No. 22-_____

In The
Supreme Court of the United States

JANE DOE, as parent and next friend of BABY MARY DOE, NICHOLE LEIGH ROWLEY, as parent and next friend of BABY ROE, and CATHOLICS FOR LIFE, INC., d/b/a SERVANTS OF CHRIST FOR LIFE,

Petitioners,

v.

DANIEL MCKEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF RHODE ISLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Rhode Island

PETITION FOR A WRIT OF CERTIORARI

DIANE MESSERE MAGEE
Counsel of Record
LAW OFFICES OF
DIANE MESSERE MAGEE, INC.
572 Main Street
Warren, Rhode Island 02885
Tel. (401) 245-8550
Email: dmm@MessereMageeLaw.com

THOMAS MORE DICKINSON
1312 Atwood Avenue
Johnston, Rhode Island 02919
Tel. (401) 490-8083
Email: tmd@appealRI.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether, in light of *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022), the Rhode Island Supreme Court erred in holding that the unborn Petitioners, regardless of gestational age, are not entitled to the protections and guarantees of the due process and equal protection clauses of the United States Constitution?

2. Whether, in light of *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022), the Rhode Island Supreme Court erred in holding that the unborn Petitioners, regardless of gestational age, categorically lacked standing to advance their claims?

PARTIES TO THE PROCEEDINGS

Petitioners are Nichole Leigh Rowley, as parent and next friend of Baby Roe, Jane Doe, as parent and next friend of Baby Mary Doe, and Catholics for Life, Inc., d/b/a Servants of Christ for Life. Pet.App.74.[1] At the time of Petitioners' filing of their Complaint, Baby Roe was 15 weeks gestational age and Baby Mary Doe was 34 weeks gestational age. Pet.App.77, 80.

Respondents are Daniel McKee, in his official capacity as Governor of the State of Rhode Island, Dominick J. Ruggerio, in his official capacity as President of the Rhode Island Senate, K. Joseph Shekarchi, in his official capacity as the Speaker of the Rhode Island House of Representatives, Peter F. Neronha, in his official capacity as Attorney General of the State of Rhode Island, Francis McCabe, in his official capacity as Clerk of the Rhode Island House of Representatives, and Robert L. Ricci, in his official capacity as Secretary of the Rhode Island Senate. Pet.App.1; Pet.App.74.

---

[1] Michael Benson, Nichole Leigh Rowley, and Jane Doe, in their individual capacities, were parties in the proceedings of the Rhode Island courts, but are not included here. Nichole Leigh Rowley and Jane Doe remain parties in their capacities as parents and next friends of Baby Roe and Baby Mary Doe, respectively.

CORPORATE DISCLOSURE

Catholics for Life, Inc., d/b/a Servants of Christ for Life, is a Rhode Island domestic non-profit corporation. There is no parent or publicly held company owning ten percent (10%) or more of its stock.

LIST OF ALL PROCEEDINGS

Rhode Island Supreme Court, No. SU-066A, *Michael Benson, et al. v. Daniel McKee, et al.*, Judgment entered May 4, 2022; Decision: *Benson v. McKee*, 273 A.3d 121 (R.I. 2022). Pet.App.1; Petition for rehearing denied June 3, 2022. Pet.App.42.

Michael Benson, et al. v. Gina M. Raimondo, et al., Rhode Island Superior Court, No. 2019-6761; Bench Decision on November 27, 2019; Order granting motion to dismiss dated December 16, 2019; Judgment entered December 16, 2019. Pet.App.28-32.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

DECISIONS BELOW

The Rhode Island Superior Court's decision was a bench decision delivered immediately after hearing on defendants' motion to dismiss, and is not reported. But, it is reprinted here at Pet.App.32-41.

The Rhode Island Supreme Court decision is reported at *Benson v. McKee*, 273 A.3d 121 (R.I. 2022), and reprinted at Pet.App.1-27. The Rhode Island Supreme Court's June 3, 2022, order denying plaintiffs' petition for reargument is not reported. But, it is reprinted at Pet.App.42.

STATEMENT OF JURISDICTION

On May 4, 2022, the Rhode Island Supreme Court issued its opinion affirming the Rhode Island Superior Court's grant of motion to dismiss and entry of judgment to defendants. Pet.App.1. On June 3, 2022, the Rhode Island Supreme Court denied plaintiffs' petition for reargument. Pet.App.42. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the United States Constitution amend. XIV, § 1,[2] the United States Constitution

[2] The verbatim text reads: "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

amend. X,[3] and the Rhode Island "Reproductive Privacy Act," Rhode Island Public Laws 2019, Ch. 27 (Enacted June 19, 2019) (House Bill 5125 Substitute B). Pet.App.43.

INTRODUCTION

This Court, in *Dobbs v. Jackson Women's Health Organization*, 572 U.S. ___ (2022), avoided the question of "when prenatal life is entitled to any rights enjoyed after birth." *See Dobbs*, slip op. at 38. Petitioners' case presents the opportunity for this Court to meet that inevitable question head on. This Court's *Dobbs* holding, that "*Roe* was egregiously wrong from the start," *id*. at 6, and its further overruling of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), surely signal rejection of this Court's statement in *Roe* that, "[t]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *See Roe v. Wade*, 410 U.S. 113, 158 (1973), overruled, *Dobbs v. Jackson*

---

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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." U.S. Const. amend. XIV, § 1.

[3] The verbatim text reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Women's Health Organization, 572 U.S. ___ (2022). The Fourteenth Amendment has no textual definition of the term "any person" therein. And it neither includes nor excludes unborn human beings specifically.

