IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-576

PATRICK MORRISEY, in his official capacity as Attorney General of the State of West Virginia,

Petitioner,

v.

WOMEN'S HEALTH CENTER OF WEST VIRGINIA, on behalf of itself, its staff, its physicians, and its patients; **DR. JOHN DOE**, on behalf of himself and his patients; **DEBRA BEATTY**; **DANIELLE MANESS**; and **KATIE QUIÑONEZ**,

Respondents.

Appeal from the Circuit Court of Kanawha County

Case Nos. 22-C-556, 22-C-557, 22-C-558, 22-C-559, 22-C-560

BRIEF FOR *AMICI CURIAE* PATRICIA COHEN, NANCY F. COTT, AND AARON TANG IN SUPPORT OF RESPONDENTS

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STATEMENT OF IDENTITY AND INTEREST

We are scholars of law and history who have, over many years, researched and written leading books and articles uncovering and analyzing the history of abortion, laws concerning the practice, and related topics. As *amici curiae* we submit this brief to assist the Court's deliberations, by offering an informed scholarly view of the legal history relevant to the case.[1]

Patricia Cline Cohen, Ph.D., is a professor emerita at the University of California, Santa Barbara. Her research concerns American history from 1750 to 1870, with emphases on women, gender, sexuality, journalism, historical demography, and medicine. Her current project studies abortion, fertility decline, and medical jurisprudence, with preliminary results in "Married Women and Induced Abortion, 1820–1860" (*available at* http://ssrn.com/abstract=4197554). Professor Cohen has authored three books and numerous articles published in the *Journal of the Early Republic*, the *Journal of Women's History*, and *The Oxford Handbook of American Women's and Gender History*. She served as the President of the Society for Historians of the Early American Republic from 2012–2013.

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[1] We provided timely notice to counsel of record for all parties of our intent to file this *amicus curiae* brief. W. Va. R. App. P. 30(b). We have also received consent from all parties to file this brief. W. Va. R. App. P. 30(a). No party to this action or its counsel authored this brief in whole or in part, and no such counsel or party made a monetary contribution specifically intended to fund the preparation or submission of the brief. W. Va. R. App. P. 30(e)(5).

Historians in 2016–17. Professor Cott has testified as an expert witness on history in state and federal courts.

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ARGUMENT

The historical record establishes that abortions before quickening were not criminalized at common law. As it pertains to the Court's present consideration of West Virginia Code § 61-2-8, the Parties have each raised the issue whether all abortion was criminalized at common law.[2] We *amici* will show that the historical record is clear on the issue: according to the common law, abortion was not criminal before the phenomenon known in the 18th and 19th centuries as "quickening," when the fetus could be felt to "stir" or move in the womb.

[2] Respondents argued below that abortion cannot be *malum in se* because (at least in part), "at common law, abortion was not wholly criminalized[.]" Memo. of Law In Support of Plaintiffs' Mot. for Prelim. Inj. (June 23, 2022) at 30 n.22. Petitioner argued in response that "[c]rimes tried at common law have the 'inherent[] immoral[ity]' associated with *malum in se* offenses," such that "the relevant query is the common law's treatment of the acts in question." Memo. In Support of Response of Def. to Plaintiffs' Mot. for Prelim. Inj. (July 11, 2022) at 17 (citation omitted).

I. Historical Sources Overwhelmingly Show That Abortions Before the Fetus "Quickened" Were Not Criminalized at the Common Law.

The Anglo-American common law did not prohibit abortion prior to the point when a pregnant woman felt movement of the fetus stirring in her uterus. That moment was commonly called "quickening" in the 18th and 19th centuries. Accordingly, the fetus was then called "quick" and the woman described as "quick with child" or "pregnant with a quick child." Early American law enunciated and followed this same principle: abortion was not recognized or regulated until a pregnant woman felt the fetus move. The timing of that phenomenon might vary considerably—from 15 to 24 weeks into a pregnancy—depending on the woman.

