

No. 19-1392

---

---

In The  
**Supreme Court of the United States**

---

---

THOMAS E. DOBBS, M.D., M.P.H., IN HIS OFFICIAL  
CAPACITY AS STATE HEALTH OFFICER OF THE  
MISSISSIPPI DEPARTMENT OF HEALTH, et al.,

*Petitioners,*

v.

JACKSON'S WOMEN'S HEALTH ORGANIZATION,  
ON BEHALF OF ITSELF AND ITS PATIENTS, et al.,

*Respondents.*

---

---

**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fifth Circuit**

---

---

**BRIEF OF AMICI CURIAE  
THE CENTER FOR MEDICAL PROGRESS  
AND DAVID DALEIDEN  
IN SUPPORT OF PETITIONERS**

---

---

HARMEET K. DHILLON  
MARK P. MEUSER  
DHILLON LAW GROUP, INC.  
177 Post St., Ste. 700  
San Francisco, CA 94108  
(415) 433-1700

CHARLES S. LIMANDRI  
*Counsel of Record*  
PAUL M. JONNA  
JEFFREY M. TRISSELL  
FREEDOM OF CONSCIENCE  
DEFENSE FUND  
P.O. Box 9520  
Rancho Santa Fe, CA 92067  
(858) 759-9930  
cslimandri@limandri.com  
*Counsel for Amici Curiae*

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	5
1. The People have an interest in protecting infants in the womb who are old enough to be trafficked for body parts .....	5
1.1. The children that Mississippi seeks to protect with a pre-viability prohibition are the same children most at risk of human trafficking for experimentation.....	7
1.2. The burdens of human trafficking of aborted infants disproportionately fall on minority communities .....	12
2. Human infants, born or <i>in utero</i> , have Equal Protection interests, regardless of prematurity or “pre-viability” .....	15
2.1. Federal law and the laws of 38 States recognize the equal constitutional rights of infants in the womb and premature infants, but these same infants receive no State protection from profit-driven abortion businesses .....	15
2.2. The unequal treatment of “pre-viability” infants entrenches equal protection violations of viable infants .....	18

## TABLE OF CONTENTS—Continued

	Page
3. This Court does not deny the People’s interests in protecting infants in the womb pre-viability .....	19
3.1. <i>Vuitch, Roe, Webster, Casey, and Gonzales</i> all recognized the People’s interest in protecting infants in the womb to the degree—but only to the degree—the question was properly before the Court .....	19
3.2. The Court’s old abortion precedents are inapposite and unworkable for addressing the new facts and questions presented here.....	21
CONCLUSION.....	22

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Box v. Planned Parenthood of Indiana &amp; Kentucky, Inc., 139 S. Ct. 1780 (2019)</i> .....	12
<i>Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010)</i> .....	21
<i>Gonzales v. Carhart, 550 U.S. 124 (2007)</i> .....	3, 6, 19, 20, 21
<i>Levy v. Louisiana, 391 U.S. 68 (1968)</i> .....	17
<i>Planned Parenthood of Greater Texas Fam. Plan. &amp; Preventative Health Servs., Inc. v. Kauffman, 981 F.3d 347 (5th Cir. 2020)</i> .....	6
<i>Planned Parenthood v. Casey, 505 U.S. 833 (1992)</i> .....	18, 19, 20, 21
<i>Roe v. Wade, 410 U.S. 113 (1973)</i> .....	12, 19, 20, 21
<i>Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970)</i> .....	21
<i>United States v. Palmer, 16 U.S. 610 (1818)</i> .....	17
<i>United States v. Vuitch, 397 U.S. 1061 (1970)</i> .....	19, 20

## TABLE OF AUTHORITIES—Continued

	Page
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997) .....	6
<i>Webster v. Reproductive Health Services</i> , 492 U.S. 490 (1989) .....	19, 20, 21
 CONSTITUTIONAL PROVISIONS	
U.S. Const., amend. XIII § 1 .....	3, 11
U.S. Const., amend. XIV § 1.....	3, 11, 16, 17, 21
 STATUTES & RULES	
1 U.S.C. § 8(a).....	15
18 U.S.C. § 1841(d), (a)(1) .....	15
26 U.S.C. § 501(c)(3).....	1
42 U.S.C. § 289g-2 .....	1, 7
S. Ct. R. 37.3(a) .....	1
S. Ct. R. 37.6 .....	1

**INTEREST OF *AMICI CURIAE***<sup>1</sup>

*Amici Curiae* are The Center for Medical Progress, Inc. (“CMP”), a 501(c)(3) non-profit investigative reporting and citizen journalism organization that monitors and reports on medical ethics and advances with a focus on issues impacting human dignity; and David Daleiden, CMP’s founder and president.

