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May 28, 2022

Chief Justice John G. Roberts  
Supreme Court of the United States  
1 First Street, NE  
Washington, DC 20543

Dear Chief Justice Roberts:

I am writing to you and your colleagues regarding Roe v. Wade. My name is obviously female. I am pragmatic about my politics, have never had a party affiliation, and have voted for both over my life. At 70, fertility is no longer a personal worry, but the strength of our experiment with democracy concerns me and motivates this letter.

One course on business law at the University of Chicago's Booth School of Business does not make me a lawyer. As with credit rating decisions while I worked at Moody's, your body's majority opinion is based upon a vote among individuals. Each of you is highly educated, accomplished, and engaged in the most pressing legal issues facing this nation. You got to the Supreme Court by examining and evaluating many complex angles and arguments surrounding these issues, starting in law school. Opinions are ultimately arguments – legal logic.

I will try to avoid any argument on my part that abortion is a right clearly spelled out under the Constitution or even the Bill of Rights. Having spent significant time trying to read and consider not only Justice Alito's arguments in his 66-page draft majority opinion, but also other Supreme Court cases and the actual wording of our founding documents, I am led to believe two conclusions about this case.

First, we may live in a digital era, but this issue does not lend itself to all or none. It is incredibly complex. The three primary views on abortion Justice Alito lays out at the beginning of his draft are correct, but they are clearly never going to be reconciled by any court in this Nation.

Second, the Constitution is demonstrating its need to be regarded as a living document, not an ancient, ossified set of specific words. Every era has its social challenges, and the Supreme Court has evolved in its role within this society since the first 1803 Marbury v. Madison case. We as a Nation are coming to terms with contentious issues that contradict the intentions of the founders. We've been peeling away at racism, homophobia, relations among persons of the same sex, and how to handle immigrants among many others. This has involved both contentious cases at the Supreme Court and also an "owning up" by each of us citizens of our history by telling its hidden stories. The role of the female in our society and economy is the most complex of those issues.

It is these two conclusions that will inform my arguments below.

### **The U.S. Supreme Court: The Summit of Justice**

The Supreme Court's decision will govern females and their families for the foreseeable future. No female wants an abortion. Abortion is and always has been the last avenue to terminate a pregnancy that a female didn't seek. Raising a human is a massive undertaking.

What is exceedingly constitutionally relevant is the legal concept of equality. The human species would die out without one of the two genders providing the vessel for the development of another human. Thomas Jefferson,

with the assistance of Benjamin Franklin, may have referenced men's "unalienable Rights" to launch our experiment in the Declaration of Independence. The female gender carries the "unalienable burden" of childbearing. This is half the citizens. The highly personal woman's decision to bear a child has a huge impact on the welfare of each woman.

The Constitution begins with "We, the People". Not "We, the Men". Forming "a more perfect union". Those words talk to separate individuals and not to only the male half among those individuals. All, forming a union that founders hoped would continue to pursue their aspirations.

The first sentence of the Constitution includes among that document's goals the goal to "promote the general Welfare". A recently retired Chief Medical Examiner of a large county in North Carolina related that she had studied autopsies from illegal abortions. The abortions were illegal prior to when she was in medical school and deaths frequent enough to warrant inclusion in the curriculum. Over her 35-year career – after the Roe decision – she hadn't personally encountered a single abortion death. That is a significant improvement in "Welfare" for the female half of the population.

The male half has not had their personal Welfare jettisoned to uncertain outcome among the fifty States. Why treat females this way? Is that the equality under the law contemplated at our Nation's founding?

The Roe decision, despite its legal or logical flaws, improved the Welfare of women. It wouldn't be much of a stretch to note that women who died from abortions pre-Roe were predominantly the poorer citizens – ones who couldn't afford the plane ticket to countries where abortion is more readily available or access to private methods. Or to even contraceptives or contraceptive education. These statistics show that overturning Roe at this point would condemn many women to death.

### **Era: Society Evolves Along with the Supreme Court**

The continued existence of our experiment with bottoms-up government is rather a miracle. We are now still blessed that the U.S. Constitution was originally drafted by property-owning white males – hardly representative of the whole Nation at that time, but highly educated and principled. We as a Nation have much more work to do towards our aspirations, but we have made remarkable progress. And we are well into the 21<sup>st</sup> century.

Justice Alito commences his argument regarding what the Constitution says and means by referencing the discussion of "the language of the instrument" in an 1824 document (on his page 9). At that time slavery was still an institution in the U.S. The Dred Scott v. Sandford Supreme Court decision in 1857 upheld slavery despite the wording of the Constitution. Even after a civil war and a Constitutional Amendment in 1865 that purported to treat all humans as "equal under the law", citizens with darker skin hues still faced all the challenges we are starting to own up to as a Nation – some merely limiting opportunity, others downright causing death or destruction of whole communities.

Over its existence the Supreme Court issued decisions that were unconstitutional. Plessy v. Ferguson in 1896 upheld "separate but equal" when the separates were hardly equal. Brown v. Board of Education in 1954 rectified the unconstitutional split, but left much work to be done.

