant of the facts of embryology, a group of nineteenth-century physicians working through

[24] James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L. REV. 33 (1985).
[25] *Id.* at 33 n.15; 34 n.18, 42 & n.35.
[26] American Med. Ass'n, 12 TRANS. OF THE AM. MED. ASS'N 75 (1859).

the American Medical Association argued that the quickening distinction should be abandoned in state law because it is morally irrelevant.[27]

In 1865, the American Medical Association recognized Dr. Horatio Storer's essay as "the best short and comprehensive tract calculated for circulation among females, and designed to enlighten them upon the criminality and physical evils of abortion."[28] Dr. Storer's prize-winning essay offers clear evidence that one motivation for the American Medical Association's advocacy of stricter abortion statutes was the scientific evidence that "the foetus in utero is *alive* from the very moment of conception,"[29] combined with the belief that the "willful[sic] killing of a human being, at any stage of its existence, is murder."[30] The essay was later published as a book and went through four editions, both before and after ratification of the Fourteenth Amendment.

In a textbook on criminal abortion published in 1868, Dr. Storer maintained that the "whole question of the criminality of the offense [abortion] turns on this one fact,—the real nature of the foetus *in utero*. If the foetus be a lifeless excretion, however soon it might have received life, the offence is comparatively as *nothing*."[31]

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[27] *See generally* FREDERICK N. DYER, THE PHYSICIANS' CRUSADE AGAINST ABORTION (2005).
[28] *Id.* at 87.
[29] HORATIO ROBINSON STORER, WHY NOT? A BOOK FOR EVERY WOMAN, 28 (1866).
[30] *Id.* at 29 (quoting HORATIO R. STORER, ON CRIMINAL ABORTION IN AMERICA 5 (1860)).
[31] HORATIO ROBINSON STORER & FRANKLIN FISKE HEARD, CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW 9 (1868).

But "if the foetus be already, and from the very outset, a human being alive, however early its stage of development, and existing independently of its mother, though drawing its sustenance from her, the offence becomes, in every stage of pregnancy, MURDER."[32] Thus one of the central aims of the abortion-law movement of the nineteenth century, led by scientists and physicians, was emphatically to protect the lives of unborn human beings. In describing the physicians' opposition to abortion, Dr. Storer referred specifically to the physicians' belief in the "sanctity of foetal life" as the impetus.[33]

3. The "quickening" distinction further undermines Means's arguments and supports Arkansas's 18-week law.

The contradictions between historical evidence and Means's account extend even to a more granular level. Means's focus on the supposed significance of quickening obfuscated the important point that quickening was always a proxy for initial evidence of life. The quickening distinction was never an indicator that unborn life was not at the heart of abortion laws; to the contrary, quickening was used as confirmation of unborn life's existence. In state courts in the nineteenth-century, quickening was sometimes deemed the evidentiary starting point for any abortion prosecution at common law, because it provided the first physical proof of new life. *See, e.g.*, *Commonwealth v. Parker*, 50 Mass. 263 (1845); *State v. Cooper*, 22 N.J.L. 52 (Sup.

[32] *Id.* at 9–10.
[33] STORER, *supra* note 31, at 23.

Ct. 1849); *Abrams v. Foshee*, 3 Iowa 274 (1856). Quickening is relevant in such cases because it provided evidence that a life in the womb had ended. With quickening typically presenting around the "16th to the 18th week of pregnancy," our nation's long history unequivocally supports an 18-week limit.[34] *Roe*, 410 U.S. at 132.