Petitioners seek a writ of certiorari for questions presented that do not require this Court to adopt any particular "theory of life." *Dobbs* at 38-39. They ask only that this Court identify the guarantees upon which Petitioners – and any unborn plaintiff regardless of gestational age – can rely for constitutional protection under the Fourteenth Amendment, and whether unborn human beings will categorically be denied access to the courts to challenge an abortion law.

In 2019, Rhode Island enacted the Reproductive Privacy Act (RPA). Pet.App.43. The drafters' explanation of the RPA's legislative purpose was, "to codify the privacy rights guaranteed by the decision reached in the United States Supreme Court decision of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny." Pet.App.88.

The RPA provides for unrestricted termination of an "individual's pregnancy prior to fetal viability"; unrestricted termination of an "individual's pregnancy after fetal viability when necessary to preserve the health or life of that individual"; defines "fetal viability"; and, provides no purpose for the arbitrary classification of the unborn human being based on "viability" or gestational age – outside of *Roe v. Wade.* Pet.App.43-46. Further, the RPA repealed several existing Rhode Island laws, including its partial birth abortion law

and its law prohibiting the fetal homicide of a quick child. Pet.App.46-56.

Moreover, the RPA stripped Petitioners, Baby Mary Doe and Baby Roe, of their "personhood," by repealing Rhode Island General Laws § 11-3-4 which established, " . . . that human life commences at the instant of conception and that said human life at the instant of conception is a person within the language and meaning of the fourteenth amendment of the constitution of the United States. . . ." Pet.App.48. Rhode Island General Laws provided for the criminalization of abortion without regard to gestational age since the year 1861 and remained on the books for 158 years, until the RPA repealed it. *See Dobbs*, slip op. at 23, n. 34.

Additionally, the RPA, on its face, uniquely classifies Rhode Island's unborn principally upon gestational age. The constitutionality of such a classification is also at issue here. And, whether there is an objective gestational age where an unborn human being is entitled to the protections and guarantees of those due process and equal protection clauses.

Petitioners further claimed the RPA is unconstitutional as applied to them, based on the RPA's repeal of the establishment of their personhood "at the instant of conception." In light of this Court's decision in *Dobbs*, and in the absence of any Rhode Island statute establishing when an unborn human being is entitled to the federal guarantees of the due process and equal protection clauses of the United States Constitution,

Amendment XIV, this Court should grant the writ to review the constitutionality of Rhode Island's RPA.

Notably, the RPA has no severability clause. Therefore, if any part of the RPA fails judicial scrutiny, the whole RPA fails. And, Baby Mary Doe and Baby Roe's, "personhood" is revived, entitling them to the full protection and guarantees of the Fourteenth Amendment of the United States Constitution – and its reciprocal provision in the Rhode Island Constitution. The concomitant result therefore is that each qualifies as "any person" under federal and state law, who may not be deprived of "life" without due process nor the guarantees of equal protection under law. On its face and as applied, the RPA fails even mere-rationality review.

Petitioners' case also provides this Court an opportunity to determine the threshold issue of standing, in the abortion law context, in light of *Dobbs*. As this Court held in *Dobbs*, abortion laws are different from all others. Do unborn human beings, at any gestational age, have any rights under the United States Constitution? Or, has *Dobbs* relegated all unborn human beings to the status of *persona non grata* in the eyes of the United States Constitution – below corporations and other fictitious entities? No state court or legislature can answer this question. Only this Court can – as the final arbiter of what the United States Constitution means. *See Marbury v. Madison*, 5 U.S. 137 (1803).

Again, the questions presented here do not require this Court to decide any "theory of life." This case presents the unavoidable confrontation of *Dobbs*, which left unresolved the tensions between the Tenth Amendment, federalism, and any surviving constitutional guarantees for the unborn. What is more, the facts here provide the precise foundation for this Court's establishment of the boundaries set by that portion of the Tenth Amendment that limits a State's inherent powers to only those that are "not prohibited by [the United States Constitution]." For all these reasons, Petitioners respectfully request that this Court grant the writ.

STATEMENT OF THE CASE

Petitioners raised their federal claims in their complaint; briefed and argued in the trial court their standing to advance their claims; took exception to the trial court's rulings; argued to the Rhode Island Supreme Court the trial court's errors relative to its dismissal of Petitioners' federal claims; and petitioned the Rhode Island Supreme Court for reargument – in light of this Court's then pending decision in *Dobbs v. Jackson Women's Health Organization*, 572 U.S. ___ (2022). Pet.App.1-92.

A. Petitioners' First Amended Complaint raised, and sought specific relief for, the federal questions presented here.

Petitioners, Baby Mary Doe (gestational age of 34 weeks) and Baby Roe (gestational age of 15 weeks), each alleged in the complaint: the legal rights and status of "person" under the United States Constitution, Amendment XIV; that the RPA "immediately, irrevocably, and permanently deprived each of them of said legal right and privileged status of 'personhood' under * * * the due process and equal protection clauses of the * * * United States Constitution, Amendment XIV"; "but for" causation; and the redressability of the restoration of the legal rights and privileged status of a "person" upon a determination that the RPA is unconstitutional under the United States Constitution. Pet.App.76-83; Pet.App.90. Petitioner, Catholics for Life, Inc., d/b/a Servants of Christ for Life, made derivative claims based on Baby Mary Doe and Baby Roe's claim of "personhood," and further claimed "but for" causation and similar redressability. Pet.App.83-86; Pet.App.90.

In addition to their above, as applied, constitutional challenges, Petitioners further claimed that the RPA is "facially unconstitutional under * * * the United States Constitution." Pet.App.76. Petitioners specifically prayed for the relief of a "declaration" that the RPA "is unconstitutional pursuant to the United States Constitution, Amendment XIV." Pet.App.92. Petitioners presented these arguments at all stages of the litigation in the Rhode Island courts.