Early common-law authorities consistently articulated this quickening threshold. As Blackstone explained in his *Commentaries on the Common Law*, life "begins in contemplation of law a[s] soon as an infant is able to stir in the mother's womb." 1 St. George Tucker, *Blackstone's Commentaries* 129 (William Young Birch & Abraham Small eds. 1803) (hereinafter, "Blackstone"). Blackstone's "works constituted the preeminent authority on English law for the founding generation." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). Blackstone's view echoed that of prior authorities, including Coke, Hale, and *Fleta*. *See, e.g.*, Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* 50 (E. & R. Brooke 1797); Matthew Hale, *Pleas of the Crown: A Methodical Summary* 53 (P.R. Glazebrook ed., 1972) (1678) (similar); *Fleta*, *in* 72 *Publications of the Selden Society* 60–61 (H.G. Richardson & G.O. Sayles eds. trans. 1955) (similar).

Early American legal scholars and statesmen likewise assumed the Blackstonian view. James Wilson, who crafted the preamble to the U.S. Constitution, quoted and endorsed Blackstone's words in his seminal political lectures of 1790: "In the contemplation of law, life

begins when the infant is first able to stir in the womb." James Wilson, *Natural Rights of Individuals* (1790), *reprinted in* 2 *The Works of James Wilson* 316 (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896). Legal treatises consistently enunciated the same view, accepting the principle that a fetus became a cognizable life for protection of the law only upon quickening. *See, e.g.*, Henry Roscoe, et al., *A Digest of the Law of Evidence in Criminal Cases* 694 (London, William Benning & Co., 5th ed. 1854) ("A child in the womb is considered *pars viscerum matris* [part of the mother's body], and not possessing an individual existence, and cannot therefore be the subject of murder."); 1 William Oldnall Russell et al., *A Treatise on Crimes and Indictable Misdemeanors* (Phila., T. & J.W. Johnson, 7th ed. 1853) 484–85, 539–40, 671; John A.G. Davis, *A Treatise on Criminal Law with an Exposition of the Office and Authority of Justices of the Peace in Virginia* 339 (Phila., C. Sherman & Co. 1838); Oliver L. Barbour, *The Magistrate's Criminal Law, a Practical Treatise on the Jurisdiction, Duty, and Authority of Justices of the Peace in the State of New York in Criminal Cases* 30, 60 (Albany, WM. & A. Gould & Co., 1841). Dr. John Beck, who disapproved of abortion at any stage, acknowledged that "[t]he *English law* 'considers life not to commence before the infant is able to stir in its mother's womb.'" John B. Beck, M.D., *Researches in Medicine and Medical Jurisprudence* 27 (Albany, E. Bliss, 2d ed. 1835) (quoting Blackstone, *supra*, at 129). Two treatises that diverged, refusing to accept the quickening rule, relied on the writer's own opinions or on *dicta*—especially *dicta* in *Mills v. Commonwealth*, 13 Pa. 631 (1850) (discussed in greater detail below (*see infra* at 8–9))—rather than precedent, and did not alter the common-law consensus. *See* Francis Wharton, *A Treatise on the Criminal Law of the United States* 610 (Phila., James Kay, Jun. and Bro., 4th ed. 1857); *see also* Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 386 (1856).

For the lawyers and judges announcing and applying this principle, "[i]t [was] not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period." *State v. Cooper*, 22 N.J.L. 52, 54 (1849). The law followed a clear principle: "[i]n contemplation of law[,] life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life." *Id.*

In practice, this meant that terminating a pregnancy before the fetus "stir[red]" was not a crime in early American law. *See* Wilson, *Natural Rights* at 316; *see also* L.S. Joynes, M.D., *On Some of the Legal Relations of the Foetus in Utero*, Va. Med. J. 187 (Sept. 1856). For example, the Massachusetts Supreme Judicial Court held in 1845 that, "at common law, no indictment will lie, for attempts to procure abortion with the consent of the mother, until she is quick with child." *Commonwealth* v. *Parker*, 50 Mass. (9 Met.) 263, 265–266 (1845). As the court explained, the common law considered "the child [to have] a separate and independent existence" only "when the embryo had advanced to that degree of maturity designated by the terms 'quick with child'" (even though an infant in utero was prospectively "regarded as a person in being" for certain civil law purposes, as Blackstone had clarified). *Id.* at 266; *see* Blackstone, *supra*, at 129. In support, *Parker* cited Blackstone and Coke, and noted that "the more ancient authorities of Bracton and Fleta" agreed. 50 Mass. at 266.