CMP and Daleiden are responsible for the 2015 undercover video series documenting the harvesting and sale of aborted fetal body parts at major abortion clinics across the country. *Amici’s* investigative reporting exposed illegal transfers of aborted human fetal tissue in violation of 42 U.S.C. § 289g-2, coercion and abuse of pregnant patients through violations of informed consent and non-medical changes to patient treatment, and the use of illegal partial-birth abortions and even infanticide in the trafficking of later-gestation human fetuses for experimental use.

*Amici’s* undercover videos with Planned Parenthood leadership identified the criminal companies DaVinci Biosciences and DV Biologics, who admitted guilt for illegally selling human fetal tissue for valuable consideration from abortions at Planned Parenthood in southern California and were shut down in a

---

<sup>1</sup> All parties have consented to the filing of this *amicus* brief through the filing of blanket consents pursuant to Rule 37.3(a). In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* or its counsel made a monetary contribution intended to fund the preparation and submission of this brief.

\$7.8 million settlement with the Orange County District Attorney. The OCDA credited *amici's* reporting with prompting the successful prosecution. *Amici's* reporting also established violations of medical ethics and standards at Planned Parenthood Gulf Coast in Texas, which the U.S. Court of Appeals for the Fifth Circuit described as a willingness to use illegal partial birth abortions to sell fetal body parts. *Amici's* reporting is also responsible for new regulatory reforms and increased public scrutiny of government-funded experimental research projects on aborted human fetuses.

*Amici* are uniquely situated to assist the Court in assessing the question presented in this case due to the facts uncovered by *amici's* reporting that demonstrate significant State interests in limiting, at minimum, some “pre-viability” elective abortions.

---

◆

## SUMMARY OF ARGUMENT

*“We’ve been very good at getting heart, lung, liver, because we know, so I’m not gonna crush that part—I’m gonna basically crush below, I’m gonna crush above, and I’m gonna see if I can get it all intact.”<sup>2</sup>*

*“I had eight cases yesterday, and I knew exactly what we needed, so I kind of looked at the list and I said, alright, this 17-weeker has*

---

<sup>2</sup> Video timestamp 12:46:55 to 12:47:05, The Center for Medical Progress, FNND0569\_20140725124533.AVI (Jul. 25, 2014). Available at <https://youtu.be/rGqTKfxirZs>.

*eight LAMS [laminaria dilators] and this one—so I knew which were the cases that were probably more likely to yield what we needed, and I made my decisions according to that, too.”<sup>3</sup>*

—Dr. Deborah Nucatola, Senior  
Director of Medical Services,  
Planned Parenthood Federation of America

1. By 15 weeks’ gestation, the human infant in the womb unmistakably manifests “the human form” identical to any other member of our community. *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007). Ironically, it is precisely from this point when the fetus becomes most recognizably a fellow human being, that the fetuses vulnerable to abortion become most useful as an experimental biologic “resource.” Even though four-month-old infants in the womb move, kick, suck their thumbs, hiccup, and demonstrate a readily discernable heartbeat and brainwaves, App. 65a,<sup>4</sup> and even though the Constitution guarantees that “neither slavery nor involuntary servitude” shall exist in America nor that any person be deprived of life without due process of law, U.S. Const., amends. XIII § 1, XIV § 1, these same children can be routinely killed through live dismemberment abortions or trafficked and sold for experimental use. These abortions already disproportionately affect

---

<sup>3</sup> *Ibid.*, 13:54:00 to 13:54:17, FNND0569\_20140725134226.AVI.

<sup>4</sup> Katrina Furth, *Fetal EEGs: Signals from the Dawn of Life*, ON POINT SERIES 28 (Nov. 2018), <https://lozierinstitute.org/fetal-eegs-signals-from-the-dawn-of-life/>; Winslow J. Borkowski & Richard L. Bernstine, *Electroencephalography of the Fetus*, 5(5) NEUROLOGY 362–65 (May 1, 1955).



poor and minority communities, and some laboratories specifically set quotas for aborted fetuses based on race.

