

No. 19-1392

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

THOMAS E. DOBBS, STATE HEALTH
OFFICER OF THE MISSISSIPPI DEPARTMENT
OF HEALTH, ET AL., PETITIONERS

v.

JACKSON WOMEN'S HEALTH
ORGANIZATION, ET AL., RESPONDENTS

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF OF *AMICUS CURIAE* DAVID BOYLE
IN SUPPORT OF PETITIONERS**

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, “Amicus”),¹ is respectfully filing this Brief in Support of Petitioners. Amicus has filed briefs (“available on request”) in various abortion-related cases at this Court, so is also filing one here, for completeness’ sake.

He is also trying to provide a perspective which shows due respect to people on both the “pro-life” and “pro-choice” sides. Indeed, this brief, while for Petitioners, has features of a brief for neither party. (Ironically, some self-styled “briefs for neither party” may not always show genuine neutrality...)

There is some good on both sides, after all: even those who respect unborn life, may admit that pro-choice advocates bring up valuable questions. E.g., what about maternal/infant mortality? rape and incest? the burden of pregnancy on women (or transgender men, or “non-binary” people, with a uterus, all a.k.a. “birthing people”), not equally shared by (cisgender) men? etc. Amicus would even like to thank both sides (this does not happen enough...) for participating in the debate, in a civil, rational manner, moving towards a better America.

Common ground may be possible. For example, even those who believe abortion can be condemned as a moral monstrosity, may also admit that not all prosecution of abortion is automatically fair or advisable. On the other hand, even those who

¹ No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission, *see* S. Ct. R. 37. Blanket permission by both parties to write briefs is filed with the Court.

generally support abortion rights may be convinced that certain abortions (e.g., late-term abortions, race-selective abortions) can legitimately be restricted by the State.

Solutions on the “extreme left” or “extreme right” may thus tend to be impractical or evil; and solutions of a more moderate nature may be more sensible. *Cf.* the film *Citizen Ruth* (Miramax Films 1996) (Laura Dern as Ruth Stoops, a promiscuous, glue-sniffing pregnant woman manipulated by both pro-choice and pro-life extremists).

True, not all extremism is bad: some things that Gandhi or Martin Luther King did (hunger strike, etc.) might be called “extreme” in their nonviolent witness towards justice. However, extremism certainly *can* be bad; and if the Court tips overly to the left or the right, and produces an unwise opinion in the instant case, the damage to the Court’s credibility, and to the Nation, could be immense.

Amicus is even concerned about violence from either side: one side might bomb abortion clinics, the other side might vandalize churches. So, the more sensible and nuanced an opinion the Court delivers, sensitive to fair questions and requests from both sides of the abortion argument, the better for all.

—In a perfect world, there would be no perceived need for abortion, and thus no perceived need for abortion to be legal. Of course, in a perfect world, there would be no maternal mortality (or other tragic, needless deaths of already-born people), no pay gap between men and women, no rapes or sexual harassment, no undue global warming to threaten humanity, etc.

We don't live in this utopia yet: a zero-abortion, and zero-problem, world. But this goal, resonating with the "more perfect Union" of which our Constitution's Preamble speaks, can be a guiding star for this thoughtful Court's careful deliberations.

SUMMARY OF ARGUMENT

For multiple reasons, such as the racism of race-selective abortions, people may call abortion an immense moral evil.

France, Ireland, and Argentina offer fewer than 15 weeks for unrestricted abortion, making it questionable to call Mississippi's 15-week limit (Gestational Age Act (H.B. 1510), Miss. Gen. Laws 2018, ch. 393 (codified at Miss. Code Ann. 41-41-191) ("the Act")), which offers women over 100 days to choose, and even allows abortion of "fatally defective" fetuses, oppressive to women.

However, must every "abortion" be of an unborn person; or could the term also apply to victimized already-born people, so that needless deaths of all of them should be avoided? And then, e.g., how does one compare the life-value of a fetus with that of a pregnant woman?

Thus, not only *supply* of abortions, but also *demand* issues (say, is the State subsidizing child welfare enough to discourage abortion?) must be considered for fairness to both fetuses and pregnant women. The 15-week ban is a social experiment, and considering relevant issues, such as whether poor women must have access to abortion, or merely to viable alternatives, may help the experiment work.

The Court should also consider the fairness, and extent of, prosecution of abortion in case of coerced sex (rape, etc.).

Polls vary greatly, but many of them show most Americans opposing legalized second-trimester abortions.

Justice Ginsburg's legacy of championing women should be useful to this Court's deliberations.

Finally, the Court may lose credibility by showing favor to extremists on either side of the case, when more moderate solutions are available.

ARGUMENT

I. PEOPLE MAY CALL ABORTION A COLOSSAL MORAL EVIL IN MANY CIRCUMSTANCES

First off: abortion is a hideously controversial issue, but under the First Amendment, people may freely opine about it, except for incitement to violence. It seems reasonable that many people find abortion to be atrociously evil: the killing of a defenseless, innocent human being or potential human being, especially if the mother's life or health is not seriously at stake from the pregnancy.

Famously, the Nazarene said, "Do unto others as you would have them do unto you." The "Golden Rule". *Matthew 7:12, Luke 6:31*. And by definition, no one having, or performing, an abortion, was aborted her/himself, because if she/he had been aborted, that person wouldn't even exist. So, there may be an implied "reciprocity" or "pay it forward"

ethic, that if your own parents let you live, you should let your own children live.

Indeed, as per the Golden Rule, *supra*, or philosopher Martin Buber's idea of "I-Thou" relationships (treating others as equals) rather than "I-It" relationships (treating others as things), any judge, or any observer, might want to put herself/himself in the place of a fetus/embryo/blastocyst/zygote ("fetus") about to be aborted. Would the judge really want to be in the place of that fetus? Would anybody? Enough said.

(The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), famously and lyrically noted, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life", *id.* at 851 (plurality op.); but that is precisely the liberty *denied the fetus herself* when she is exterminated. What about the *fetus'* choices? —Some would say that the freedom to abort ends, where the fetus' nose begins.)