In *Cooper*, the New Jersey Supreme Court explained that, prior to the enactment of the first English statute criminalizing abortion in 1803, there was "no precedent, no authority, nor even a *dictum* . . . which recognizes the mere procuring of an abortion as a crime known to the law." 22 N.J.L. at 55 ("[I]t is perfectly certain, by the unanimous concurrence of all the

authorities, that that offence could not be committed unless the child had quickened.").[3] The court therefore concluded: "[T]he procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law . . . . There is neither precedent nor authority to support it." *Id.* at 58. And because the common law did not criminalize the procuring of an abortion, it also did not criminalize attempting to do so. *Id.* The court also rejected the prosecution's claim that such an attempt was an offense against the fetus. "[T]he very point of inquiry is, whether that be at all an offence or not, and whether the child be *in esse* [in being], so that any crime can be committed against its person." *Id.* at 54.

High courts of numerous states likewise determined that the common law did not criminalize abortions pre-quickening, including several that cited *Parker* as precedent. *Smith v. State*, 33 Me. 48, 55 (1851) ("At common law, it was no offence to perform an operation upon a pregnant woman by her consent, for the purpose of procuring an abortion, and thereby succeed in the intention, unless the woman was 'quick with child.'"); *Abrams v. Foshee*, 3 Iowa 274, 279 (1856) ("[T]o cause, or procure an abortion, *before* the child is quick, is not a criminal offence at common law."); *Smith v. Gaffard*, 31 Ala. 45, 51 (1857) ("At common law, the production of a miscarriage was a punishable offense, provided the mother was at the time 'quick with child.'"); *Mitchell v. Commonwealth*, 78 Ky. 204, 210 (1879) ("[I]t never was a punishable offense at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child."); *Eggart v. State*, 40 Fla. 527, 532 (1898) (explaining that it "undoubtedly was the common law" that "it was no crime to procure the miscarriage of a woman

[3] Notably, although American authorities were aware of the English law, none adopted anything like it for several decades after 1803.

with her consent, unless she was . . . 'quick with child'"); *State v. Alcorn*, 64 P. 1014, 1016 (Idaho 1901) ("At the common law an abortion could not be committed prior to the quickening of the fœtus."); *Edwards v. State*, 112 N.W. 611, 612 (Neb. 1907) ("At common law it was thought that a person could not be guilty of abortion unless the pregnant woman was quick with child.").

In sum, the historical record is clear that the common law did not criminalize pre-quickening abortion. And the United States Supreme Court's recent opinion confirms as much.

II. ***Dobbs v. Jackson Women's Health Organization*** **Accepts the Claim that Pre-Quickening Abortions Were Permitted at Common Law.**

In his Opening Brief, Petitioner relies upon the recent United States Supreme Court decision *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), to undergird the notion that abortion qualifies as "a crime that is inherently immoral, such as those prosecuted at common law." Pet.'s Br. at 19–20. *Dobbs* does not support Petitioner's argument.[4] Instead, *Dobbs* reinforces the "rule" that abortions were permitted at common law before quickening. *See Dobbs*, 142 S. Ct. at 2252 (describing the pre- and post-quickening distinction as "the quickening *rule*" (emphasis added)). To the extent that Petitioner relies upon *Dobbs* to undermine the common-law quickening distinction, he distorts historical evidence and relies upon reasoning that American courts did not follow. In other words, Petitioner fails to engage