2. Moreover, the current equal protection violations to which a four-month-old pre-viable infant is subject are staggering. The vast majority of States in the Union, including Mississippi, plus the United States federal government, recognize pre-viability unborn children as human beings under the law equal to any other, for purposes of protection from physical violence and injury. Yet, due to this Court's antiquated, 1900s-era abortion precedents, absent laws like Mississippi's, unborn-victims-of-violence laws do not protect the very same unborn victims from the violence of predatory businesses that operate with the explicit purposes of killing them by abortion and selling them for experimentation. In fact, the widespread and unlimited practice of the "abortion exception" for "pre-viability" unborn victims of violence actually entrenches equal protection violations for born-alive "*post-viability*" infant victims, with tragic and lethal consequences as seen in the Kermit Gosnell case in Philadelphia, PA.

3. While this Court's old abortion precedents have admittedly engendered extreme consequences, this Court itself has never denied the compelling interest that the People of the United States have in promoting the life and liberty of the youngest and most vulnerable Americans, even "pre-viability." Indeed, every time a State has placed this interest squarely in front of this Court and this Court has thoroughly examined it, this Court has acknowledged and endorsed some significant accommodation of the interest. To the

extent that any of this Court’s old abortion cases are still even operative in such a way as to conflict with this interest, it must be recognized that they are inapposite to determining the constitutional interests at stake here.

---

◆

**ARGUMENT**

**1. The People have an interest in protecting infants in the womb who are old enough to be trafficked for body parts.**

*“A lot of people want intact hearts these days because they’re looking for specific nodes—AV nodes, SA, I was like, Wow, I didn’t even know, good for them. Yesterday was the first time she said people wanted lungs. And then, like I said, always as many intact livers as possible.”*

—Dr. Deborah Nucatola,  
Senior Director of Medical Services,  
Planned Parenthood Federation of America<sup>5</sup>

*“If we alter our process, and we are able to obtain intact fetal cadavers, we can make it part of the budget that any dissections are this, and splitting the specimens into different shipments is this, that’s—it’s all just a matter of line items.”*

—Melissa Farrell, Director of Research,  
Planned Parenthood Gulf Coast<sup>6</sup>

---

<sup>5</sup> The Center for Medical Progress, *supra* note 2, at 12:48:14 to 12:48:31.

<sup>6</sup> Video timestamp 12:00:35 to 12:01:00, The Center for Medical Progress, FNND0569\_20150409113420.AVI (Apr. 9, 2015).

It is precisely the equal humanity of the fetus vulnerable to abortion that makes him or her valuable for scientific experimentation. One of the most ubiquitous experimental uses for aborted human fetal organs and tissue is the construction of so-called “*humanized*” mouse and rat models—immunodeficient rodents that have the fresh organs, tissues, and cells of aborted human fetuses implanted into them to grow human immune and other cellular systems inside of them for disease testing and drug development. To wit, some scientists make their lab rats more useful for experiments by pilfering the humanity of an aborted child.

This Court has already recognized the significant public interests in pre-viability regulations of abortion when “*choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life,*” and for the purpose of “*protecting the integrity and ethics of the medical profession*” so that the medical, legal, and ethical duties of medical science to human life are not confused. *Gonzales*, 550 U.S. at 157 (italics added) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)).

It is the same concerns for medical integrity, protection of unborn lives, and human dignity that

---

Available at [http://www.ca5.uscourts.gov/opinions/pub/17/17-50282-vids/FNND0569\\_20150409113420.mp4](http://www.ca5.uscourts.gov/opinions/pub/17/17-50282-vids/FNND0569_20150409113420.mp4). See also *Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 379–81 & note 8 (5th Cir. 2020) (Elrod, Jones, Smith, Willett, Ho, Duncan, Engelhardt, JJ., concurring) (discussing footage of Ms. Farrell), 386–87 (Higginson, Stewart, Costa, JJ., concurring) (concurring in relevant part).

undergird the national prohibitions on transferring aborted human fetal tissue as *quid pro quo* consideration. 42 U.S.C. § 289g-2. If a human infant *in utero* is old enough to be trafficked for his or her organs, he or she should be old enough to be protected by the State from elective abortion.