However, some Orwellian terminology from the pro-choice side has worked to obscure the potential horrors of abortion. For example, perhaps the term "terminate your pregnancy" should refer to the regular way of terminating pregnancy (having the baby), rather than to abortion, because saying "terminate your pregnancy" rather than "have an abortion" may sanitize and obfuscate a deadly, filicidal procedure.

And in recent years, the term "abortion care", instead of just "abortion", has become popular. But when the fetus is being dismembered and killed, and maybe old enough to feel pain from the killing, does

the fetus feel “cared” for? (On that note: those who say abortion is safer than carrying a pregnancy to term... omit that abortion is *not* safer for the *fetus*.)

Women lawyers (or other professionals/workers) may tell the Court that an abortion was needed to help them focus on their careers. Maybe, but that misses the point that the aborted may have had *their own* lives and careers as well, if they hadn’t been extinguished. (And if someone has 10 abortions, and snuffs out 10 lives and careers...)

And when people discuss abortion as a woman’s right, there may be at least *two* women in question, since in roughly half of pregnancies, the fetus may be female. So, should people also take account of the *woman in the womb*, not just the pregnant woman? (Sex-selective abortion is pertinent here: those who claim to want equality for women but don’t object to a female fetus being destroyed *because it is female*, may have more thinking to do.)

Thus, is it acceptable to use the words/phrases “selfishness”, “narcissism”, or “sacrificing your child’s life for your own worldly benefit”, in connection with abortion, at times? Readers can judge for themselves. *Cf.* the current film *Cruella* (Walt Disney Pictures 2021) (London fashion designer tries to kill infant daughter so that the child won’t interfere with her career).

Too, many abortions could be classed as hate crimes. Race-selective, sex-selective, disability-selective, and also sexual-orientation-selective, abortions may be murderous, cruel discrimination. If a woman decides to abort her fetus for the sole reason that he is partly Jewish, how much does that

differ from Auschwitz? (Especially if the abortion occurs at a *government facility*, or is funded by *taxpayer money*: state action/funding used for a blatantly discriminatory purpose.)

And as is well known, Hitler exterminated not only Jews but also disabled people: so, those who kill their fetus because she has Down syndrome, are arguably continuing the Führer's evil work...

Re sexual-orientation-selective abortions, Amicus is concerned that if science finds genetic markers which show an increased chance for a baby to be LGBT+ (lesbian/gay, bisexual, transgender, hermaphrodite, etc.), then parents may choose to abort that fetus because they don't want an LGBT+ baby. But LGBT+ lives matter, as do Black and all other lives, regardless of race, gender, disability, or orientation status.

Thus, Mississippi may want to preemptively outlaw abortions performed on the basis of sexual orientation. This could put the Magnolia State on the cutting edge of human rights, both fetal rights and LGBT+ rights: quite a coup, as it were.

And any abortion, whether targeted against a particular disliked group or not, could even lead those involved to burn in Hell for eternity: *see, e.g.*, Catechism of the Cath. Church, ¶ 2272 (automatic excommunication, for reasons including “the irreparable harm to the innocent who is put to death”). *See also, e.g.*, “Thou shalt not kill” (*Exodus* 20:13), which has been a deeply meaningful moral criterion for millennia.

Indeed, any number of bad things can be said about abortion. There is lechery, e.g., putting carnal

pleasure above the life of the child that the carnal activity produces. Cowardice, in that abortion hits a defenseless target who can't hit back. Treachery, in particular, kinslaying, since one arguably betrays one's own child to death by aborting the youngling. "A little more than kin, and less than kind." WILLIAM SHAKESPEARE, HAMLET act 1, sc. 2.

Finally, given the projected possible decline in world population, and the vast empty spaces of our Solar System awaiting colonization by Earth, "excess world population" is not a convincing reason to have an abortion, either.

Thus, all told, some would make out a case for abortion being, at times, a monstrously self-serving and violent act, and in some cases also racist, sexist, homophobic, ableist, or even torture (if the fetus is old enough to feel pain). Arguably, children should be in peace, not in pieces.



(Abortion photograph courtesy of LifeSiteNews, available at https://lifesite-cache.s3.amazonaws.com/images/made/images/blog/D-and-E-abortion_645_430_55.jpg)

Amicus hopes he has established, *supra*, that “pro-life” advocates are not just some mob of Bible-thumping fanatics and misogynists: but rather, that they may have genuine, serious reason for opposition to abortion, and for opposition to the legality of at least some abortions.

II. A 15-WEEK ABORTION LIMIT MAY BE HIGHLY REASONABLE, GIVEN THE MANY NATIONS WITH MORE STRINGENT LIMITS, AND GIVEN THE WHOLE FIRST TRIMESTER ALLOWED FOR LEGAL ABORTION

And many countries, civilized ones, have legal-abortion limits not much different from Mississippi’s, although more stringent than that State’s. For example,

Abortion in France is legal on demand up to 12 weeks after conception (14 weeks after the last menstrual period). Abortions at later stages of pregnancy are allowed if two physicians certify that the abortion [is] to prevent grave permanent injury to the physical or mental health of the pregnant woman; a risk to the life of the pregnant woman; or that the child will suffer from a particularly severe illness recognized as incurable. ...

....

...France legalized abortion in ... 1975, which permitted a woman to receive an abortion on request until the tenth week of pregnancy[, though t]he ten-week limit was extended to the twelfth week in 2001.

Wikipedia, *Abortion in France*, https://en.wikipedia.org/wiki/Abortion_in_France (as of 14:32 GMT, Mar. 28, 2021) (citations omitted). Thus, France is arguably even more restrictive of abortion than Mississippi, given that Mississippi allows 15 weeks, more than the 14 weeks France allows.