Some legal arguments say pushing constitutional abortion considerations down to the States puts the issue before the voters in each State. Justice Alito's draft is heavily weighted in the history of abortion among the States. He often refers to what is "deeply embedded" in our culture over long periods as if sheer length of time for a practice makes it more legally justifiable. Our culture has dramatically evolved over those long periods of time, particularly illustrated by the vote itself. In 1824 no female had the ability to vote. Females in New Jersey

could vote in 1797, but its legislature reversed that ability in 1807. Western states led the Nation, allowing a female to exercise her vote beginning with Wyoming in 1869, when still a territory. Six western states allowed a female to vote before 1900. The first state east of the Mississippi to allow women to vote was New York – in 1917, only three years before a constitutional amendment bestowed the right to vote on all women in the nation. Another nine plus Alaska (a territory) allowed the female vote before passage of the Nineteenth Amendment in 1920. (These statistics are courtesy of the Rutgers Eagleton Institute of Politics.)

What is perhaps even more illustrative of the evolution of individual rights and female engagement in the pursuit of happiness in our Nation is their presence on the Supreme Court itself. The first female SCOTUS justice was Sandra Day O'Connor in 1981. Ruth Bader Ginsberg followed more than ten years later.

Women in developed countries have been having fewer and fewer children. Men have become more involved in childrearing. This evolution has allowed women to play a larger and larger role outside homes because of not only Roe and other judicial and legislative support, but also the examples of our female SCOTUS justices of recent decades. Families, communities, and businesses have evolved to adapt to the new possibilities of greater female control over her reproductive choices. Overturning Roe would reverse this progress.

### **U.S. Constitutional Protection of Unspecified Freedoms**

Do rights need to be enumerated specifically in the Constitution to truly be rights? Does each type of personal decision need to be categorized by the Constitution to be considered “a right”? These are legitimate questions to ask as they go to the heart of the logic of Justice Alito’s argument (and to the opinions so many other Roe opponents hold).

The Constitution and its Amendments were drafted in a spirit of freedom from government suppression, securing “the Blessings of Liberty to ourselves and our Posterity”, but the founders couldn’t have listed every possible word. They weren’t trying to write social sci-fi to predict what might be possible in the future by enumerating all the technological and social advances over time.

The Ninth Amendment serves as a broad clause to accommodate the evolution in quality of life and the benefits of democracy they could only dream of. “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” That clarification, for the People, is similar to the clarification of governmental rights not specified for the federal level being reserved to the States.

Overturning Roe would throw a monkey wrench into the Supreme Court’s argument logic in prior opinions regarding the rights of corporations. One of the reasons Roe opponents raise most often was that abortion wasn’t enumerated as a right under the Constitution. I’ve read the Constitution many times, looking for the word “corporation” not to mention the enumeration of corporations’ rights. Yet the Supreme Court has gone out of its way to protect corporations’ alleged rights.

In *Citizens United v. FEC*, the Court’s majority opinion described “social implications” relating to a corporation’s right to political speech and the “chilling effect” on elections should that right be curtailed. While “Congress shall make no law ... abridging the freedom of speech” is explicit in the First Amendment, applying this to a corporation, PAC, or union is purely the Court’s social interpretation. Political speech is equated with money, also not enumerated in the Constitution. A corporation doesn’t even possess a larynx, the voice box. Money isn’t words or sentences. Yet the Supreme Court has gone out of its way to treat corporations as “persons” legally. While a brilliant legal tool that is a foundation of the U.S. economy, extending that legal tool to free speech in *Citizens United* or to freedom of religion in the *Hobby Lobby* case goes way outside any

reading of the Constitution or the Bill of Rights. Only a “natural person” – a female – can get pregnant. Why would 50% of natural persons be treated as less equal under our Constitution than a corporation?

The majority opinion in *Burwell v. Hobby Lobby* goes even further. The opinion describes the legal treatment of corporations as “persons” as a “legal fiction.” The Constitution isn’t the basis for this legal fiction. The opinion states it is based upon the Dictionary Act of 1871, which is itself controversial within the judicial community.

### **Other Legal Considerations**

I will continue to address key points in Justice Alito’s draft.

#### *The States Rights Argument*

The “States rights” argument is a convenient, simple tactic to overturn *Roe*. This angle starts with the initial view that abortion isn’t explicitly mentioned in the Constitution or Amendments, then follows on with what is in the Constitution: that governing rights not specified for the federal level are reserved to the States. It is the initial view that creates the politically, morally, or religiously convenient tactic to use a specified clause.

#### *The Word “Moral”*

The word “moral” does not appear in the Constitution or the Amendments. Yet it is frequently used in judicial reasoning surrounding this issue. The point isn’t that the issue doesn’t involve morality. The point is that the Constitution leaves religious considerations to an individual and the Court has left what is viewed as pornography, for example, to the eyes on an individual beholder. If the absence of a specific word makes that issue impossible to discuss at the highest federal judicial level, then how can an opinion be based upon Justice Alito’s statement that abortion is “a profound moral issue”? Of course it is, as any discussion of it reflects, both in legislation and in court opinions. But not being mentioned in the Constitution might be a reason to leave moral considerations to those whose hearts and consciences most affected by the action.