**1.1. The children that Mississippi seeks to protect with a pre-viability prohibition are the same children most at risk of human trafficking for experimentation.**

Midtrimester human fetuses at four months old and later are precisely the fetuses most in demand for experimental use. The liver, thymus, and bone marrow of an aborted infant, typically at gestational age 16 to 24 weeks, are sought for implantation into immunodeficient rodents to construct so-called “humanized mice,” a living platform hosting a cellular human immune system for disease studies and drug testing.<sup>7</sup> Midtrimester aborted fetal body parts may be ordered for scientific reasons due to the level of development of the stem cells and tissues, but may also be desirable for more practical, mechanical reasons—*e.g.*, it is somewhat easier to identify and dissect the body parts of an 18-week fetus than to do so on a much smaller 12-week fetus. In later first trimester abortions “[v]ery small

---

<sup>7</sup> J.M. McCune, et al., *Long-Term Human Hematopoiesis in the SCID-hu Mouse*, 172(4) J. EXP. MED. 1055–63 (Oct. 1, 1990), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2188599/pdf/je17241055.pdf>.

embryo-fetal parts may be apparent” but “become easier to identify thereafter.”<sup>8,9</sup> Later second-trimester infants older than 15 weeks also have larger and more developed muscular and skeletal systems so that their body parts are more likely to survive the forceps-extraction abortion procedure in one piece. In second-trimester dilation and evacuation (D&E) forceps procedures, “[m]ore frequently, the fetal body may be partially intact, and incision of the thoracic and/or abdominal wall may be required to examine the internal

---

<sup>8</sup> Maureen Paul, et al., *First-trimester aspiration abortion*, in MANAGEMENT OF UNINTENDED AND ABNORMAL PREGNANCY 149 (2009).

<sup>9</sup> Companies like Advanced Bioscience Resources and StemExpress sometimes charge \$100 to \$200 more for a first-trimester specimen than a second-trimester specimen, due to the relative difficulty and rarity of obtaining usable first-trimester tissue. See Fees for Services Schedule, StemExpress, LLC (Apr. 1, 2010), available at [https://freebeacon.com/wp-content/uploads/2015/11/All-StemExpress-Documents\\_Redacted.pdf](https://freebeacon.com/wp-content/uploads/2015/11/All-StemExpress-Documents_Redacted.pdf), p. 2; Fees for Services Schedule, Advanced Bioscience Resources, Inc. (Jan. 1, 2015), available at [https://www.centerformedicalprogress.org/wp-content/uploads/2018/09/CMP\\_ABRwhitepaper.pdf](https://www.centerformedicalprogress.org/wp-content/uploads/2018/09/CMP_ABRwhitepaper.pdf), Ex. A; Fees for Services Schedule, Advanced Bioscience Resources, Inc. (Jan. 1, 2019), available at <https://static1.squarespace.com/static/59783407e3df280fdb4cc751/t/60fe73589fb0f8527aaa94ea/1627288456766/UCSF+Organ+Procurement+Fee+Sheet.pdf>. Yet, reflective of the market demand for second-trimester body parts, ABR has repeatedly and significantly increased its prices for second-trimester specimens over the past decade, consistently far outpacing inflation. MAJ. STAFF OF S. COMM. ON THE JUDICIARY, 114TH CONG., HUMAN FETAL TISSUE RESEARCH: CONTEXT AND CONTROVERSY 114–27 (Comm. Print 2016), <https://www.govinfo.gov/content/pkg/CPRT-114SPRT22920/pdf/CPRT-114SPRT22920.pdf>.

viscera.”<sup>10</sup> Indeed, beginning around 16 weeks is when a forceps dilation and evacuation (D&E) procedure can be augmented with pharmacologic agents like Misoprostol to both open the cervix as wide as possible and force the uterus into labor, assisting the forceps extraction with a live delivery of a whole fetus. The Society of Family Planning Clinical Guidelines recommend Misoprostol administration to assist in forceps D&E extraction of the fetus, and describe the drug as acting to “initiate uterine contractions.”<sup>11</sup> “Misoprostol, increasingly used to enhance dilation before second-trimester abortion, might also increase the risk of premature fetal expulsion.”<sup>12</sup>

Recent disturbing examples of the fetuses targeted for experimental harvesting demonstrate that the “pre-viability” infants Mississippi seeks to protect with the Gestational Age Act are the same group most vulnerable for organ trafficking and experimentation. At the University of Pittsburgh, a study funded by the NIAID cut the scalps off of the heads and skin off of the backs of 5-month old aborted infants to graft onto laboratory mice and rats: “*De-identified human fetal*

---

<sup>10</sup> See Linda M. Ernst, et al., *Pathologic Examination of Fetal and Placental Tissue Obtained by Dilation and Evacuation*, 137(3) ARCH. PATHOL. LAB. MED. 326–37 (Mar. 1, 2013), available at <https://meridian.allenpress.com/aplm/article/137/3/326/193427/Pathologic-Examination-of-Fetal-and-Placental>.