Similarly, in Ireland, following the death of Savita Halappanavar there in 2012, during her 17th week of pregnancy, from septic miscarriage and not being allowed a legal abortion, abortion was liberalized so that abortion in the first 12 weeks of pregnancy (apparently gestation, not conception) was legal; and later abortions were made legal in case of threat to the life of, or serious threat to the health of, the mother, or fatal fetal abnormality. Wikipedia, *Abortion in the Republic of Ireland*, https://en.wikipedia.org/wiki/Abortion_in_the_Republic_of_Ireland (as of 15:47 GMT, June 29, 2021).

That degree of law-liberalization seems counterintuitive, in that clearly allowing abortion for serious threat to the mother's health might have been enough to save Halappanavar's life, and legal abortion in only the first 12 weeks of pregnancy wouldn't have helped to save her life. However, regardless of whether the full liberalization was needed, it was deemed an appropriate response, or

sequel, to Halappanavar's death. But it doesn't give 15 weeks as does Mississippi, it gives merely 12.

Thus, it seems *prima facie* ridiculous that a 15-week limit would be some horrible oppression of women, if a 12-week limit in Ireland were deemed an adequate provision for problems like Halappanavar's death.

And, going to another continent than Europe, for comparison: in Argentina, abortion law was recently liberalized to allow abortion through 14 weeks of pregnancy (apparently gestation, not conception), Wikipedia, *Abortion in Argentina*, https://en.wikipedia.org/wiki/Abortion_in_Argentina (as of 22:55 GMT, July 10, 2021). The local Church wasn't happy about this, see David Agren (Cath. News Service), *Argentina legalizes abortion despite strong Catholic opposition in Pope Francis' homeland*, America, Dec. 30, 2020, <https://www.americamagazine.org/politics-society/2020/12/30/abortion-argentina-pope-francis-catholic-pro-life-239626>.

Nor was the Pope himself, apparently, see Inés San Martín, *Pope Francis weighs in on Argentina's abortion debate*, Crux, Nov. 26, 2020, <https://cruxnow.com/church-in-the-americas/2020/11/pope-francis-weighs-in-on-argentinas-abortion-debate/>,

Pope Francis[, re] the
decriminalization of abortion in his
Argentinian homeland, sen[t] a
handwritten letter to a group of women
from Buenos Aires' slums asking, "Is it
fair to hire a hitman to resolve a
problem?"

...The women sent [the Pope a] letter last week, asking for him to be their voice

.....

“We write to your Holiness, with the desire to ask for you to help us express to public opinion that we feel prisoners in a situation where our own family is compromised, as are our teenage daughters and future generations, that grow old with the idea that **our life is not wanted** and that we don’t have a right to have children because we are poor,” the women wrote on Nov. 18. (Bold and underline in the original.)

Id. So, if only *fourteen* weeks of legal abortion was too *liberal* for the Church and some poor Argentinian women, it makes it harder to argue that *fifteen* weeks of abortion in Mississippi is some fascist plot to deprive women of autonomy.

And many other countries may also have restrictions on second- and third-trimester abortions. All told, Mississippi is in good company in restricting abortions after the 15th week.

And regardless of other countries: the Act, on its own merits, allows the entire first trimester (when most abortions occur anyway) for people to decide about abortion. 15 weeks is 105 days, which gives couples/women over 100 days to decide. This is a significant amount of time, making it harder to say that the window for decision is an “undue burden”. (Compare a 6-week time to decide, which offers less than 50 days.)

Some may even wonder if the Act is actually too *lenient*, since it allows abortion not only for medical emergencies but even for allegedly-fatal fetal disabilities, *id.* at § 4. *See, e.g.*, Livia Borghese & Matthew Robinson, *Pope likens abortion to ‘hiring a hitman’ at anti-abortion conference*, CNN, 7:45 a.m., May 26, 2019, <https://www.cnn.com/2019/05/26/europe/pope-francis-abortions-hitman-rome-intl/index.html>, “The Pontiff stated that abortion was never acceptable – not even in instances when fetuses are seriously ill – and urged doctors to support women to complete all pregnancies.” *Id.*

E.g., what if a “fatal fetal defect” is wrongly diagnosed, and it’s only after the abortion that the parents find they had no reason to abort after all? Also, Amicus is concerned that “fetal defects” may be used disproportionately against vulnerable or confused parents, who may be pressured to exaggerate, say, a case of fetal Down syndrome and wrongly claim the fetus has some “fatal defect”.

Incidentally, even if the fetus isn’t a “constitutional person” yet, there could be quasi-personhood somehow protecting the fetus; after all, there may be laws criminalizing a third party (e.g., a street thug) harming a pregnant woman’s fetus.

Too, the fetus might have some “executory interest” in life, property, etc., on expectation of constitutional personhood. So, considering everything *supra*, the Court may have excellent reason, *prima facie*, to uphold the Act.

But the other side may now deserve some attention...

III. NOT EVERY ABORTION MAY BE IN THE WOMB; OR, THE BREADTH OF WHAT “PRO-LIFE” MAY MEAN

Given that there are many needless deaths of born people, not just unborn people, some may ask, “What is an abortion?” This question is raised by the tense conversation between Kay (Diane Keaton) and Michael Corleone (Al Pacino) in *The Godfather Part II* (Paramount Pictures 1974), following Kay’s apparent miscarriage, when she says,

It wasn’t a miscarriage. It was an abortion. An abortion, Michael. Just like our marriage is an abortion. Something that’s unholy and evil. I didn’t want your son, Michael! [etc.]

, before he hits her in the face, *id.* While not everyone would agree that Kay should have had the abortion: clearly, Michael, the ruthless gangster lord who does violence to his wife, may be to blame in some sense.

And on a broader level, the “rape and violence-against-women culture” that infests society, where a former President can boast about grabbing women’s genitals, and where there are many incidents of rape and sexual harassment that still occur even after #MeToo or other abuse-awareness movements became prominent, may be responsible in part for many abortions.