As science and medical knowledge advanced during the 1800s, quickening made less sense as an indicator. The quickening distinction was abandoned by most American jurisdictions by the end of the nineteenth century, an outmoded product of "both pragmatic and metaphysical influences."[35] Pragmatic because, before advent of ultrasounds and other measures, feeling the unborn child move was the only sure proof of human life in the mother's womb. Convictions for abortion required proof that the unborn child was alive at the time and thus that the abortion was the cause of death.[36] Fetal movement as the indicator of life was no longer sensible as earlier means of confirming pregnancy developed. Influences to abandon the quickening distinction were also metaphysical, because there had been a lingering ancient theory

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[34] *See also First Fetal Movement: Quickening*, AMERICAN PREGNANCY ASSOCIATION, https://americanpregnancy.org/while-pregnant/first-fetal-movement/(last visited Nov. 1, 2019) ("Some moms can feel their babies move as early as 13-16 weeks" of pregnancy); Mayo Clinic Staff, *Pregnancy Week by Week, Fetal Development: 2nd Trimester*, MAYO CLINIC https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/fetal-development/art-20046151 (last visited Nov. 1, 2019) ("18 weeks after conception, you might be able to feel your baby's movements (quickening)").

[35] JOHN KEOWN, ABORTION, DOCTORS AND THE LAW 3 (2002).

[36] FRANCIS WHARTON & MORETON STILLÉ, TREATISE ON MEDICAL JURISPRUDENCE 346–355, 273–277 (1855).

from medieval times and the age of Aristotle that a distinct human being comes into existence once movement is detected ("theory of animation").[37] Along these lines, Blackstone had referenced legal protection "as soon as an infant is able to stir in his mother's womb."[38] This theory of life, too, was obsolete long before *Roe*, as embryonic science advanced.

Legislators and physicians abandoned the quickening distinction in the nineteenth century, based on deeper medical knowledge and signaling a firm conviction that one should not deliberately destroy innocent human life. When states in the nineteenth century began replacing common-law rules about abortion with legislation, they frequently discarded the quickening distinction and made abortion or attempted abortion a statutory crime throughout pregnancy. The motive to protect unborn life was plain. For example, after the Massachusetts Supreme Court held in 1845 that attempted pre-quickening abortion was "not punishable at common law"—while noting that pre-quickening abortion was "offensive to good morals and injurious to society"[39] (*Commonwealth*, 50 Mass. at 268)—the Massachusetts legislature passed a statute making it a crime to attempt to "procure the miscarriage of any woman" irrespective of quickening.[40] When a New Jersey court held that attempted

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[37] DYER, *supra* note 4, at 114–15.

[38] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 117–18 (Philadelphia: R. Welsh, 1902–1915).

[40] DYER, *supra* note 4, at 115 (internal citations omitted).

pre-quickening abortion was not indictable at common law (*State,* 22 N.J.L. at 54), the New Jersey legislature passed a statute making it a crime to attempt to "procure the miscarriage of a woman then pregnant with child" irrespective of quickening.[41] Similarly, when an Iowa judge held in an 1856 case that that a statutory prohibition of killing "any human being, with malice aforethought" was inapplicable in the case of abortion before quickening, the Iowa legislature passed a statute banning "foeticide" that turn on quickening.[42] *Abrams*, 3 Iowa at 278.

Roe itself recognized that abortions before quickening were widely considered criminal offenses. *Roe*, 410 U.S. at 136 (referencing a statute that "made abortion of a quick fetus . . . a capital crime . . . [and] provided lesser penalties for the felony of abortion before quickening"). The Court noted that "Connecticut, the first State to enact abortion legislation, adopted in 1821 [a law] related to a woman 'quick with child'" and made "[a]bortion before quickening . . . a crime . . . in 1860." *Id.* at 138 (citations omitted). As early as 1828, "New York enacted legislation . . . barring destruction of an unquicken[e]d fetus as well as a quick fetus, . . . the former only a misdemeanor, but the latter second-degree manslaughter." *Id.* This shows regard and legal protection for life from conception, and further undercuts Means's propositions.

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[41] LUCIUS ELMER, A DIGEST OF THE LAWS OF NEW JERSEY 177–78 (2nd ed. 1855).
[42] DYER, *supra* note 4, at 116 (internal quotation marks omitted).