<sup>11</sup> Society for Family Planning, *Cervical preparation for surgical abortion from 20 to 24 weeks’ gestation*, 77 CONTRACEPTION 308–14 (Dec. 12, 2007), [https://www.societyfp.org/\\_documents/cervical\\_prep\\_3rd\\_2007.pdf](https://www.societyfp.org/_documents/cervical_prep_3rd_2007.pdf).

<sup>12</sup> Maureen Paul, et al., *supra* note 8, at 160.

*tissues at the gestational age of 18 to 20 weeks were obtained from medically or electively indicated termination of pregnancy.*” The authors write that “Full-thickness human fetal skin was processed via removal of excess fat tissues” before stitching it onto the rodents.<sup>13</sup> Furthermore, FOIA documents recently obtained by Judicial Watch show since-cancelled government contracts with the tissue procurement firm Advanced Bioscience Resources for paired sets of aborted fetal livers and thymus at the “preferred gestational age” of “16–24 weeks,” or four to six months of pregnancy.<sup>14</sup> In a series of 24 invoices from ABR to National Institute of Allergy and Infectious Diseases (“NIAID”) to researchers over a two-year period, every single invoice billed for fetal body parts from gestational age 17 weeks or older, sometimes as old as 22 weeks.<sup>15</sup>

Admissions by Planned Parenthood leadership caught in *amici’s* undercover video reporting corroborate that human infants vulnerable to abortion at older than 15 weeks are also the most at risk for

---

<sup>13</sup> Moses T. Bility, et al., *Development of humanized mouse and rat models with full-thickness human skin and autologous immune cells*, 10 SCI. REP. 104598 (Sep. 3, 2020), <https://rdcu.be/cpWvy>.

<sup>14</sup> Available at <https://www.judicialwatch.org/wp-content/uploads/2021/03/Humanized-Mice-prod-3-00876-pgs-501-505.pdf>.

<sup>15</sup> Press Release, Judicial Watch, Judicial Watch Obtains Records Detailing NIH Purchases of Aborted Fetal Parts for “Humanized Mice” Testing (Feb. 13, 2020), <https://www.judicialwatch.org/press-releases/judicial-watch-obtains-records-detailing-nih-purchases-of-aborted-fetal-parts-for-humanized-mice-testing/>.

human trafficking for organ harvesting and experimentation. Dr. Mary Gatter, at the time the president of PFFA’s Medical Directors’ Council, described her experience selling fetal tissue to Novogenix Laboratories, LLC in southern California: “*Sometimes [the technician] would be there saying, ‘Oh, I really need liver today,’ and there would be **a 17-week patient who would be perfect.***”<sup>16</sup> Dr. Deborah Nucatola, then PFFA’s Senior Director of Medical Services, described her clinical practices for obtaining in-demand fetal body parts:

*“I had eight cases yesterday, and I knew exactly what we needed, and I kind of looked at the list and I said, alright, **this 17-weeker** has eight LAMS [laminaria dilators], and this one—so I knew which were the cases that were probably more likely to yield what we needed, and I made my decisions according to that, too.”*<sup>17</sup>

The Thirteenth Amendment to the U.S. Constitution provides that “*Neither slavery nor involuntary servitude [ . . . ] shall exist within the United States,*” amend. XIII § 1, and the Fourteenth Amendment provides that no State may “*deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,*” amend. XIV § 1. It is impossible to look at the stacks and stacks of invoices for the body

---

<sup>16</sup> Video timestamp 12:21:19 to 12:21:26, The Center for Medical Progress, FNNI0773\_20150206114947.AVI (Feb. 6, 2015). Available at <https://youtu.be/FgKTqAgokdY>.

<sup>17</sup> The Center for Medical Progress, *supra* note 4.



parts of premature or “pre-viable” infants that have been published through public records requests and not plainly recognize that in the trafficking of aborted fetuses for experimentation, human beings are being bought and sold for their usefulness to someone else’s labor. Few State interests could be more compelling than that of stamping out such vestigial barbarism completely. If a human child is old enough for his or her body parts to be sold (in violation of federal law), he or she is old enough for the State to protect from extermination by induced abortion.

