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January 29, 2021

Governor William Asa Hutchinson II
Arkansas State Capitol, Suite 250
500 Woodlane St.
Little Rock, AR 72201

Re: Senate Bill 6, "An Act to Create the Arkansas Unborn Child Protection Act"

Dear Governor Hutchinson:

You have asked me, as General Counsel for the National Right to Life Committee, to review and provide my legal opinion on Senate Bill 6, titled "An Act to Create the Arkansas Unborn Child Protection Act." As set out herein, I oppose SB6 at the present time.

Context

Roe v. Wade declared a right of privacy encompassing abortion. 410 U.S. 113 (1973). *Roe* was widely decried by legal scholars as being without constitutional warrant, yet subsequent cases made the declared right virtually absolute. *See* James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. Law 181 (1989).[1]

In the early years after *Roe*, there was much scholarly debate over how to reverse *Roe* by means of a federal statute or constitutional amendment. In 1984, the Horatio R. Storer Foundation published *Restoring the Right to Life: The Human Life Amendment*, for which I was the editor and authored part. I have helped guide the *Roe* reversal strategy through this and other activities, including by authoring numerous articles and amicus curiae briefs, providing legislative testimony, consulting, advising, and litigating cases advocating the prolife view. Despite valiant efforts in the 1980s, attempts to reverse *Roe* by a federal constitutional amendment or statute failed. And as discussed below, efforts to overrule *Roe* have not yet borne fruit, though incremental progress has been made.

Prolife strategy—which includes but is not limited to *Roe*-reversal strategy—has also focused on the appointment and confirmation of U.S. Supreme Court justices favorable to abortion regulations that the prolife movement promotes and, hopefully, to overruling

[1] *Available at* https://digitalcommons.law.byu.edu/jpl/vol3/iss2/2/).

Roe. The representative cases discussed next show some progress in altering the makeup of the Court, but they include a cautionary tale for the present situation.

The 1973 *Roe* case was decided 7-2, i.e., the majority comprised 7 justices and only 2 dissented. 410 U.S. at 115. After *Roe*, the Court considered cases involving state regulation of abortion based on (i) recognized state interests in maternal health and protecting preborn human life (after viability) and (ii) how *Roe* said states could implement those interests, e.g., informed-consent requirements, clinic regulations, parental- and spousal-involvement laws, etc. But the majority increasingly diminished the force of those state interests and what it said states could do to regulate abortion, instead making the abortion right increasingly absolute. That absolutist direction played an important part in a diminishing majority over time in the following cases.

In September 1981, Reagan-appointee Justice O'Connor took her seat on the Supreme Court. In 1983, in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 418, she joined the dissenters (making for a 6-3 decision) and stated forceful critiques of the majority's interpretation and application of *Roe*.

In 1986, in *Thornburgh v. ACOG*, 476 U.S. 747, 782, the Reagan Justice Department filed an amicus brief calling for the overruling of *Roe*. Rather than doing that, the Court issued its most extreme decision to date. But that extremeness caused Chief Justice Burger to join the dissent, making for a 5-4 decision, and he proclaimed that if this is what *Roe* means it should be reconsidered. Justice O'Connor again filed a strong dissent (joined by then-Justice Rehnquist). *Id.* at 814.

In February 1988, Reagan-appointee Justice Kennedy took his seat on the Court, replacing Justice Powell, part of the *Thornburgh* majority. There seemed a chance a majority for reversing *Roe* had been achieved. At this time I was active in presenting the Court with an opportunity to reverse *Roe* by bringing cases seeking consideration of the rights of fathers who objected to the abortion of their unborn children.[2]

But in 1992, Justices O'Connor and Kennedy dashed those hopes by joining a reaffirmation of the basic abortion right in *Planned Parenthood of Southeastern Pennsylvania v.*

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[2] I also authored or coauthored articles advocating *Roe*'s reversal during this time. *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. Law 181; Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Penn. L. Rev. 157 (1989); Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade?, 15 J. Contemp. L. 131 (1989); Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duq. L. Rev. 271 (1990); Bopp, Coleson & Barry A. Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule* Roe v. Wade?, 1 Const. L. J. 55 (1990).