B. Rhode Island Public Laws 2019, Ch. 27 – the RPA.

In 2019, the Rhode Island General Assembly passed, and the Governor signed, the Reproductive Privacy Act. Pet.App.43. The RPA immediately took effect on passage. Pet.App.66. The drafters' explanation of the RPA was "to codify the privacy rights guaranteed by the decision reached in the United States Supreme Court case of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny." Pet.App.88.

The RPA contains no factual findings about fetal development or gestational age based on any medical or other authorities. It provides, however, that:

> "[n]either the state, nor any of its agencies, or political subdivisions shall:
>
> (1) Restrict an individual person from . . . terminating that individual's pregnancy prior to fetal viability; * * * [and]
>
> (3) Restrict an individual person from terminating that individual's pregnancy after fetal viability when necessary to preserve the health or life of that individual. . . ." Pet.App.43-44.

Specifically, the RPA provides that the "termination of an individual's pregnancy after fetal viability is expressly prohibited except when necessary, in the medical judgment of the physician, to preserve the life or health of that individual." Pet.App.45. While the RPA states that it does not "[a]brogate the provisions of 18 U.S.C. § 1531, titled 'partial-birth abortions

prohibited and cited as the "Partial-Birth Abortion Ban Act of 2003 [The Act],"'" it simultaneously repeals "in its entirety" Rhode Island's partial birth abortion laws. Pet.App.45; Pet.App.53-56.

The RPA defines "fetal viability" as "that stage of gestation where the attending physician, taking into account the particular facts of the case, has determined that there is a reasonable likelihood of the fetus' sustained survival outside of the womb with or without artificial support." Pet.App.44. The RPA does not define the word "fetus" therein.

Additionally, the passage of the RPA specifically repealed statutes that: provided that all human life begins at the instant of conception; murder of pregnant or presumed pregnant woman charged in same indictment with infant child; prohibited willful killing of unborn quick child; and required spousal notification for abortion. Pet.App.46-53.

Penalties for violations of the RPA are limited to sanctions for "unprofessional conduct." Pet.App.46. The RPA also provides for state insurance coverage benefits for abortion-related services for those financially eligible. Pet.App.56. Finally, there is no severability clause to save the RPA if any court determines that any part of the RPA is unconstitutional.

C. Rhode Island Superior Court Proceedings.

Petitioners "initiated this action in the [Rhode Island] Superior Court on June 19, 2019, seeking to halt the passage of House Bill 5125 Substitute B, which later became the RPA, [and] the [superior court] denied [Petitioners'] request for injunctive relief." Pet.App.7. On June 25, 2019, after passage of the RPA, Petitioners filed their First Amended Complaint, seeking, generally: (1) a declaration of status, rights and obligations of the parties under Rhode Island General Laws § 9-30-1 *et seq.*, Uniform Declaratory Judgments Act ("UDJA"), and (2) a determination of the constitutionality of the RPA, under the Rhode Island Constitution and under the United States Constitution. Pet.App.74-92. Petitioners' First Amended Complaint maintained its original as applied and facial challenges to the RPA's constitutionality. Pet.App.74. On August 27, 2019, in lieu of a responsive answer, defendants filed a motion to dismiss all of Petitioners' claims under R.I. Super. R. Civ. P. 12(b)(6). Pet.App.8.

On November 27, 2019, defendants' motion to dismiss and plaintiffs' objection thereto, were heard in the superior court. The judge immediately ruled from the bench, granting defendants' motion to dismiss, and ordered entry of judgment for defendants on the merits of all plaintiffs' claims. Pet.App.28-41.

Specifically, the superior court held that, "[t]he unborn persons I find do not have rights as persons to make this challenge, and they rest their claims in large

part on statutory provisions that have been repealed as unconstitutional. I think that Baby Mary Doe's quick child claim to standing is not persuasive, and The Servants of Christ for Life standing is derivative to the Baby Roe and Baby Doe claims and, therefore, fail." Pet.App.35.

Plaintiffs entered their exception to the superior court decisions. Pet.App.39-40. The resulting Order and Judgment entered on December 16, 2019. Pet.App.28-31. Plaintiffs timely filed their appeal to the Rhode Island Supreme Court. Pet.App.8.

D. Rhode Island Supreme Court Proceedings.

1. The Rhode Island Supreme Court affirmed the superior court's decision.

The Rhode Island Supreme Court acknowledged that "state constitutional and statutory law is subordinate to * * * 'the [United States] Constitution[,]'" Pet.App.17. The foundation of the Rhode Island Supreme Court's decision begins and ends with their analysis and reliance on *Roe v. Wade*. Pet.App.3-8; Pet.App.16-19. Specifically, the Rhode Island Supreme Court cites *Roe* for its proposition that, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Pet.App.17. Based on *Roe*, [the Rhode Island Supreme Court] concluded that "the unborn plaintiffs fail to assert a legally cognizable and protected interest as persons pursuant to [the statutes repealed by the RPA], which are contrary to the United

States Constitution as construed by the United States Supreme Court." Pet.App.17.

Further, the Rhode Island Supreme Court opined that "at the time the RPA was enacted the unborn plaintiffs had no legal rights or status under [Rhode Island Law]." Pet.App.18. The Rhode Island Supreme Court, however, relied on earlier decisions of the United States District Court – District of Rhode Island and the United States Court of Appeals for the First Circuit – deeply rooted in *Roe* – that Rhode Island's criminal abortion statutes and quick child abortion-related statute were facially unconstitutional. Pet.App.5-6; Pet.App.17-18. *See Doe v. Israel*, 358 F. Supp. 1193, 1195-1196 (D.R.I. 1973); *see also Doe v. Israel*, 482 F.2d 156, 159 (1st Cir. 1973).