**1.2. The burdens of human trafficking of aborted infants disproportionately fall on minority communities.**

At least one member of this Court has already recognized a compelling State interest in “preventing abortion from becoming a tool of modern-day eugenics.” *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring). The late Justice Ginsberg revealed in a media interview that she believed *Roe v. Wade*, 410 U.S. 113 (1973) was rooted in eugenic views: “Frankly I had thought that at the time *Roe* was decided, there was concern about population growth and particularly growth in populations that we don’t want to have too many of.”<sup>18</sup> Sadly, persistent racial disparities in many aspects of American life are realized most starkly in the racial

---

<sup>18</sup> Emily Bazelon, *The Place of Women on the Court*, THE NEW YORK TIMES MAGAZINE (July 7, 2009), <https://nyti.ms/3BJYs4r>.

disparity on induced abortion: while Black women account for less than 13% of the female population nationwide, Black women account for 28% to 34% of abortions.<sup>19</sup>

In the trafficking of aborted infants for experimental use, the burdens of research abortions to supply human fetuses fall even more disproportionately on minority communities. A recently released grant application from the University of Pittsburgh for a multi-million dollar aborted fetal kidney “distribution hub” advertises its “[i]nclusion (or exclusion) of individuals on the basis of sex/gender, race, and ethnicity” and sets out a numerical quota for 25% of the aborted fetuses to come from Black women, 50% total to come from racial minorities, and only 50% to come from white pregnancies.<sup>20</sup> Tellingly, Allegheny County, the major

---

<sup>19</sup> Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107(12) AM. J. PUB. HEALTH 1904–09 (Jul. 23, 2017), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304042>; Katherine Kortsmitt, et al., *Abortion Surveillance—United States, 2018*, 69(7) MMWR SURVEILL. SUMM. 1–29 (Nov. 27, 2020), [https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm#T5\\_down](https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm#T5_down); U.S. Census Bureau, *ACS Demographic And Housing Estimates*, <https://data.census.gov/cedsci/table?g=0100000US&tid=ACSDP1Y2018.DP05&q=ACSDP1Y2015.DP05>.

<sup>20</sup> University of Pittsburgh NIH grant application, *University of Pittsburgh as the GUDMAP Tissue Hub and Collection Site* (Nov. 6, 2015). Available at pp. 74–76, 203–05, of <https://www.centerformedicalprogress.org/wp-content/uploads/2021/07/NIH-FOIA-54074-06.07.2021-Production.pdf>.

metropolitan area that supplies Pittsburgh abortions, is nearly 80% white and less than 13% Black.<sup>21</sup>

Racially-targeted practices in harvesting aborted fetuses were also documented in *amici's* undercover reporting. In response to a question about the convenience of collecting fetuses with sickle-cell anemia genes, Melissa Farrell, Planned Parenthood Gulf Coast's Director of Research, proposed to "*collect everything from African-Americans*" receiving abortions at the clinic, targeting all Black women for fetus harvesting given that statistically some would be sickle-cell carriers, even though the clinic intake forms already identified specific carrier patients.<sup>22</sup>

---

<sup>21</sup> U.S. Census Bureau, <https://data.census.gov/cedsci/table?q=ACSDP1Y2015.DP05&g=0500000US42003&tid=ACSDP1Y2018.DP05&hidePreview=true>.

<sup>22</sup> Video timestamp 8:39:25 to 8:42:06, FNND0569\_20150409081515.AVI (Apr. 9, 2015). Available at [http://www.ca5.uscourts.gov/opinions/pub/17/17-50282-vids/FNND0569\\_20150409081515.mp4](http://www.ca5.uscourts.gov/opinions/pub/17/17-50282-vids/FNND0569_20150409081515.mp4). *Supra* note 6.

**2. Human infants, born or *in utero*, have Equal Protection interests, regardless of prematurity or “pre-viability.”**

**2.1. Federal law and the laws of 38 States recognize the equal constitutional rights of infants in the womb and premature infants, but these same infants receive no State protection from profit-driven abortion businesses.**

Federal law recognizes human infants *in utero*, and premature infants born alive, as persons under the law at any gestational age. The federal Unborn Victims of Violence Act recognizes the “child in utero” as “a member of the species homo sapiens, at any stage of development, who is carried in the womb” whose death or injury in the course of a federal crime is subject to prosecution the same as that of any born child or adult individual. 18 U.S.C. § 1841(d), (a)(1). The federal Born Alive Infants Protection Act establishes even more broadly that, for purposes of “any Act of Congress” and “any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States,” “the words ‘person’, ‘human being’, ‘child’, and ‘individual’, shall include every infant member of the species homo sapiens who is born alive at any stage of development.” 1 U.S.C. § 8(a). As of 2018, the laws of 38 States also recognized infants in the womb as protectable equal victims under other State criminal statutes—and in nearly all cases, this recognition

extended to pre-viable infants.<sup>23</sup> In summary, black letter federal law and overwhelming State law establishes that even “pre-viability” human infants are persons in contemplation of law, whether born alive or still living *in utero*.