Casey. 505 U.S. 833 (1992). They coauthored (with Justice Souter) an unusual three-member joint opinion relying heavily on the legal doctrine of *stare decisis*, i.e., the idea that the Court should stand by prior Court decisions (absent the clear presence of certain Court-prescribed factors, which they found inapplicable). The joint opinion was apparently intended to shut down efforts to overturn *Roe*. And it reveals the powerful influence of *stare decisis* and Court-legitimacy concerns:

> After considering the fundamental constitutional questions resolved by *Roe,* principles of institutional integrity, and the rule of *stare decisis,* we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

505 U.S. at 845-46. Coupled with this emphasis on "institutional integrity" and "*stare decisis*," the three-member opinion said personal views didn't matter, *id.* at 850:

> Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

From the foregoing, we see that Justice O'Connor was strongly opposed to the post-*Roe* direction and analysis of the Court, but ultimately disfavored overruling *Roe*'s core right. Justice Kennedy also didn't meet the expectation that he would be ideologically compatible to Reagan. It is a well-known phenomenon that justices appointed by conservative Presidents often don't live up to such expectations. Various reasons are posited—pressure to "grow in office" from liberal reporters, desire for acceptance in establishment circles, etc.—but absent an actual voting record, a justice's voting pattern can't accurately be predicted. This cautionary tale shows that believing a majority exists to overrule *Roe* doesn't make it so. *Casey* both reaffirmed *Roe* and held that *Roe* didn't meet the Court's criteria for overruling precedent, making things worse.[3]

The power of *stare decisis* and institutional-integrity concerns is also apparent in Chief Justice Roberts's actions in two cases involving abortion-clinic regulations and qualifications for persons performing abortions. He joined Justice Alito's dissent (also joined by Justice Thomas) in the 5-3[4] decision in *Whole Women's Health v. Hellerstedt*,

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[3] *Casey* also established a variant of an "undue burden" test Justice O'Connor advocated. The nature of that test was litigated in recent cases with the Court taking a view of what is undue (and how to establish that) that has been hostile to abortion regulation.

[4] Justice Scalia died on February 13, 2016, leaving only eight Justices to decide *Hellerstedt*. Justice Breyer wrote the majority opinion, joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan. The dissenters were Chief Justice Roberts and Justices Thomas and Alito. Scalia would

136 S. Ct. 2292, 2330 (2016), because (inter alia) he disagreed with how the majority interpreted and applied *Casey*'s "undue burden" test, *id.* at 2342-50. But in a case that involved similar ambulatory-surgical-care requirements for abortion clinics and hospital-admitting privileges for those performing abortions, *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020),[5] he joined the 5-4 majority judgment (though not the majority's opinion) based on *stare decisis*. *Id.* at 2133. He said:

> I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case.

Id. He extolled the value of *stare decisis*, *id.* at 2133-35, then explained why he had disagreed with the undue-burden analysis in *Hellerstedt*, but concluded that because the cases were "alike," *stare decisis* required that he follow *Hellerstedt*, *id.* at 2141-42:

> *Stare decisis* instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous. For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.

The Chief Justice could have simply said he dissented for the reasons he dissented in *Hellerstedt*, as is often done, but instead he argued and applied *stare decisis*. His approach shows the power of *stare decisis* in allowing Court members to assert it to avoid even their own prior assertions and arguments. It can also be used by new Court members to say, as was said in *Casey*, that despite one's own beliefs precedents should control. Recall the enormous pressure on them to follow *Roe* as precedent at confirmation hearings for justices appointed by Republican presidents. That is designed to have an inhibiting effect on new justice's votes.

From the foregoing, it is clear that Court members' votes in abortion cases cannot be safely predicted absent a clear opinion statement like Justice Thomas's in *Russo*: "The Constitution does not constrain the States' ability to regulate or even prohibit abortion." *Id.* at 2149. Even dissents in abortion cases, where available, don't always predict votes, as seen with Justice O'Connor in *Casey* and Chief Justice Roberts in *Russo*. So dividing

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be replaced by Justice Gorsuch before the next case discussed.