C. Despite these critical flaws, Means's historical view has been perpetuated, leading to confusion in the courts.

Roe rested heavily on its view of common law, informed by Means's writings, but missed the crucial truth that, all along, prohibitions on abortion regarded unborn life. The Court discussed the distinction between laws regulating abortion before and after "quickening" and recognized that the distinctions "appear[ ] to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins." *Roe*, 410 U.S. at 133. Movement in the womb indicated "animation," that is, it confirmed that the human being was full of life. *Id.* At the same time, prevailing theology and canonical law, fixed animation at between 40 and 80 days. *Id.* at 134. Regardless, the Court recognized that "'quickening'—the first recognizable movement of the fetus in utero, appear[s] usually from the 16th to the 18th week of pregnancy." *Id.* at 132. This alone should support the constitutionality of Arkansas's 18-week law.

Yet somehow the *Roe* majority opinion alleged that Means's 1971 article "makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." *Id.* at 136. The opinion also posited a "sharp[] dispute[]" over "the contention that a purpose of these [nineteenth-century state] laws, when enacted, was to protect prenatal life." *Roe*, 410 U.S. at 151. The Court also noted an "absence of legislative history," but ultimately hinted agreement that "most state laws were designed solely to protect the

woman." *Id.*. The opinion cites two Means articles as the scholarly support for the view that the sole legislative purpose of nineteenth-century abortion statutes was the protection of women. *Id.* at 151 n.47.

- This error was perpetuated when the two central claims of Means's research were incorporated into prominent amici curiae briefs signed by hundreds of professional historians in *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989) and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) — despite the claims having been discredited by academic research on this topic. Justice Rehnquist's four-justice dissent in *Casey* detailed some of the key errors in the unfounded claim that "the historical traditions of the American people . . . support the view that the right to terminate one's pregnancy is 'fundamental'" 505 U.S. at 839–40: "The common law which we inherited from England made abortion after 'quickening' an offense."
- "At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace."
- "By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books."
- "21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when Roe was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother."

Casey, 505 U.S. at 952 (Rehnquist, C.J., dissenting) (citations omitted).

Given this historical record, "it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as 'fundamental' under the Due Process Clause of the Fourteenth Amendment." *Id.* at 952–53 (Rehnquist, C.J., dissenting).

II. Even with *Roe*'s inaccurate historical underpinnings, the 18-week law should stand.

The district court's order here shows why the distortion of our nation's history matters. Preventing states from enacting sensible regulations to protect prenatal life frustrates the long-honored common-law protections for life in the womb. It also contravenes *Roe*'s own findings that unborn life was protected at quickening. And, it contradicts the undeniable evidence that the Fourteenth Amendment was widely understood by the people who ratified it to be entirely compatible with laws restricting abortion.

The injunction in this case invalidates a law protecting unborn life at the very point at which *Roe* itself acknowledged that common law did so. *Roe*, 410 U.S. at 132. It is based on a misunderstanding of scientific and legal history. Our nation's common law tradition lends no support to stripping states of the ability to enact reasonable protections for life in the womb.

CONCLUSION

Common law, statutory law, history, and science all confirm that abortion restrictions are properly based on consideration for protecting the life of the child. Under any correct reading—including *Roe*'s own description of "quickening" and its significance—an 18-week limit on abortion is permissible as consistent with long-established common law and deep-rooted understanding of personal liberty and fundamental rights. This Court should vacate the injunction and use the opportunity to ask the U.S. Supreme Court to revisit the grievous error that has infected more than four decades of jurisprudence.

Respectfully submitted,

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November 4, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,849 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Garamond.

Pursuant to Local Rule 28A(h)(2), I also certify that this brief has been scanned for viruses utilizing the most recent version of a commercial virus scanning program, Traps Version 4.1.2., and is virus-free.

Dated: November 4, 2019

/s/ Kevin H. Theriot
Kevin H. Theriot
Attorney for Amicus Curiae
Justin Buckley Dyer, Ph.D.

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send a notification of such filing to CM/ECF participants.

/s/ Kevin H. Theriot
Kevin H. Theriot
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