[4] The only leg for Petitioner possibly to stand on is *Dobbs*'s discussion of what it calls a "proto-felony-murder" rule, to be inferred from certain ancient authorities that call the crime murder if a woman meets death in the course of an abortion. *See Dobbs*, 142 S. Ct. at 2250–51. Regardless of whether this inference is accurate, American courts did not invoke this reasoning to erode the common-law quickening rule, so it is irrelevant to the current discussion of whether pre-quickening abortions were criminalized. The "proto-felony-murder rule" may be a helpful term for understanding court decisions that applied to people who performed post-quickening abortions that resulted in death. But *Dobbs* is devoid of evidence that the "proto-felony-murder rule" was in tension with the common-law quickening rule.

accurately with the historical record and sources cited in *Dobbs*, and, as a result, fails to support his allusion to abortion being an inherently immoral crime. *See* Pet.'s Br. at 19–20.

A. *Dobbs* Acknowledged That the Common Law Deemed Abortions Criminal Only After Quickening.

Dobbs acknowledged that the common law recognized a "distinction between pre- and post-quickening abortions," and regarded only the latter as potentially criminal. *See Dobbs*, 142 S. Ct. at 2249 ("The eminent common-law authorities (Blackstone, Coke, Hale, and the like), *all* describe abortion *after quickening* as criminal." (internal quotations and citations omitted, emphasis added)); *id.* at 2251 ("The most important early American edition of Blackstone's Commentaries reported Blackstone's statement that abortion of a *quick* child was at least 'a heinous misdemeanor.'" (internal quotations and citations omitted, emphasis added)); *id.* ("And by the 19th century, courts frequently explained that the common law made abortion of a *quick* child a crime." (emphasis added)). Thus, according to *Dobbs,* the common-law rule was that no criminality attached to obtaining a pre-quickening abortion. *Id*. It was not until statutes enacted many decades after the founding that some states began to depart from this rule. *See id*.

Petitioner also cites a portion of *Dobbs* that relied upon a case that unconventionally departed from the common-law quickening rule. Pet.'s Br. at 19–20. *Dobbs* cited *Mills v. Commonwealth*, 13 Pa. 631 (1850), to state that the rule was "not universal."[5] *Dobbs,* 142 S. Ct. at 2252, 2255. The case clearly defied the general consensus. Petitioner's reliance on this portion of the *Dobbs* opinion is misguided because the *Mills* decision did not alter the common-law principles discussed above. In *Mills*, the Supreme Court of Pennsylvania rejected the

[5] *Dobbs* also cited an 1880 North Carolina case, *State* v. *Slagle*, 83 N.C. 630 (1880), which quoted *Mills* with approval. *Dobbs,* 142 S. Ct. at 2252. *Slagle's* discussion of the quickening distinction was also dicta that played no factual role in the outcome of the case: the alleged abortion at issue occurred *after* quickening. 83 N.C. 630, 632 (1880).

quickening distinction only in *dicta* and was later heavily criticized for departing from precedent without any basis to do so. Pennsylvania charged the defendant with "intent to cause and procure the miscarriage and abortion of" a woman who was "pregnant and big with child," indicating post-quickening. *Id.* at 633. Despite the fact that quickening had occurred, the *Mills* Court opined that the common law's approach to abortion "never ought to have been the law anywhere" because any abortion was "the destruction of gestation, by wicked means and against nature." *Id*.

This view about what the common law *should* have been lacked any basis in precedent, and other courts forcefully rejected it. *See Mitchell*, 78 Ky. at 206–07. Indeed, courts in at least nine states concluded that pre-quickening abortions were not criminalized at common law when they examined the issue during the nineteenth century, including Massachusetts, New Jersey, Maine, Iowa, Alabama, Kentucky, Florida, Idaho, and Nebraska. *See supra* at 5–6. The dicta contained in *Mills* was therefore virtually unique among state courts in their recitation of the common law. To the extent that Petitioner relies upon it as evidence of the common law status of pre-quickening abortion, he does not characterize the historical record accurately. Neither *Mills* nor *Dobbs* changes what the common law had been for centuries.