Prior to the RPA, Rhode Island law recognized that "human life commences at the instant of conception and that said human life * * * is a person within the * * * meaning of the fourteenth amendment of the constitution of the United States[.]" Pet.App.5. And, in 1975, the Rhode Island Legislature enacted the abortion-related "quick child" statute, "criminalizing the willful killing of an unborn quick child[,]" defined as "an unborn child whose heart is beating, who is experiencing electronically-measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of usual medical care and facilities available in this state." Pet.App.6. The Rhode Island Supreme Court credits the RPA with, "the repealing [of] certain statutes otherwise prohibiting abortion in

this state that were flatly unconstitutional [under the *Roe* and *Casey* standards]." Pet.App.7.

Ultimately, the Rhode Island Supreme Court held that Petitioners, Baby Mary Doe and Baby Roe, lacked standing because they were not "persons" under the Fourteenth Amendment to the United States Constitution, and, they lacked standing to access the courts. Pet.App.16-18. Significantly, the Rhode Island Supreme Court declined to apply their "substantial public interest" equity exception to the general standing requirement here because, "with respect to the constitutionality of the RPA itself * * * this question has been answered by the United States Supreme Court." Pet.App.19.

Finally the Rhode Island Supreme Court held that "[w]ith respect to the derivative claims [of Servants of Christ for Life], because we determined that the unborn plaintiffs lack standing, these derivative claims similarly fail." Pet.App.18.

The Rhode Island Supreme Court affirmed the trial court's decision "in all respects." Pet.App.2. Petitioners timely filed their Petition for reargument with the Rhode Island Supreme Court on May 16, 2022. Pet.App.67.

2. The Rhode Island Supreme Court denied Petitioners' Petition for reargument.

In the face of an impending landmark *Dobbs* decision from this Court, and while acknowledging that Rhode Island, "state constitutional and statutory law is subordinate to * * * 'the [United States] Constitution[,]'" the Rhode Island Supreme Court refused to grant Petitioners' Petition for reargument. Pet.App.42. In their Petition for reargument, Petitioners reasserted their claims sounding in the United States Constitution's Fourteenth Amendment and their "potential rights' under that amendment. Pet.App.69-73. They also reasserted their claims of standing to challenge the RPA. Pet.App.71-72.

Petitioners argued that, if, as appeared likely, this Court overruled *Roe*, then the foundation of the Rhode Island Supreme Court's decision crumbles. Pet.App.72. Specifically, Petitioners argued that "[u]nder this Court's *de novo* standard of review for Rule 12 motions, these matters should be reconsidered in light of the potential overruling of *Roe*." Pet.App.72. Petitioners repeatedly argued to the Rhode Island Supreme Court that, "because this Court deemed *Roe* controlling on the issues in this case, and given *Roe*'s doubtful survival, Plaintiffs-Appellants are compelled to seek to address this changing landscape to present this Court with an opportunity to respond to it." Pet.App.72. Still, the Rhode Island Supreme Court denied reargument.

The Rhode Island Supreme Court even declined to defer consideration of the petition for reargument until after this Court decided *Dobbs*. Defendants asked the Rhode Island Supreme Court to articulate, as a basis for their underlying decision, "independent and adequate state grounds," in order to justify denial of Petitioner's Petition for reargument. The Rhode Island Supreme Court declined the invitation. Pet.App.42. Petitioners, Baby Mary Doe, Baby Roe and Servants of Christ for Life now seek relief from this Court.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because, in light of *Dobbs*, the Rhode Island Supreme Court erred in holding that Petitioners, Baby Roe and Baby Mary Doe, were categorically not "any person" recognized under the Fourteenth Amendment. In the absence of an explicit textual definition of the words "any person" in the Fourteenth Amendment, this Court should grant the writ in order to establish its meaning and scope relative to abortion laws. "Because there is no constitutional text speaking to the precise question, the answer * * * must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court." *Printz v. United States*, 521 U.S. 898, 905 (1997). Alternatively, this Court should grant the writ to provide state and federal courts with guidance on how to analyze unborn plaintiffs' claims of Fourteenth Amendment protection and guarantees, post-*Dobbs*. And, to delineate the

extent of the restraint the Fourteenth Amendment places upon a state's Tenth Amendment sovereignty.

I. This Court should grant the writ and clarify "when prenatal life is entitled to any rights enjoyed after birth."

As this Court held in *Dobbs*, abortion laws are unique. *Dobbs*, slip op. at 5. In rejecting Petitioners' claims of Fourteenth Amendment due process and equal protection guarantees, the Rhode Island Supreme Court based their decision to affirm dismissal of Petitioners' case on *Roe* and *Casey*. Pet.App.1-25. And on the eve of this Court's expected overruling of *Roe* and *Casey*, the Rhode Island Supreme Court denied reargument. Pet.App.42. *Dobbs* overruled *Roe* and *Casey*. This Court should grant the writ to hold that, in light of *Dobbs*, the Rhode Island Supreme Court erred in its wholesale denial of Petitioners' petition for reargument, and its affirming the trial court's dismissal of Petitioners' claims to the due process and equal protection clauses' guarantees under the Fourteenth Amendment.