Indeed, fear of her own husband’s potential violence led Geraldine “Gerri” Santoro to bleed to death in a motel room from an unsafe self-inflicted abortion. Wikipedia, *Gerri Santoro*, <https://en>.

wikipedia.org/wiki/Gerri_Santoro (as of 17:45 GMT, June 25, 2021):



(Available at https://upload.wikimedia.org/wikipedia/en/thumb/0/02/Gerri_Santoro_%281964%29.jpg/250px-Gerri_Santoro_%281964%29.jpg) While Santoro attempted an abortion at 28 weeks, Santoro Article, *supra*, not by 15 weeks: still, her unfortunate death is and has long been a symbol of the maternal death that can occur when legal abortions aren't available.

(Amicus isn't supporting abortion rights here, but merely trying to provide balance by offering a photo of a dead body from an illegal abortion, since he has already shown a photo of an aborted fetus *supra*.)

Sadly, though, there may be real-life "Aunt Lydias", see Margaret Atwood, *The Handmaid's Tale* (1985) (Hulu/MGM Television 2017-present), sanctimonious and often outwardly-religious women who needlessly deride or oppress other women re their fertility choices:



Aunt Lydia (Ann Dowd) getting pokey with June Osborne/“Offred” (Elisabeth Moss). (Courtesy of SBS Australia, *available at* https://www.sbs.com.au/topics/sites/sbs.com.au/topics/files/styles/full/public/6554fe72-26fc-47ca-9bd8-068b70c3198b_1525739579.jpeg?itok=ODDmH6uy&mtime=1525739650)

And it would be remiss not to mention our current, horrific political/social situation. For example, there is QAnon (perhaps a.k.a. “al-QAnon”, given its terroristic tendencies which surfaced on January 6, 2021), which subsists on myths that Democrats are satanic pedophiles.

True, there are Democrats (and Republicans...) and “Hollywood” people who have been soft on, or participated in, pedophilia and/or other sexual misconduct and child abuse. There have been Jeffrey Epsteins and Harvey Weinsteins—not to mention Donald Trump(s) threatening to “grab women’s -----” or such.

But while it is good to oppose evil sexual behavior and child abuse, storming the U.S. Capitol is not the way to do it. Nor is bombing abortion clinics.

It is disturbing to see someone who downplays the 1/6/21 attack and the deaths of black men (or others) in police custody, attacks mask-wearing and COVID-19 vaccination, and gets excited by the death penalty, call himself “pro-life”. The cognitive dissonance is excruciating. Thus, the vices of some “pro-choice” people, *supra* at 4-8, could also be ascribed to some “pro-life” people.

Someone who refuses to mask or be vaccinated, and kills himself or others because of that, may functionally be an abortionist. Including being a *per se* abortionist, if he infects and kills a pregnant woman... and her fetus.

Cf. also, e.g., the film *First Reformed* (A24 [Films] 2017), in which, *see id.*, Mary Mensana (Amanda Seyfried) laments to Pastor Ernst Toller (Ethan Hawke) that her husband wants her to have an abortion because he thinks climate change, and the decaying world it brings, make it improper to have children. So, global warming can produce fetal death.

In a sense, George Floyd (RIP) was aborted. So was Officer Brian Sicknick (RIP). So were all the victims of COVID-19 who needlessly died (RIP) because politicians told people that masks or vaccinations were unnecessary.

Even Pope Francis, who compared abortionists to hitmen, *supra* at 11, 13, draws some equivalence between non-abortion issues and abortion; *see, e.g.,* Amanda Michelle Gomez, *Pope admonishes Catholics that poverty and immigration are just as important issues as abortion*, ThinkProgress, Apr. 9, 2018, 10:38 a.m., <https://archive.thinkprogress.org/pope-francis-abortion-catholics-social-justice-issues->

a522c2efe876/. So, to call needless deaths “abortions” even if they aren’t fetal deaths, has some legitimacy.

Given all the above, then: what “calculus of death” should the Court use in analyzing abortion rights? Is it worth, say, the death of a million fetuses, if that would prevent one Gerri Santoro-style death-from-self-induced-abortion happening? Are ten million embryos the same value as ten partially-born fetuses (if we value more-developed fetuses more than less-developed ones)?

Thus, the Court might be tempted to leave it all up to the States: but what that could mean, given political realities in the U.S., is that the life of a mere zygote is more important than a Gerri Santoro death in some “red” States; while the death of an infinite number of fetuses of up to c. 23 weeks’ (or more?) development is less important than the life of a Gerri Santoro in some other, “blue” States. Is that extreme, “patchwork” variation between States desirable?

Again, some kind of “moderate” solution from the Court could be best at present. And one type of “moderation” includes considering both “supply” and “demand” factors re abortion.

IV. SUPPLY AND DEMAND IN THE ABORTION DEBATE: REGULATING ABORTION STRONGLY, BUT PROVIDING VIABLE ALTERNATIVES, SO THAT FEWER WOMEN WOULD CHOOSE ABORTION

While Mississippi would reduce the “supply” of abortion by banning it after 15 weeks, the “demand” side is also crucial. Why do people choose to abort in

the first place? What appealing alternatives are there?

Charles C. Camosy, in *Common ground in the abortion debate is obvious: Support mothers.*, America, July 1, 2021, <https://www.americamagazine.org/politics-society/2021/07/01/common-ground-abortion-camosy-240961>, insightfully notes,

Here is the obvious common ground on the “supply” side of the abortion debate. Though majorities say they support *Roe v. Wade*, they do not actually support current abortion law in the United States ..., which currently doesn’t allow for restrictions before about 22 weeks. Americans seem to want a much more pro-life abortion policy — something close to the 12-week threshold in Finland and Denmark.

The objection is that the U.S. doesn’t have the social supports for mothers and families that these countries have. If we did, we could afford to have more restrictive laws.

...I happen to think the standard established in *Casey* that abortion restriction could not place “undue burden” on women makes little sense without thinking about the level of social support. Regardless, there is also obvious common ground to be had on the “demand” side of abortion as well — the need to take care of the babies who would be born to women who now choose abortion. Pro-lifers and pro-

choicers should both want to help women and families be in a place to choose to have another child.

....

[L]et's face it, it isn't easy to dialogue and plan and strategize with someone who has diametrically opposed views to our own on important issues. But[, w]e must do this not just because Jesus prayed for unity before he died, but because the lives of women and children depend on us doing so.