B. Colonial and Earlier Common Law Cases Cited By Petitioner Do Not Support the View That Early America Criminalized All Abortions.

Recent scholars intent on showing that the common law deemed all abortion a crime have dug up a series of cases from the 1200s through the 1700s to argue that point. The *Dobbs* majority accepted a few of their claims. *See Dobbs*, 142 S. Ct. at 2249–51. The sources, when more closely examined (as we and other historians have done), do not serve to support the argument.

A few early cases discovered may be claimed to be related to abortion, but they actually address felonious *percussio* (battery) on a pregnant woman. These cases concern unwanted assaults that harmed a woman and endangered or ended her pregnancy. *See, e.g.*, 2 De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879) (Henry de Bracton's 13th-century treatise explaining that if a person has "struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide."). A woman so injured could then bring a private action seeking punishment of her batterer; this right of action was based on injury to the woman, not to the fetus. Carla Spivack, *To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England*, 14 Wm. & Mary J. of Women & L. 107, 110 (2007) ("[T]hese cases resemble modern torts and are based on recognition of the injury done to the woman.").[6]

These are not "abortion" cases as we understand that term today. Wolfgang Muller, *The Criminalization of Abortion in the West* 75 (2012) ("[P]rocurement of abortion in the modern acceptance of the term, performed with the consent of the pregnant mother, had never held a place among thirteenth-century appeals and indictments. Adjudication of criminal *percussiones* had been the sole concern."). They do not involve voluntary efforts by a pregnant woman to terminate her pregnancy but instead describe violent, nonconsensual acts against the pregnant woman committed by another person. *See Fleta*, *supra*, at 88 ("A woman may bring an appeal . . . for a quickened child in her womb wickedly crushed or wickedly killed by a blow.").

The few American colonial cases found and cited ostensibly to show early-stage abortion being criminalized likewise are neither persuasive nor conclusive. And, in any event, these cases

[6] Spivack has also debunked the claim that proceedings in ecclesiastical courts support the view that pre-quickening abortions were prohibited at common law. *See* Spivack, *supra*, at 142-50.

did not involve criminal prosecutions by colonial authorities. *See, e.g.*, *In re Stillbirth of Agnita Hendricks' Bastard Child* (1679), in *Records of the Court of New Castle on Delaware 1676–1681*, at 274–75 (1904) (a standard examination to determine the father of an unmarried woman's stillborn "bastard" child in colonial Delaware, where no penalties—criminal nor civil—were brought against any party); 7 Susie M. Ames, Am. Hist. Ass'n, *County Court Records of Accomack-Northampton*, Virginia, 1632–1640, at 29–32, 37, 43 (1973) (describing a contested accusation of one neighbor against another in colonial Virginia, again without any prosecution for any crime); *Proprietary v. Brooks*, 10 Md. Archives 464–465 (1656) (a Maryland case involving a wife suing her husband for beating her and causing a miscarriage). As with other authorities cited in *Dobbs*, these cases do not undermine the common-law quickening rule.

CONCLUSION

The overwhelming majority of historical sources establish and reinforce the quickening rule: abortions prior to quickening were not criminalized at common law.

Dated this sixth day of September, 2022.

By: */s/ Gabriele Wohl*

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WOMEN'S HEALTH CENTER OF WEST VIRGINIA, on behalf of itself, its staff, its physicians, and its patients; **DR. JOHN DOE**, on behalf of himself and his patients; **DEBRA BEATTY**; **DANIELLE MANESS**; and **KATIE QUIÑONEZ**,

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CERTIFICATE OF SERVICE

I, Gabriele Wohl, counsel for Patricia Cohen, Nancy F. Cott, and Aaron Tang, do hereby certify that on September 6, 2022, I caused a true copy of the foregoing brief to be served on all parties and the Court by filing the same in the File&Serve Express system, which includes electronic mail for the counsel identified below.

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