A. Legal protections for unborn human beings are objectively deeply rooted in the Nation's history and tradition.

"A constitution, from its nature, deals in generals not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and

therefore confine it to the establishment of broad and general principles." Chief Justice Marshall – *Bank of United States v. Deveaux*, 9 U.S. 61, 87 (1809). "Every State has an undoubted right to determine the status, or domestic and social condition of the persons domiciled within its territory, *except* insofar as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States." *Strader v. Graham*, 51 U.S. (10 How.) 82, 93 (1851) (emphasis supplied). To wit, the Fourteenth Amendment is a direct restraint against the Tenth Amendment's continuance of States' inherent sovereign powers – relating precisely to the due process and equal protection guarantees afforded "any person" in the United States. This Court should grant the writ to examine whether the Rhode Island Supreme Court erred in failing to recognize said constitutional restraint in deciding that Petitioners, "unborn plaintiffs," were not part of the broad category of "any person" protected by the Fourteenth Amendment.

More precisely, "[i]n *United States v. Palmer*, Chief Justice Marshall was examining the use of 'person' in a federal statute and found it to be a word of inclusion, not one of limitation: 'The words of this section are in terms of unlimited extent. The words "any person or persons," are broad enough to comprehend every human being.'" Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 Issues L. & Med. 185, 201 (2010) citing *United States v. Palmer*, 16 U.S. 610, 631 (1818). It was Chief Justice Marshall, "who was the jurist who authored the opinion promulgating the

Supreme Court's role as the definitive interpreter of the Constitution in *Marbury v. Madison*, [5 U.S. 137 (1803)]." *Id*. at 200.

Historically, "[t]he law divided 'persons' into two categories, natural and artificial. Natural persons were those human beings created by God, 'Natural persons are such as the God of nature formed us.' William Blackstone, 4 *Commentaries on the Laws of England* 195 (1769). Artificial persons were corporations that were 'created and devised by human laws for the purposes of society and government.' *Id*. at 288." *When Unborn Human Beings Were Persons*, 22 Issues L. & Med. 172 (2006).

Traditionally, the words "human being," used synonymously with "person," were consistently and commonly understood to mean humans both born and unborn. "As the common law developed over several hundred years, famous legal authorities including Fleta, Staunford, Lambarde, Dalton, Coke, Blackstone, Hawkins, and Hale referred to the unborn human being as a 'child' and never as 'potential life.'" *When Unborn Human Beings Were Persons*, 22 Issues L. & Med. 172 (2006) citing Dennis J. Horan et al., *Two Ships Passing in the Night: An Interpretavist Review of White-Stevens Colloquy on* Roe v. Wade, 6 St. Louis U. Pub. L. Rev. 229, n. 270, at 281-291 nn. 359-378 (1987). Specifically, " . . . in *Wong Wing v. United States*, Justice Field declared in his separate opinion, 'The term "person," used in the fifth amendment, is broad enough to include any and every human being within the jurisdiction of the republic.'" Gregory J. Roden, *Unborn*

Children as Constitutional Persons, 25 Issues L. & Med. 185, 201 (2010) citing *Wong Wing v. United States*, 163 U.S. 228, 242 (1896). More recently, this Court held that, "[b]y 12 weeks' gestation, an unborn child has taken on 'the human form' in all relevant aspects." *Gonzales v. Carhart*, 500 U.S. 124, 160 (2007). "It has been the uniform and unvarying decision of all common law courts in respect to estate matters for at least the past two hundred hears that a child *en ventre sa mere* is 'born' and 'alive' for all purposes for his benefit." *In re Holthausen's Will*, 175 Misc. 1022, 26 N.Y.S.2d 140, 143, 145 (N.Y. Sur. Ct. 1941); *see also* William J. Maledon, *Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame Law 349, 353 (1971).

Floor debates in Congress nine years before and one year after the enactment of the Fourteenth Amendment, referencing back as far as Magna Carta, further shows that the "term 'person' [was] to be one of inclusion, not of limitation." Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 Issues L. & Med. 185, 201 (2010) citing CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859); *see also* CONG. GLOBE, 40th Cong., 1st Sess. 542 (1867); *see also* Charles Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 Issues L. & Med. 119, 186 (2007). Congressman John Bingham said in the 35th Congress:

> "[N]atural or inherent rights, which belong to all men irrespective of all conventional

> regulations, are by this constitution guarantied [sic] by the broad and comprehensive word 'person,' as contradistinguished from the limited term citizen . . . guarding those sacred rights which are as universal and indestructible as the human race. . . ." CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859).

And in the 40th Congress, Congressman Bingham distinguished the limiting word of "freeman," in "Magna Charta," with the word "person," stating that in our Constitution:

> " . . . it is not to be inquired whether a man is 'free' by the laws of England; it is only to be inquired is he a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty." CONG. GLOBE, 40th Cong., 1st Sess. 542 (1867).

Certain legal rights of the unborn child are as old as the common law itself. Numerous decisions of the English courts – at least one relying on Roman civil law – recognized property rights of an unborn child, probate rights, rights to "inherit all manner of estates," to have a guardian appointed for him/her, equity, and to recover in tort law (including prenatal injuries). *See Wallis v. Hodson*, 2 Atkyns 115, 118, 26 Eng. Reprint 472 (1740) ("Nothing is more clear, than that this law considered a child in the mother's womb absolutely born, to all intents and purposes, for the child's benefit."); *see also Doe v. Clarke*, 2 H.Bl. 399; *Hall v. Hancock*, 32 Mass. (15 Pick.) 225, 257-258 (1834); *Aubuchon*

v. Bender, 44 Mo. 560, 568 (1869); *Biggs v. McCarty*, 86 Ind. 352 (1882); and *Deal v. Sexton*, 144 N.C. 110-111, 56 S.E. 691, 692 (1907).