[5] *Available at* https://www.law.cornell.edu/supremecourt/text/18-1323 (without the pagination of the reported version cited in text here).

the current Supreme Court into perceived"liberal" and "conservative" wings can't overcome the unpredictability of what Justices will actually do when faced with reversing *Roe*. And note that the word "perceived" in the prior sentence is appropriate for the following descriptions because on many issues Court members align differently than might be expected based on a liberal-conservative perspective.

On the current Court, the perceived liberal wing comprises Justices Breyer, Sotomayor, and Kagan; the perceived conservative wing comprises Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett; and the Chief Justice is a swing vote on many issues.

The liberal wing consistently votes together against abortion regulations and would oppose overruling *Roe*. So at present one may safely assume that there will be three votes against overruling *Roe* and against most abortion regulations in an abortion case.

In the conservative wing, there is less certainty, as illustrated by the June 2020 *Russo* decisions' opinions and alignments.[6] In *Russo*, Justice Thomas clearly stated that *Roe* was wrongly decided, 140 S. Ct. at 2149-51, and that "our abortion jurisprudence finds no basis in the Constitution," *id.* at 2153, but he was not joined by another justice in that or any other part of his dissenting opinion. Justice Alito dissented (joined in part by Justices Thomas and Kavanaugh), *id.* at 2153-71, as did Justice Gorsuch, *id.* at 2171-82, and Justice Kavanaugh, *id.* at 2182, but all argued based on *Hellerstedt* and normal judicial doctrines that were being ignored. Justice Gorsuch expressly opined that *Roe* was not at issue, *id.* at 2171:

> In fact, *Roe* . . . is not even at issue here. The real question we face concerns our willingness to follow the traditional constraints of the judicial process when a case touching on abortions enters the courtroom.[7]

From these opinions, it is unclear whether any justice other than Justice Thomas actually believes that *Roe* was wrongly decided. And even if one or more believe *Roe* was wrongly decided, it is another matter whether they would be willing to overrule it.

From the foregoing, it is not at all clear that a majority exists on the Supreme Court for overruling *Roe*. Absent such a majority, a case directly challenging *Roe*, risks yet another opinion reaffirming *Roe* and holding that it doesn't meet the Court's criteria for

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[6] The lead opinion was a plurality opinion by Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan. 140 S. Ct. at 2119. Justice Ginsburg has been replaced by Justice Barrett.

[7] My position is that *Roe* is always at issue in a case based on the right to abortion that *Roe* found because, absent that right, there would be no case. Justice Thomas's dissent recognizes this fact and states this position. But as Justice Gorsuch's statement at least indicates, *Russo* could be decided without reaching *Roe*.

overruling precedents as happened in *Casey*. In fact, trying to force an overruling of *Roe* without adequate incremental preparation risks actually pushing justices away from openness to overruling *Roe*.

A risk also exists regarding the possible improvement of the Court's constitutional rationale for an abortion right. *Roe* was decided on a substantive-due-process rationale (i.e., finding abortion to be within the "liberty" protected by the Due Process Clause of the Fourteenth Amendment), which was widely criticized at the time and remains a weak argument, as Justice Thomas notes in his *Russo* dissent discussing *Roe*'s lack of constitutional grounding. But an equal-protection theory has been advanced, which some find more compelling. In a case challenging an abortion right, there is the potential danger of a reaffirmation of the right based on what the late Justice Ginsburg long advocated—an "equal protection" analysis under the Fourteenth Amendment. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Justice Ginsburg joined by Justices Stevens, Souter, and Breyer) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). If this view gained even a plurality in a prevailing case, this new legal justification for the right to abortion would be a powerful weapon in the hands of pro-abortion lawyers that would jeopardize all current laws on abortion, such as laws requiring parental involvement for minors, waiting periods, specific informed consent information, etc. A law prohibiting abortion might force justices not wanting to overrule *Roe* (for whatever reason) to vote to strike down the law, giving an opportunity to rewrite the justification for the right to abortion for the Court. This is highly unlikely in a case that decides the constitutionality of such things as partial-birth abortion bans, parental-involvement laws, women's right-to-know laws, waiting periods, and other legislative acts that do not prohibit abortion.