Id. See also, e.g., Nicholas Kristof, *She's Evangelical, 'Pro-Life' and Voting for Biden*, N.Y. Times, Oct. 21, 2020, <https://www.nytimes.com/2020/10/21/opinion/evangelicals-election-biden.html>, in which late evangelist Billy Graham's granddaughter Jerushah Duford opines,

“I genuinely wish the Democratic Party would have a greater value for life inside the womb,” Duford said. “Yet I equally wish the Republican Party would place a greater value on life outside the womb. You cannot choose just one and define yourself as pro-life.”

Id. (Ironically, Duford and fellow “evangelicals for Joe Biden” have since expressed discomfort with Biden's not supporting pro-life causes as much as they would have liked, see Laycie McClain, *Pro-Life Evangelicals Who Supported Biden Are Upset*, March 9, 2021, ChurchLeaders.com, <https://churchleaders.com/news/391919-pro-life-evangelicals-who->

supported-biden-are-upset.html. But Duford’s point in Kristof’s article *supra* is still worth appreciating, for noting the “schizophrenia” affecting the Nation’s two major political parties re “pro-life” issues.)

Also ironically, then, it may be the kinds of social supports that *Democrats* often champion, which may make more justifiable the abortion restrictions that *Republicans* often champion. This may be *politically* counterintuitive, but logically sensible. If the State wants to interfere with women’s bodies coercively (restrict abortion), perhaps there should be some kind of serious “compensation” or support to those women.

(In terms of a “bargain”: women might ask, “You’re taking some of my abortion rights away: what am I getting in return?”)

Even more ironically, Biden Administration plans to fund abortion with public money, might make it more justifiable for Mississippi to restrict abortion, since women couldn’t complain that they can’t afford an abortion, and issues of “inequitable access to abortion for poor women” would be less relevant. (Amicus isn’t supporting the Administration’s plans; he is merely noting the ironic elements.)

**V. THE COURT MAY CONSIDER WHETHER
MISSISSIPPI OFFERS SUFFICIENT
SUPPORT TO PREGNANT WOMEN, IN
CONSIDERING THE LEGALITY OF THE
STATE’S EXPERIMENT WITH A 15-WEEK BAN**

Thus, the Court, in the interest of fairness, may want to ponder whether Mississippi, in its burdening of pregnant women by the 15-week limit, is also

ensuring those women have decent alternatives to abortion. Some would say Mississippi should also ensure that women have ample access to abortion in the first 15 weeks. Amicus is not here to support abortion—nor is Mississippi—, so, if that State does not offer copious abortion access, it should offer copious help to pregnant women so that the “demand side” is addressed, and more women wouldn’t even want to abort in the first place.

(Thus, the Biden Administration’s offer of money to subsidize abortion wouldn’t be needed; and women would have a live baby instead of a dead one, if they take money to support “terminating the pregnancy” by having the baby, instead of money to procure an abortion.)

Exactly what kind and level of support for women, Amicus isn’t going to say. He is not a maternal- or child-welfare expert; and Respondents and their amicae/i may offer massive detail, anyway, about how Mississippi supposedly falls short of giving poor women and minorities fair treatment. However, some benchmarks could be taken from the countries, such as France, Ireland, Argentina, etc., that do restrict abortion after the first trimester.

Also, for example, Mississippi could adopt the Medicaid expansion of the Patient Protection and Affordable Care Act (Pub. L. 111-148, 124 Stat. 119 (2010), *as amended by* the Health Care and Educ. Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) and the Tax Cuts and Jobs Act of 2017, Pub. L. 115–97, 131 Stat. 2054 (2017)). Now that *California v. Texas*, 593 U.S. ____ (2021) is over, and the forces trying to destroy “Pelosicare” (a.k.a. “Obamacare”) have lost yet again, maybe reality will

set in and Mississippi lives can be saved by adopting a program that expands health care to many needy people.

Mississippi lives matter: one reason for writing this brief. To play politics and deny needed health care to Mississippians may not impress everyone who monitors the way that women, the poor, and minorities are treated, especially with the equities of abortion rights in question. “Do unto others as you would have them do unto you”, *supra* at 4.

And, e.g., are pregnancy tests free in Mississippi? Are all rape kits tested? Is the State going to publicize the 15-week limit enough so that no one will be surprised by it? Etc.

Of course, the sensitive question of whether it is a constitutional requirement that poor and minority women have the “positive liberty” to have an abortion (e.g., enough money to have an abortion, as opposed to “negative liberty”, i.e., the lack of open legal bans on having the abortion), may need resolution.

Some may complain that it disrespects poor or minority women’s agency, not to guarantee that they have a positive liberty of abortion access. But this is debatable. Again, with support for women to have the baby instead of having an abortion, there is a live baby instead of a dead one, which sounds like a positive thing.

Too, the disparate effect of funding abortion for poor or minority women may mean not only public involvement in killing of unborn children from a poor or minority background; it may, of course, mean a *larger absolute number* of killings of such children,

poor and minority. This may be redolent of eugenics, and some of the more unsavory things Margaret Sanger did as a birth-control advocate. *Cf.* the Dead Kennedys' punk rock song *Kill the Poor* (Cherry Red Records 1980),

Behold the sparkle of champagne
 The crime rate's gone
 Feel free again
 Oh, life's a dream with you, Miss Lily White
 Jane Fonda on the screen today
 Convinced the liberals it's okay
 So let's get dressed to dance away the night
 While they

Kill kill kill kill kill the poor [x3]
 Tonight

Id. (Available at <https://www.youtube.com/watch?v=L8zhNb8ANe8>)

In any case, the Act is an *experiment*, and entering *terra incognita*. For decades, *Roe v. Wade* (410 U.S. 113 (1973)) has prevented banning of pre-viability abortion. So, is the Act going to work? Will it be fairly enforceable? Hopefully so, but that is conjectural right now. If the experiment works, and is fair to the poor and others, then a 15-week ban could also work in other States nationwide.