"The property rights of the unborn child progressed to such a point that in 1938 the Supreme Court of Rhode Island held that a posthumous child was entitled to a share in the income of a trust from the date of her father's death rather than from the date of her subsequent birth. *Industrial Trust Co. v. Wilson*, 61 R.I. 169, 200 A. 467 (1938). In [that] case, it was the court's opinion that there was 'no sound reason' for treating the posthumous child differently from her brothers and sisters in this matter. *Id*. at 176, 200 A. at 476." William J. Maledon, *Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame Law 349, 353 (1971); *see Fleet Nat. Bank v. Miglietta*, 602 A.2d 544, 547 (1992).

In a landmark medical malpractice case an "infant plaintiff (a 'viable child') sought recovery for injuries sustained while in the process of being 'removed from his mother's womb.'" William J. Maledon, *Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame Law, 349, 353 (1971). The court in *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946), stated:

> "As to a child being 'part' of its mother[,] . . . [t]rue it is in the womb, but it is capable now of extrauterine life . . . it is not a 'part' of the mother . . . as that term is generally understood. Modern medicine is replete with cases of living children taken from dead mothers." *Id*. at 140. * * * "The law is presumed to keep

> pace with the sciences and medical science has certainly made progress since 1884. We are concerned here only with the right and not its implementation." *Ibid.* at 143.

The "modern" post-*Bonbrest* view was to even " . . . reject the viability requirement and allow recovery when the injury is received at any time during gestation." *The Unborn Child and the Constitutional Conception of Life*, 56 Iowa L. Rev. 995, 997 (1971) (citations omitted); *see also Stinnett v. Kennedy*, 232 So. 3d 202, 210 (Ala. 2016).

Over 138 years ago, this Court held that "unborn persons were entitled to protection under the Due Process Clause in the case of *McArthur v. Scott*." *See* Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 Issues L. & Med. 185, 224 (2010). *McArthur* held that the inheritance and property rights of the unborn persons were violated because, "[n]o provision was made for the preservation of the rights of the afterborn grandchildren." *McArthur v. Scott*, 113 U.S. 340, 396 (1884). Pointedly, this Court in *Dobbs* said, "There is ample evidence that the passage of these [criminalizing abortion] laws was [] spurred by a sincere belief that abortion kills a *human being*. Many judicial decisions from the late 19th and early 20th centuries made that point. (citations omitted)." *Dobbs*, slip op. at 29 (emphasis supplied).

This Court should grant the writ to finally determine whether prenatal life, at any gestational age, enjoys constitutional protection – considering the full

and comprehensive history and tradition of our Constitution and law supporting personhood for unborn human beings. More precisely, do Baby Roe (15 weeks gestational age) and/or Baby Mary Doe (34 weeks gestational age) qualify as "any person" under the Fourteenth Amendment?

In *Dobbs* this Court held that, "[w]hile individuals are certainly free to think and to say what they wish about 'existence,' 'meaning,' the 'universe,' and 'the mystery of human life,' they are not always free to act in accordance with those thoughts." *Dobbs*, slip op. at 31. In *Dobbs*, however, this Court left unfinished the necessity of interpreting the restraint on the States' Tenth Amendment power, to regulate for its health and safety, imposed by the Fourteenth Amendment guarantee that no such laws shall deprive "*any person*" the "right to life," "without due process of law; nor deny to *any person* . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis supplied).

In light of this Court's overruling of *Roe* and *Casey*, this Court should answer whether there is any gestational age where an unborn human being is recognized as "any person" under the Fourteenth Amendment – with legally cognizable rights deserving of constitutional protection. No state can answer this question. It is solely for this Court to interpret and say what the Fourteenth Amendment means. Nor do the principles of federalism nor the Tenth Amendment's reservation of powers give cover to avoidance of this paramount issue. Failure to resolve this issue will serve to "further coarsen society to the humanity of not

only newborns, but all vulnerable and innocent human life. . . ." *Gonzales v. Carhart*, 500 U.S. 124, 157 (2007). This Court should grant the writ, and reverse the Rhode Island Supreme Court, because it is consistent with our Nation's history and tradition to recognize legal protections and rights for unborn human beings, like Petitioners, Baby Mary Doe (34 weeks gestational age) and Baby Roe (15 weeks gestational age).

B. This Court's jurisprudence and constitutional and statutory construction principles support the grant of the writ here.

Given the gap in this Court's jurisprudence relative to the unique case of abortion law and the application of the words "any person" within the Fourteenth Amendment, this Court must complete the analysis begun in *Dobbs* – a case not considered by the Rhode Island Supreme Court – or declare, once and for all, that there is no objective gestational age where an unborn plaintiff can claim the protection of the United States Constitution. "As for some additional guidance from common sense, meaning the 'common understanding of intelligent men,' one may ask, what is the normal action for a person to take when trying to discern the nuances of a word? Consulting a dictionary seems a reasonable and normal course of action." Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 Issues L. & Med. 185, 202 (2010). Equally instructive is this Court's jurisprudence relating to the federal Partial Birth Abortion Ban Act of 2003 (The Act).

Specifically, this Court should grant the writ because the canon of constitutional avoidance does not save the RPA. "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (internal quotes and citations omitted). There is no reasonable saving constitutional construction here because the constitutionally dispositive term – "any person" – as used in the Fourteenth Amendment is undefined. Now is the time. This is the case.

As this Court did in *Dobbs* – construing the term "liberty" in the context of abortion law – it must now construe the term "any person" as it relates to unrestricted abortion laws. Absent a textual definition of "any person" in the Fourteenth Amendment, and any jurisprudence offering the scope and meaning of the term "any person" in this context, this Court should grant the writ.