An equal protection justification for the declared abortion right was advocated by attorneys for the Planned Parenthood Federation and the ACLU in *Webster v. Reproductive Health Services*. 492 U.S. 490 (1989). It has also been advocated by Harvard Law School Professor Laurence Tribe, among others. *See, e.g.* Laurence Tribe, *American Constitutional Law* 1353 n.109 (2d ed. 1988). While an argument can be made that the equal protection clause provides no basis for a right to abortion, *see* Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade?, 15 J. Contemp. L. 136-41, the late Ruth Bader Ginsburg argued that the equal-protection clause provides a justification for an abortion right that is superior to the analysis employed in *Roe*. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L Rev. 375 (1985). And as noted above, four dissenting justices in *Gonzales* joined her position. Were the Court to embrace her view that the equal protection clause protects the right to choose abortion on the basis of gender discrimination (in a

majority opinion, or even in a plurality opinion), states would likely have to fund abortions that they are not currently required to fund in programs for indigent persons. This has happened in some states that passed an equal rights amendment (which has a similar analytical effect to adopting an equal protection rationale for abortion rights). *See, e.g.*, *Fisher v. Dept. Pub. Welfare*, 482 A.2d 1137 (1984), *rev'd*, 502 S.2d 114 (Pa. 1985); *Maher v. Roe*, 515 A.2d 134 (Conn. Super. Ct. 1986).

While the foregoing equal-protection risk may seem less likely with the departure of Justice Ginsburg, note that (i) even a plurality opinion adopting it would be problematic and (ii) the constituency of the Court when any particular case arrives before the Court remains somewhat unpredictable, as illustrated by the deaths in office of Justices Scalia and Ginsburg and in light of the current makeup of the Executive Branch and Senate.

In sum, the wisest course is to continue with what brought about previous overrulings, i.e, incremental attacks that undercut a decision until it falls. This most famously was the strategy that resulted in the overruling of the racial separate-but-equal doctrine. This approach provides opinions that can be cited as inconsistent with the case at issue when a decision finally overrules a precedent. In the abortion context, that means continuing with incremental attacks as has been the recent prolife approach, especially seeking to cut back on the undue-burden analysis employed in *Hellerstedt* and *Russo*. Continued favorable development in the case law will remove the argument, used in *Casey* and seemingly persuasive to Justices O'Connor and Kennedy there, that the Court would be viewed as political and just changing with changing majorities if it overrules *Roe* now. And it will allow for further opinions by current justices to provide better guidance and predictability as to their position and to cite in favor of overruling. The pressures on justices perceived as conservative is enormous, as seen in recent confirmation hearings, and to gain their hoped-for support later it is wise to allow them to build a case for overturning *Roe* by doing lesser, but important, things now in the form of creating a more favorable environment for overturning *Roe*.

SB6

If enacted, SB6 would

- provide definitions of key, operative terms, including "abortion," "fertilization," "medical emergency," and "unborn child";
- expressly argue and call for overturning *Roe v. Wade*, 410 U.S. 113 (1973);
- provide statutory language banning abortion in Arkansas "except to save the life of a pregnant woman in a medical emergency";
- provide felony penalties (fine and/or imprisonment) for a person "[p]urposely

perform[ing] or attempt[ing] to perform an abortion";

- would "not . . . [a]uthorize the charging or conviction of a woman with any criminal offense in the death or her own unborn child";
- exclude contraceptives "administered before the time when a pregnancy could be determined through conventional medical testing" and provided "in accordance with manufacturer instruction"; and
- provide an affirmative defense for physicians caring for pregnant women where harm comes to the unborn child accidentally or unintentionally.

While the Bill has many admirable features, it is not a law that would be triggered if and when *Roe* is overruled but directly challenges the proclaimed abortion right in *Roe*. There no way to uphold it without overruling *Roe*. Of course, its intent is to offer a presumed favorable Court majority a vehicle for overruling *Roe*. But that approach is not the best and has dangers as outlined above.