Also, it may be possible in the future to lower the weeks for legal abortion even further. Even if the limit is not lowered to 6 weeks ("heartbeat ban") or zero weeks, it might be lowered, e.g., to 12 weeks after gestation, which was the allowed limit in France from 1975 to 2001, *Abortion in France, supra* at 9-10, and is the current limit in Ireland, *Abortion*

in Ireland, supra at 10, showing that a 12-week limit isn't inherently some horrible misogynist war on women.

(Of course, a limit as stringent as 12 weeks, would invite corresponding State measures to support pregnant women and children appropriately, to compensate for the imposition on women's choices by a 12-week limit. And allowing a 12-week limit right now, instead of 15 weeks, could seem like lunacy.)

If the Court upholds Mississippi's law, but that State offers insufficient support for women and children, that would make a mockery of the term "pro-life", and might shamefully hurt innocent people.

One silver lining of remanding the case to lower courts for further consideration, is that that would give time for Mississippi to make improvements to its support policies, or relevant abortion policies.

For example, although that State offers seven days following a child's birth during which the child may be dropped off, permanently, to an emergency medical services provider to be taken care of, Miss. Code Ann. § 43-15-201 (2001) (amended 2020): that time seems a little slim to Amicus, almost a token, given the weight of the choice the woman has to make. Maybe it should be seven weeks, or 70 days, instead of a mere seven days.

And, as Amicus noted *supra* at 7, Mississippi could add a ban on aborting fetuses because of their perceived likely sexual orientation. This would show that the State opposes hate crimes and homophobia, and would make abortion law more humane and equitable, saving lives from needless destruction.

So, as or after Mississippi makes any needed improvements, the lower court(s) could then opine about whether the State is offering women and children (born and unborn) the fairness they deserve, considering the burdens that the Act or other abortion restrictions place on women. Then, as needed, this Supreme Court can offer its own opinion on the matter.

VI. DISCUSSION OF PROSECUTING ABORTIONS AFTER COERCED SEX (RAPE, INCEST, ETC.) MAY BE NECESSARY FOR FAIR CONSIDERATION OF ABORTION LAW

Speaking of the Court, one factor that risks being ignored by the Court is the factor of coerced sexual activity, e.g., rape, incest, harassment. How fair is it to prosecute abortions if the woman did not consent to be impregnated in the first place? Are there women who have abortions after being raped, who will get more jail time than Bill Cosby did?

This is a very unpleasant issue, because the children of a coerced relationship are just as human as anyone else. Few currently-living children of rape victims would want to go back and have been aborted, Amicus is guessing. However, again, to prosecute abortion in case of coerced sex, may seem unfair. An ugly conundrum. What is to be done?

Amicus is not saying that there can never be prosecution of abortions in coerced-sex situations. However, the Court may want to think about how much prosecution (if any) is fair. (And should guidelines on the possibility, and extent, of prosecution of abortion in coerced-sex situations, be constitutionalized, e.g., decided at this Court's level;

or should it all be left up to the mercies, tender or not, of local prosecutors?)

For the sake of example: what if the maximum penalty for abortion in case of coerced sex were twenty dollars (or even just one dollar)—waivable for the truly poor, if women, not their doctors, were fined—, plus an infraction (like a traffic ticket), and having to receive a pamphlet detailing alternatives to abortion, such as adoption? The fine (or “civil assessment”, if the term “fine” is too offensive) would go to a fund to help rape victims and pregnant women.

Would that be such a terrible punishment? \$20, infraction, pamphlet? It doesn’t seem too damaging, but it might make at least some women, or doctors, think more about whether they want to take the irrevocable step of being involved in abortion.

Of course, many pro-choice people will complain that it is monstrous to have *any* penalty against a woman who has an abortion after coerced sex. And, many pro-life people will complain that the \$20-etc. penalty is a mere slap on the wrist, and say that, instead, the law should throw the book at anyone who has any abortion. But Amicus is just trying to inspire the Court to think creatively, and fairly.

(Fortunately, there are no known rapists or sexual harassers on the Court. If there were, and they ruled in ways that seemed misogynist, that would be a bad thing.)

VII. ABORTION POLLS ARE DISPARATE, BUT MANY INDICATE PUBLIC SUPPORT FOR SERIOUS LIMITS ON LEGAL ABORTION

We now turn to the People's opinion on abortion. Notable polls on abortion are of some help in the debate, even though the Court isn't obliged to follow public opinion. But whether or not "th' Supreme Court follows th' iliction returns", as Finley Peter Dunne's fictional "Mr. Dooley" noted (1901), it doesn't hurt if a Court opinion also chimes with the People's opinion.

On that note, several polls support the idea that Americans disapprove of legalizing second- (and third-) trimester abortions.

First, years of Gallup polls consistently show, in polls extending from 1996 to 2018 (Table 15, of unnumbered tables), *Abortion*, Gallup News, <https://news.gallup.com/poll/1576/abortion.aspx>, that c. 60-66% of Americans believe abortion should generally be legal during the first three months of pregnancy; but c. 64-71% of Americans believe abortion should generally be illegal during the second three months, and c. 80-86% of Americans believe abortion should generally be illegal during the last three months of pregnancy. Tbl. 15.

Clearly, 22 consecutive years of polls are serious evidence that roughly two-thirds of Americans want second-trimester abortions to be generally illegal. This chimes with what Mississippi wants.

It also chimes with another, more recent poll: *see* David Crary & Hannah Fingerhut, *AP-NORC poll: Most say restrict abortion after 1st trimester*, AP News, June 25, 2021, <https://apnews.com/article/only-on-ap-us-supreme-court-abortion-religion-health-2c569aa7934233af8e00bef4520a8fa8>,

61% of Americans say abortion should be legal in most or all circumstances in the first trimester of a pregnancy. However, 65% said abortion should usually be illegal in the second trimester, and 80% said that about the third trimester.

Id.