This Court has " . . . rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *See Citizens United v. FEC*, 585 U.S. 310, 394 (2010). And, in determining that a closely held family corporation was a "person" for purposes of a religious freedom claim, this Court looked to the federal Dictionary Act on whether to extend "personhood" in that context. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707-708 (2014).

"Under the Dictionary Act, ["'unless the context indicates otherwise;'"] 'the wor[d] "person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.' *Ibid*. *See FCC v. AT&T Inc.*, 562 U.S. 397, 131 S.Ct. 1177, 1182-1183, 179 L.Ed.2d 132 (2011) ('We have no doubt that "person," in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear'). Thus, unless there is something about the RFRA context that 'indicates otherwise,' the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard." *Burwell v. Hobby Lobby Stores, Inc.*, at 708. This Court held that the definition of "person" under the Religious Freedom Restoration Act of 1993 (RFRA) did, in fact, include the legal entity of a closely held corporation, holding that, "The term 'person' sometimes encompasses artificial persons (as the Dictionary Act instructs), and it is sometimes limited to natural persons." *Id*. This Court should grant the writ here to afford the unborn a similar threshold analysis.

In so doing, this Court would find that the Dictionary Act includes – alongside its definition of "person" – the specific provision that, "[n]othing in this section shall be construed to * * * deny * * * or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being 'born alive' as defined in this section." 1 U.S.C. § 8(c). Further, the Dictionary Act, in defining the word

"person," uses the words "person," "human being," "child," and "individual" synonymously. 1 U.S.C. § 8(a).

Rhode Island grants rights to its unborn human beings in the following areas: (1) wrongful death claims, *see* R.I. Gen. Laws § 10-1-7; (2) intestacy inheritance rights, *see* R.I. Gen Laws § 33-1-1, and R.I. Gen. Laws § 15-8-3; (3) fetal death registration, *see* R.I. Gen. Laws § 23-3-17; and "Representation of unborn, unascertained, and incompetent persons." *See* R.I. Gen. Laws § 33-22-17. At no time has any state or federal court declared these laws unconstitutional. Nor was any such challenge raised in this case by defendants.

Additionally, until the passage of the RPA, Baby Mary Doe was a statutory "quick child" under R.I. Gen. Laws § 11-23-5; and, both Baby Roe and Baby Mary Doe were "persons" under R.I. Gen. Laws § 11-3-1 *et seq*. Rhode Island law recognized that "human life commences at the instant of conception and that said human life * * * is a person within the * * * meaning of the fourteenth amendment of the constitution of the United States[.]" Pet.App.5-6. Rhode Island is not alone in this regard. There is near total accord among the States where protection for the unborn is provided for in probate, criminal, estate, property, and tort laws. *See supra* Section I.A. (discussion of the history and tradition of this Court, English courts, common law, and contemporaneous congressional floor debate relating to the treatment of unborn human beings as persons in the law). This Court should grant the writ to finally answer whether unborn human beings have

any rights, at any gestational age, under the United States Constitution.

Notably, the RPA subjects itself to the Partial Birth Abortion Ban Act of 2003 (18 U.S.C. § 1531) (The Act), notwithstanding the RPA repealing Rhode Island's own partial birth abortion law – and providing for partial birth abortions for more reasons than The Act allows. Pet.App.45. Specifically, the RPA provides for abortion up until birth, " . . . when necessary to preserve the health or life of that individual; . . . ." Pet.App.44. The Congressional Findings of The Act concluded, however, that " . . . partial birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care, and should, therefore, be banned." 18 U.S.C. § 1531 sec. 2 para. (13). The Act provides for partial birth abortion only "to preserve the life of the mother." *Id*.

Further, this Court should grant the writ to clarify its holding in *Gonzales v. Carhart*, 550 U.S. 124 (2007) – whereby it upheld as constitutional a congressional law that gives unborn human beings legal status. The Partial Birth Abortion Ban Act of 2003 applies " . . . both previability and postviability because, by, common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales v. Carhart* at 147. This Court and Congress have already gone beyond defining an unborn child as merely a "fetus."

Specifically, the Congressional Findings of The Act declare that the "practice of performing a partial birth abortion * * * in which a physician delivers a living, unborn child's body [to some anatomical markers] * * * for the purpose of performing an overt act * * * that the person knows will kill the partially delivered infant * * * is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." 18 U.S.C. § 1531 sec. 2 para. (1). Moreover, the method of abortion prohibited by The Act is set to protect an unborn "fetus" because it is "killed just inches before . . . completion of the birth process." *Gonzales* at 157.

More specifically, "The Act expresses respect for the dignity of human life." *Id.* Under the Dictionary Act, the " . . . all vulnerable and innocent human life" protected by The Act is a "human life" that is, by definition under the Dictionary Act, not "born alive." 1 U.S.C. § 8(b). Our Nation's Legislative Branch has already provided for, and this Court has ruled constitutional, law that gives legal status and rights to unborn human beings similar to those afforded "born alive" persons. Precisely, The Act speaks of the abortion of a "child," partially born child," "infanticide," "babies," "the ending of life," and, " . . . the disturbing similarity to the killing of a newborn infant [which] promotes a complete disregard for infant human life." 18 U.S.C. § 1531 sec. 2 para. (14). Our Legislative Branch documents, in The Act's Congressional Findings, that "[i]t is a medical fact [] that unborn infants at this stage feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than

that of newborn infants and older children, when subjected to the same stimuli." 18 U.S.C. § 1531 sec. 2 para. (14). The Act references the "child" experiencing the gruesome and inhumane procedures attendant to such an abortion. The Act consistently references the "child" pre-abortion and after completed birth interchangeably. This Court should grant the writ to declare, once and for all, that the "child" protected by The Act is a "person," within the meaning of "any person," in the Fourteenth Amendment – entitled to all its protections and guarantees. Such interpretation is fully within this Court's jurisprudence relative to its reference to the Dictionary Act.