Were SB 6 enacted, it would immediately be challenged successfully in federal district court because *Roe* would control the decision, with attorneys fees awarded to the challengers. If appealed, the district court would be affirmed because *Roe* controls, again with attorney fees to the challengers. Then, the U.S. Supreme Court would be asked to review the case. It would have the option whether to accept it because such judicial review is discretionary. At that point, various justices would have to decide what to do. For many reasons, they might well not accept the case for review, which would simply add another unfavorable appellate-court precedent. (And while denial of review theoretically means nothing legally, it would be deemed Court rejection by media and the public.) But if the required four justices vote to accept the case, the issue of overruling *Roe* would be before the justices without the preparation of important holdings undercutting *Roe* that would be there with the favored incremental approach. As in *Casey*, the pressure to protect the Court from looking political (simply overruling because a new majority had arrived) would be enormous, with court-integrity and *stare decisis* concerns forcefully argued. There would be strong pressure for justices who are personally opposed to abortion and believe *Roe* was wrongly decided to write an opinion along the lines of the joint opinion in *Casey*. And if they do so, they become unlikely votes for actually overruling *Roe* when better groundwork has been prepared.

In my considered legal opinion, based on my legal experience and long history of working to overturn *Roe*, the likelihood of overruling *Roe* by enacting SB 6 is very small and remote. And the suggestion of a very small and remote chance does not favor enactment because the risk of harm is far greater and imminent. Whether a majority exists that would actually want to overrule *Roe* now—in light of court-integrity and *stare decisis*

concerns—is not established and unclear. And the chances of such a majority coming together diminishes from efforts to presently, directly overturn *Roe*. Creating pressures to overrule *Roe* without laying the incremental groundwork that has historically been used to justify overruling precedents would push justices toward the shelter of relying on court-integrity and *stare decisis* concerns and voting not to overrule *Roe* despite their personal beliefs about abortion and *Roe*. So I oppose SB6 at the present time.

Helpful Legal Changes

While bans on the core abortion right at the state level currently pose too little promise and too much harm risk, there are many helpful things that states can do to improve the legal situation in their state to continue the incremental march toward overruling *Roe*. Several pro-life groups, especially the National Right to Life Committee, have model bills that are the result of much thought and experience. Such well-conceived laws will reduce or eliminate the likelihood of litigation and possible losses that will require the state to pay attorneys fees for pro-abortion lawyers. Crucially, if there is a favorable majority now on the U.S. Supreme Court it will soon become apparent and solidified as challenges to such laws make their way to the Court and are upheld, thereby creating cases to cite when *Roe* is eventually overruled. Here are some examples.

- A constitutional amendment to (1) state a pro-life public policy and (2) eliminate the state constitution as a basis for a state court to declare a state right to abortion, along the following lines: "SECTION 1. The policy of the State of X is to protect the life of every unborn child from conception until birth, to the extent permitted by the federal constitution. SECTION 2. Nothing in this constitution shall be construed to grant or secure any right relating to abortion or the public funding thereof."
- A statute banning partial-birth abortion.
- A statute including unborn victims in homicide laws.
- A statute protecting infants born alive as a result of attempted abortion.
- A statute banning human cloning and embryonic stem cell research.
- A statute requiring parental involvement for minors seeking abortion.
- A statute requiring true informed consent for women seeking abortion, with state-prescribed content and a waiting period after receipt of the information.
- A statute providing protection for pro-life health care providers and pharmacists who refuse to participate in abortion-related activity.
- A statute requiring that abortion clinics meet certain standards, such as those required

for other ambulatory surgical care facilities in the state.

- A statute patterned after the proposed Unborn Child Pain Awareness Act.
- A statute informing the woman seeking an abortion that the unborn will experience pain.
- A statute requiring the woman to view ultrasound images of her unborn baby.

Finally, I too want to see *Roe* overruled and have worked to do so for much of my life. I applaud those with the same goal. But in this critical time, when progress at the U.S. Supreme Court seems possible with a careful approach, we must take care not to undermine that possibility. I appeal to all involved to proceed in the wisest way, as outlined herein, the one most likely to achieve the longed-for goal of one day overruling *Roe*.

Sincerely,

THE BOPP LAW FIRM, PC

James Bopp, Jr.