However, other polls say different things. Even other tables in the same page of Gallup polls cited *supra* at 28, seem to contradict Table 15 and the AP-NORC poll. Table 4 shows for the May 3-18, 2021 period that 52% of respondents say abortion should either be legal only in a few circumstances, or never be legal at all, *id.* This seems to contradict, in a pro-life direction, the Gallup and AP-NORC poll claims, *supra*, that c. 60%+ Americans approve of legal first-trimester abortion.

By notable contrast, Table 9 from the same page of Gallup polls cited *supra*, says, *id.*, that 56% of Americans oppose a ban on abortions after the 18th week of pregnancy. This seems to contradict, at least partially, the claim of table 15, *supra*, that c. 65%+ Americans disapprove of legal second-trimester abortion—so the result goes in a pro-choice direction, and also seems to contradict Table 4, *supra*, which claimed that 52% of Americans wanted only a few abortions to be legal.

So, what is to be done when the polls contradict one another? Are the polls confused, or the pollsters, or the people polled? In any case, the Court, if it wants to approve Mississippi's 15-week ban, has at least some evidence (Table 15 and the AP-NORC poll, *supra*, showing American disapproval of second-

trimester abortions, perhaps for over two decades) in its favor—although the pro-choice side may seize on other polls favoring them more.

Speaking of pro-choice, one now remembers a famous pro-choice Justice:

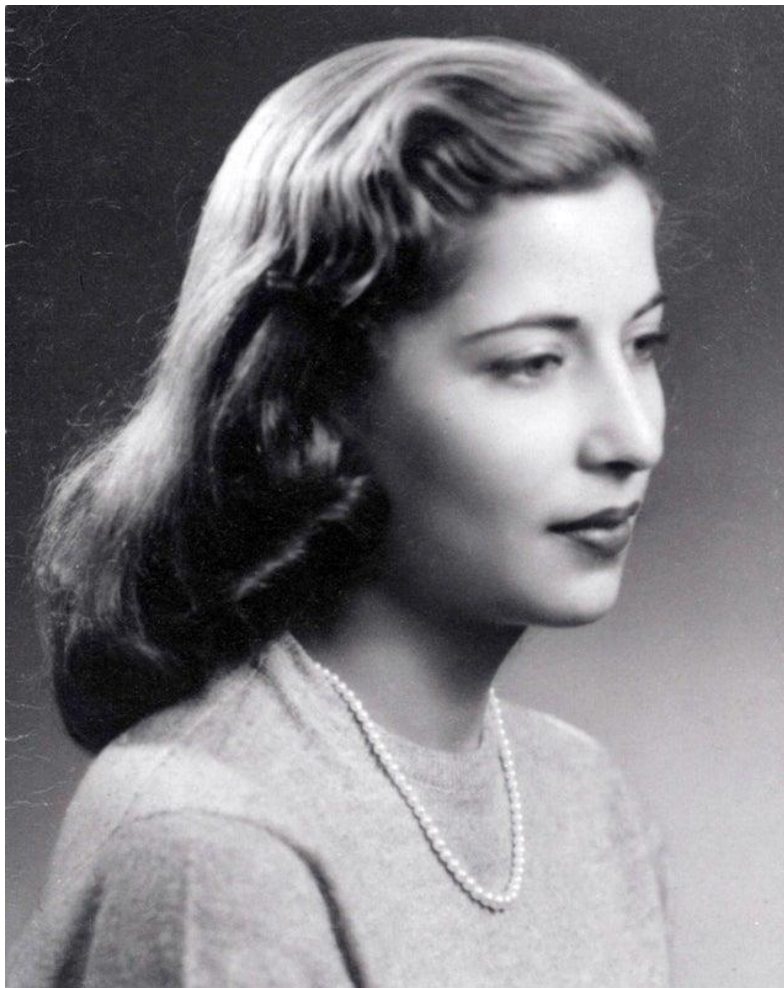
VIII. RESPECTING THE LEGACY OF JUSTICE GINSBURG, IN CONSIDERING THE INSTANT CASE

Following the death last year of Justice Ruth Bader Ginsburg (RIP), there is a new Court, insofar as there is a new Member. Each Court will do things in its own way, as is its right. However, it would be unwise to forget Ginsburg's legacy, a legacy too momentous to describe fully here. Regardless of her actual foot size, she left some large shoes to fill, so to speak.

Amicus often disagreed with that Justice on abortion issues, but still respected her greatly. On that note: even though the present Court may likely rule differently in *Dobbs* than Ginsburg would've liked, still, her thoughts, style, and feminism should be of inspirational value.

When the Court opines, will it have adequately considered the well-being of the pregnant woman, not just the woman (or man) in the womb, the fetus? Will the Court's opinion be accusable of misogyny (*de facto*, not *per se*...); or will it have truly tried to come to grips with the travails of what it means to be pregnant for c. 9 months, especially if the pregnancy was unwanted (and possibly the result of rape or other coerced sex)? Can the Court show respect to

women's equality with men, and also show due respect to both the born and the unborn? Etc.



(Courtesy of GentlyWeepingGuitar_, *Young Ruth Bader Ginsburg*, Reddit, c. 2019, available at <https://preview.redd.it/dyy9l0vmub921.jpg?width=640&crop=smart&auto=webp&s=01295477a5aaf77300cc0de2525f597e8c4d889e>)

Naturally, the legacies of other Court alumnae/i, such as Justices Sandra Day O'Connor, Antonin Scalia (RIP), Anthony Kennedy ("of unknown whereabouts"), etc., can also be looked to for guidance. However, Ginsburg receives pride of place here since she is the most recent departure from the Court, and because of her dual successes as a women's-rights advocate and as a mother of children. If the Court can pen an opinion with which Ginsburg might disagree, but of which she wouldn't be *too* ashamed, that could be a wonderful thing.

**IX. AN EXTREME RULING IN EITHER
DIRECTION COULD DEVASTATE
THE CREDIBILITY OF THE COURT; OR,
AVOIDING THE "CONSTITUTIONAL BENDS"**

Finally: Amicus, as always, is concerned about the credibility of the Court. An extreme ruling by the Court, in either direction, could hurt the Court's standing among thinking people. (The *personal* stakes are vanishingly small for Amicus himself, as he is not (currently) on the Court, nor is it likely he is going to get pregnant. But the stakes for the Court, and the Nation, are enormous.)