Petitioners, Baby Roe (15 weeks gestational age) and Baby Mary Doe (34 weeks gestational age) fall within the previability and postviability unborn, respectively, protected by The Act. This Court should grant the writ to decide whether, at least, those unborn "infants," "chil[dren]," protected by The Act each qualify as "any person" under the Fourteenth Amendment. At a minimum, that portion of the RPA that conflicts with The Act, under the doctrine of preemption and the Supremacy Clause of the United States Constitution, is void.[4] *See Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L.Ed. 23, 41 (1824). And, without a severability clause,

[4] The verbatim text of the Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. IV, cl. 2.

the RPA fails constitutional muster in its entirety. This Court has sufficient established law and jurisprudence to grant the writ here, and should reconcile the well-defined legal status of the "unborn child" of The Act, with the undefined federal protections and guarantees of the Fourteenth Amendment afforded that "unborn child."

II. This Court should grant the writ and clarify whether an unborn human being has standing to access the courts.

The Rhode Island Supreme Court held no other basis for its determination Petitioners lacked standing than the court's analysis of *Roe* and *Casey* – concluding that Baby Roe and Baby Mary Doe were not "persons." Pet.App.16-18. If this Court determines that Baby Roe and Baby Mary Doe each qualify as "any person" under the Fourteenth Amendment, then the standing requirement is satisfied – to the extent the RPA denied Baby Roe and Baby Mary Doe due process of law before Rhode Island enacted the RPA; and, on its face, the RPA creates an unconstitutional classifications of "persons" – viable and non-viable.

If this Court, however, finds that neither Baby Roe nor Baby Mary Doe qualify as "any person" under the Fourteenth Amendment, then this Court should grant the writ to determine if the Rhode Island Supreme Court erred in not applying the "substantial public interest exception" to the general standing requirement. Specifically, the Rhode Island Supreme Court held

that, "[a]lthough plaintiffs' contentions implicate an important question, . . . their substantive claims with respect to the constitutionality of the RPA itself are not a matter of substantial public interest because this question has been answered by the United States Supreme Court [in *Roe* and *Casey*]." Pet.App.19. The Rhode Island Supreme Court's reasoning on this point evaporated with *Dobbs*. This Court, at least, should vacate and remand this case back to the Rhode Island courts for reargument and rehearing, with instructions from this Court, in light of *Dobbs*.

The preamble to the United States Constitution provides that "We the people," "establish this Constitution," to "establish Justice," and to "secure the Blessings of Liberty to ourselves and our *Posterity*." U.S. Const. Preamble (emphasis supplied). While the Preamble's purpose is " . . . not to create a right, it does define for whom the rights were created." James Joseph Lynch, Jr., *Posterity: A Constitutional Peg for the Unborn*, 40 Am. J. Juris. 401, 401-402 (1995) citing *United States v. Boyer*, 85 V. 425 (D.C. Mo., 1898) (quoting Justice Story on the Constitution, § 462). The Preamble created two classes of sovereignty: "ourselves" and our "Posterity" – apparently on equal footing. *Id*. at 402 (citation omitted). The understanding that "Posterity" includes those lives in being – i.e., human beings – is consistent with the meaning of posterity in 1776. *Ibid*. (citations omitted).

Further, Article III, section 2 of the United States Constitution provides for jurisdiction in this Court, "for all cases in . . . Equity. . . ." U.S. Const. art. III, § 2.

Unborn human beings have had standing to seek equitable relief from the courts – like an injunction. Petitioners sought to permanently enjoin the RPA in this case. Pet.App.91. The "Substantial Public Interest" conferring standing is an equitable remedy. This Court should grant the writ to determine whether the Rhode Island Supreme Court erred in denying Petitioners equitable relief.

Finally, this Court should grant the writ to answer whether the RPA's facial classification between viable and non-viable human beings provides a sufficient basis for Petitioners' standing here. Pet.App.43-45. In this case, Baby Roe and Baby Mary Doe are members of the same class of human beings, but the RPA favors Baby Mary Doe over Baby Roe, on its face. Those similarly situated are not treated similarly by the RPA. "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' " *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citations omitted). As such, the RPA's classification is unconstitutional.

This Court should grant the writ to clarify the standing requirements of unborn human beings, to challenge abortion laws based on the quasi-suspect classification of age – gestational age – termed viable or non-viable. And, further determine whether such classification, based on gestational age, is a quasi-suspect classification entitled to a heightened level of judicial scrutiny under the Fourteenth Amendment's equal protection clause jurisprudence. *Id.* at 216-218.

CONCLUSION

This Court should grant the petition for a writ of certiorari here. The questions presented are pointed and inevitable, in light of *Dobbs*. The record here presents all that is necessary to resolve the unfinished business left by *Dobbs*. Now is the time.

Alternatively, this Court should vacate the ruling of the Rhode Island Supreme Court and remand the case for further proceedings in light of this Court's decision of *Dobbs v. Jackson* – with specific guidance as to the analysis courts should take in this instance.

Respectfully submitted,

DIANE MESSERE MAGEE
Counsel of Record
LAW OFFICES OF
DIANE MESSERE MAGEE, INC.
572 Main Street
Warren, Rhode Island 02885
Tel. (401) 245-8550
Email: dmm@MessereMageeLaw.com

THOMAS MORE DICKINSON
1312 Atwood Avenue
Johnston, Rhode Island 02919
Tel. (401) 490-8083
Email: tmd@appealRI.com

Counsel for Petitioners

September 1, 2022