This is consistent with the history of the Fourteenth Amendment, which establishes the State obligation and Congressional authority to protect the life and liberty of “any person” and ensure the “equal protection of the laws” to “any person within its jurisdiction.” amend. XIV § 1. Indeed, recent legal scholarship has established indisputably that the State legislatures that ratified the Fourteenth Amendment in 1865 understood and intended the words “person within its jurisdiction” to include all living human infants whether *in utero* or born alive.<sup>24</sup> Even prior to the ratification of the Fourteenth Amendment, this Court

---

<sup>23</sup> National Conference of State Legislatures, *State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women* (May 1, 2018), <https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>. Some states have begun repealing (or attempting to repeal) these laws ostensibly out of concern that an “abortion exception” indeed violates the Equal Protection Clause. *See, e.g.*, Rhode Island HR 5125 (“The Reproductive Privacy Act”), at Sec. 4 (eliminating protection for unborn “quick” children from fetal homicide), as enacted June 19, 2019, available at <https://www.billtrack50.com/BillDetail/1018806>. Whether eliminating an entire class of human being’s legal rights—out of concern for preserving the sacred cow of abortion—is constitutional, moral, and/or humane is another question altogether.

<sup>24</sup> *See* Josh Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J. L. & PUB. POL’Y 539 (2017). Available at [http://www.harvard-jlpp.com/wp-content/uploads/sites/21/2018/02/Craddock\\_FINAL.pdf](http://www.harvard-jlpp.com/wp-content/uploads/sites/21/2018/02/Craddock_FINAL.pdf).

acknowledged that the word “person” in law was a term designed to include all of humanity. In *United States v. Palmer*, 16 U.S. 610 (1818), Chief Justice Marshall explained that “every human being” and “the whole human race” was included in the words “person or persons” in federal law. *Id.* at 631–32. And in *Levy v. Louisiana*, 391 U.S. 68 (1968), this Court articulated a simple test for ensuring equal protection for marginalized persons, reasoning that so-called “illegitimate” children were not “non-persons” as they were “humans, live, and have their being,” and therefore, “clearly ‘persons’ within the meaning of the Equal Protection Clause of the Fourteenth Amendment.” *Id.* at 70.

What is not consistent with the Fourteenth Amendment’s original meaning, or especially its equal protection guarantee, is the unequal treatment of infant persons in the womb and premature born-alive persons when physical violence is done against them through professionally induced abortion. To wit, it is a crime of violence against a 19-week human infant *in utero* if an abusive partner slips Misoprostol into the pregnant mother’s drink to induce an abortion. But, if the same infant is aborted inside a Planned Parenthood using Misoprostol to obtain intact body parts for sale, the State’s only enforcement mechanism is to prosecute the sale of body parts, rather than the clinic’s attack on the child in the first place. The commercial and experimental exploitation of aborted human infants demonstrates unequivocally that “pre-viability” infants are alive, human, and have a being whose common humanity with ours, while it makes them

valuable to buy and sell, should moreover guarantee their constitutional rights to equal protection.

## **2.2. The unequal treatment of “pre-viability” infants entrenches equal protection violations of viable infants.**

Sadly and predictably, the unequal treatment of infants in the womb “pre-viability” in the context of elective abortion promotes and enables the unequal treatment of *post-viable* infants even after birth, with tragic consequences. In 2013, Dr. Kermit Gosnell was convicted in Philadelphia, PA of the murder of three post-viability infants born alive in his abortion clinic at gestational ages approximately 25 to 30 weeks.<sup>25</sup> Dr. Gosnell was also convicted of 21 counts of illegal abortions on post-viability fetuses past the limit of Pennsylvania law. The illegal and dangerous practices at Dr. Gosnell’s clinic were known of and reported by many individuals in the Pennsylvania and Philadelphia government and health care communities as far back as 1993. However, due to the State’s application of *Casey*’s “undue burden” standard and attachment to “pre-viability” abortions, all health inspections of abortion clinics, including Dr. Gosnell’s, ceased in 1995, and the numerous complaints about Dr. Gosnell’s practices went unanswered.<sup>26</sup> The State’s disregard for “pre-viability”

---

<sup>25</sup> Jon Hurdle & Trip Gabriel, *Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures*, THE NEW YORK TIMES (May 14, 2013), <https://nyti.ms/3i2DuG4>.