(A quick note here on "federal vs. State abortion regulation": some folk claim they want abortion issues returned to the States. But one must be careful what one wishes for at times. Do those folk, say, want all federal curbs on partial-birth abortion vacated, returning the issue to the States? Plenty of States might allow partial-birth abortion, if possible.

If people just want maximum bans on abortion, federal-plus-State, period, perhaps they should be

honest about it, instead of saying they want everything sent back to the States.)

...Let us say, for example, that the Court leaves *Roe* and *Casey* intact, and overturns Mississippi's 15-week ban Act, out of fear of the "greenhouse effect" produced by colossal volumes of hot air from pundits (sometimes left-of-center), people to whom abortion-on-demand is more sacred than life itself, practically.

That would be one unsuitable extreme: overturning a sensible, moderate ban on post-15-weeks abortions, just because that ban would be "unfashionable" among certain rigid commentators who haven't noticed that it isn't 1973 anymore, and women in 2021 have far more opportunities, power, and contraceptives than they did five decades ago.

However, the other extreme may be frightening as well. Let us say that the Court not only upholds the 15-week ban, but also goes further, allowing States a "heartbeat ban" (at c. 6 weeks' pregnancy), or even a full ban (0 weeks' pregnancy), on abortion. Amicus has no fondness for abortion—he wasn't aborted himself—, but there are many issues here.

First, would those bans be enforceable, or fairly enforceable? Especially given the large numbers of abortions in the first trimester, compared to smaller numbers later on.

In Mississippi, would a wealthy white Daughter of the Confederacy be prosecuted for abortion to the same extent as a poor, African-American janitor or school-lunch worker would be? Would women be prosecuted for miscarriages?

Second, it could look like a "bait-and-switch", even "dirty" or "slimy", for the Court to have granted

certiorari to a case involving a 15-week ban, but then slide way down the scale and allow bans at six, or zero, weeks. Would the Court want to look sneaky, underhanded, or driven by personal political/religious agendas? e.g., Catholic-vs.-Jew disputes?

(Fortunately, there may be no known Members of the Court associated with fanatical religious groups which encourage the submissiveness of women. If there were, and they ruled in ways that seemed misogynist, that would be unpleasant.)

It might even, ironically and tragically, *hurt* the pro-life cause to have premature rulings in favor of six-week or zero-week abortion limits. (If *Roe*'s "viability bright-line test" disappears: would Mississippi find six-week, or zero-week, abortion limits, with undue-burden tests, constitutional, or not?) The colossal backlash that could result if such stringent limits were passed now, might lead many more Americans to support codifying *Roe*, or other extreme pro-choice measures.

However, if Americans are convinced that the Court is sensible and non-partisan, then moderate measures like a 15-week ban might not only thrive, but also serve as a bridge to bans at a lower number of weeks, in the future, when conditions for women have improved enough that such bans might seem fair instead of outrageous.

...“The bends” (decompression sickness) is a condition wherein a diver comes up from the deep too quickly and suffers horrible pain because of too-rapid change in pressure. Amicus is concerned about the “Constitutional bends” which could result from too rapid a shift, an overly-shocking deprivation of abortion rights that have been traditional since *Roe*.

Roe shouldn't be considered some sainted "super-precedent"; but it is, admittedly, a precedent of some decades' vintage.

Maybe, just maybe, a Court-allowed 6-week or 0-week limit on abortion would somehow work wonderfully and have no malign repercussions, despite being a shock 75% reduction, or 100% reduction, from a 24-week limit.

Then again, maybe blueberry muffins—*already-buttered* ones—will fall from the sky, so that no one will ever have to buy them at a store again. Maybe pigs will fly, too, so that bacon will happily land in your frying pan by itself, free of charge. One can always hope.

So, if the Court sticks to okaying Mississippi's 15-week ban, as long as it's equitable (adequate healthcare/tax credits for pregnant women and their children, etc.), that could avoid either the "bends" which might flow from a 6-week or 0-week limit on abortion, or the stagnation which could come from wallowing in the c. 24-week limit that currently exists. If a 15-week limit is a workable "golden mean" for now, Amicus would not be surprised at all.

* * *

"We must love one another or die." W.H. Auden, *September 1, 1939* (1939). Amicus has used this quote before, but it is a useful quote. It is apposite to the atmosphere of hatred, violence, polarization that infests America today.

And it reminds us that love between parents and children, born or unborn, is a beautiful thing, as is society's love for nurturing everyone, parent or child,

regardless of race, political party, or other characteristics, not only in the womb but also outside of it.

The Court, although few of its Members may ever have been pregnant—pregnancy being a useful experience for understanding abortion—, is *itself* now pregnant, as it were, with the instant case, gravid with the terrible swelling weight of all of *Dobbs*' included or implied controversies and challenges; and one can only hope for a successful delivery.

If the Court were to fail to deliver a worthwhile opinion, and the whole experience were abortive, this would be a sad thing. Again, Justice Ginsburg's legacy of articulateness, passion for social justice, and concern for women's rights, may be of help to the Court.

Hopefully, Amicus' brief can help midwife an auspicious opinion from the Court, and/or from any lower court(s) to whom the case is remanded.

But a good Court opinion may have many mothers and fathers, so Amicus is again grateful for the input of both "pro-life" and "pro-choice" sides (if the input is sensible; *see* once more *Citizen Ruth*, *supra* at 2, mocking the fanaticism of extremists on both sides), and the talents of various parties or amicae/i in helping the Court's opinion work to "form a more perfect Union and secure the Blessings of Liberty to ourselves and our Posterity", U.S. Const. pmb1.

CONCLUSION

Amicus respectfully asks the Court to think carefully about how Mississippi's, and the Nation's, laws and policies should respect and protect both the born and the unborn—"ourselves and our Posterity", as noted *supra*—; and humbly thanks the Court for its time and consideration.

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