<sup>26</sup> *In re County Investigating Grand Jury XXIII*, Misc. No. 0009901-2008, pp. 9–13 (Ct. Com. Pl., 1st Jud. Dist. Penn., Jan.

infant lives directly enabled and covered up for Dr. Gosnell’s disregard for “post-viability” infant lives.

Similarly, the crimes of DaVinci Biosciences, LLC and DV Biologics, LLC in southern California, which illegally sold fetal organs and tissues from abortions at Planned Parenthood Orange & San Bernardino Counties, were enabled by being shielded from scrutiny due to the privileged practice of “pre-viability” abortions at Planned Parenthood.

**3. This Court does not deny the People’s interests in protecting infants in the womb pre-viability.**

**3.1. *Vuitch, Roe, Webster, Casey, and Gonzales* all recognized the People’s interest in protecting infants in the womb to the degree—but only to the degree—the question was properly before the Court.**

This Court has always shown great deference to the federal and State legislatures’ asserted interests in protecting unborn human life even when “pre-viability.” In *Gonzales*, this Court made clear that the federal Partial-Birth Abortion Ban Act’s application to protect both “pre-viability” and “post-viability” infants in the womb did not undermine its constitutionality. *See Gonzales*, 550 U.S. at 156. This Court upheld its prohibition on the intact delivery of a living human infant for

---

14, 2011). Available at <https://cdn.cnsnews.com/documents/Gosnell,%20Grand%20Jury%20Report.pdf>.



lethal purposes, due to the compelling state interest in protecting such children “in human form” and the rational basis of the state to protect women and infants from such a degradation of the medical profession. *Id.* at 145, 159–60. Similarly, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), this Court recognized the significant State interest in protecting unborn life and declared that *Roe*’s principles (particularly its “rigid” “viability” framework) must cede to the State’s interest in protecting prenatal infant lives as succeeding cases brought this State interest before the Court: “[W]e do not see why the State’s interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.” *Id.* at 517–20. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), recognized the State’s “legitimate interests in protecting prenatal life,” *id.* at 853, a proposition later developed by *Gonzales*. Yet in *Casey*, it was not necessary for the Court to fully analyze the legislature’s interest in protecting “pre-viability” infants, as a pre-viability abortion limit was not before the Court and so its analysis of the interest was undeveloped. These cases reviewing States’ interest in protecting fetal life drew their recognition of that interest from *Roe* itself, which purported to establish a balance between interests in fetal life and maternal liberty. Even this Court’s oldest abortion case, *United States v. Vuitch*, 397 U.S. 1061 (1970), accepted the State’s authority to enforce “pre-viability” prohibitions on

elective abortions, though the interest in fetal life was not directly before the Court.

**3.2. The Court’s old abortion precedents are inapposite and unworkable for addressing the new facts and questions presented here.**

Only in *Webster* and *Gonzales* has this Court been faced directly with adjudicating the State’s asserted interests in protecting human life *in utero* and “pre-viability”—core legislative interests that flow from the government’s obligations under the Fourteenth Amendment itself. (“Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.” *Steinberg v. Brown*, 321 F. Supp. 741, 747 (N.D. Ohio 1970).) Each time this Court has been called on to closely examine the State’s interest in protecting infant lives, this Court has blessed the effort. *See supra*. The inequities of *Roe* and *Casey*’s averted gaze or time-bound scope need not be perpetuated. “[*S*]tare *decisis* is not an end in itself. It is instead ‘the means by which we ensure that the law will . . . develop in a principled and intelligible fashion.’” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). To the extent that the old abortion precedents from *Roe* or *Casey* conflict with the State interests here, the State’s factual findings and interests newly developed here

render the old cases inapposite and unworkable for determining the rights and interests of the parties.



### CONCLUSION

Not all “pre-viability” prohibitions on elective abortions are unconstitutional. If a four-month old child vulnerable to abortion is old enough to be sold for organ harvesting experiments, he or she is old enough to be protected from elective abortion. This Court must uphold Mississippi’s law.

HARMEET K. DHILLON  
MARK P. MEUSER  
DHILLON LAW GROUP, INC.  
177 Post St., Ste. 700  
San Francisco, CA 94108  
(415) 433-1700

Respectfully submitted,

CHARLES S. LIMANDRI  
*Counsel of Record*  
PAUL M. JONNA  
JEFFREY M. TRISSELL  
FREEDOM OF CONSCIENCE  
DEFENSE FUND  
P.O. Box 9520  
Rancho Santa Fe, CA 92067  
(858) 759-9930  
cslimandri@limandri.com  
*Counsel for Amici Curiae*

July 2021