#### *The Enumeration of Alternatives a Pregnant Woman May Have*

Justice Alito enumerates the many alternatives and means to support birth. Access to insurance and quality medical care is not available to all women, particularly poor women. Having time off for maternity leave is a corporate benefit that isn’t part of the reality of females cleaning houses or taking care of children. He neglects to mention the economic cost of raising a child beyond birth.

The World Health Organization in a November 2021 report provides statistics that shine a light on how backward reversing *Roe* would move this developed nation. WHO states that 45% of all abortions performed around the globe are unsafe. 97% of these take place in developing countries. Reversing *Roe* would put the United States on a footing with regard to abortions with the developing world.

There are more informed approaches to reducing abortions than the same “raw judicial power” he laments in *Roe* that would be similar were *Roe* overturned. Better birth control methods, greater birth control availability, and better education of our youth on the procreative hard wiring within the human animal have led to less reliance on abortion over the past decade. Although the number of total abortions increased slightly (2%) and the abortion rate per 1,000 females of childbearing age increased 0.9% in 2019 from the prior year, the number and rate over the prior nine years (2010 to 2019) decreased 18% and 21%, respectively, according to the Center for Disease Control’s November 2021 report. Young women in their 20s accounted for more than half of abortions in 2019.

Of course adoption is a wonderful act to do, if you're the one doing the adopting. Being forced to carry a child to term because members of the judiciary feel you should because there just might be someone out there to adopt that child is a very, very different consideration.

### *Allegedly Legislating From the Bench*

Some Justices and others in senior legal positions claim that the Supreme Court shouldn't "legislate from the bench". A quick look at a few of the major Supreme Court cases show that the Court has issued significant decisions when personal, constitutional rights are at issue, not just opining on the legality of legislation.

The Supreme Court dished out what is regarded today as injustice in its 1896 Plessy v. Ferguson decision. Then in 1954's Brown v. Board of Education decision the Court overturned Plessy's "separate but equal" doctrine, a milestone in our Nation's pursuit of true equality under the law. This and many other cases were brought in front of the Court because personal rights were at issue, not a law. The debate surrounding Roe intensely involves personal rights.

### *Decisions Based on "the Law", Not Societal Wishes or Dreams*

What if those legal arguments over the years made in earlier cases, captured in earlier opinions, and used in opinion references by Justices in the future were firmly seated in ethics, morality and opinion of the era of that time? Using them in current opinions merely imports the personal opinions, ethics, morality, and practice of the past into the present. A legal reference to morality is no different from a media reference to morality. It's still a view on morality. Volumes of references don't make the argument stronger.

### *What Does "Ordered Liberty" Mean?*

Justice Alito references promoting "ordered liberty" as a major objective of the Court, with citations. What exactly does that mean? It's not mentioned in the Constitution. Having begun this letter before the event in Uvalde, I find constitutional issues at the Supreme Court level seeping into this argumentation. Can the Supreme Court be very wrong on basic constitutional issues? The Second Amendment clearly states the objective of the clause is "a Militia", "necessary to the security of a free State". That sure sounds like protection, not murder. Yet the Court continues to protect a supposed right to carry a military assault rifle. We "natural persons" are reeling from the assault on morality that doesn't seem to make it into Supreme Court decisions. I'd be remiss if I neglected this so obvious point being discussed among ordinary folks without an Ivy League education at the top court in the land.

### **An Individual Vote**

Each Justice votes as an individual. Each is as human as any other person in this country. As Jonathan Haidt laid out in his book, *The Righteous Mind*, your views derive from the gut. Because the cognitive lobe was the last to evolve, it is hard to build a rational argument when your gut may be raising unsettling currents. Your education and personal practice assist each of you in finding ways to build a rational argument that will stand up to public scrutiny. With two radicalized political parties, it may be hard to be courageous navigating through this contentious case.

Because of your education and present role, you members of the Supreme Court are an incredibly elite body. You're diverse now in regard to race, gender, and religion, but elite in terms of education. Regardless of political views, eight of the nine hold law degrees from either Harvard or Yale. Looking at both undergraduate and law school, fifteen of their eighteen degrees are from Ivy League schools. Only a sliver of the citizens in this nation have been able to attend schools of this level of privilege and social rank. Social affiliation associated

with educational attainment and then adding party affiliation is part of being human, a part even a Supreme Court Justice cannot entirely overcome.

I mention this because each of you individuals must cast a vote. A vote that will affect all females, nearly all of which will never attend a prestigious school, but likely need to work at some point in their life. Which lobe of your brain dominates your vote? I hope you exercise the courage to vote as your logical, cognitive brain leads you.

There are existential issues facing the Nation – its form of government, massive debt accumulated from many conflicting sources despite the best of intentions, and the ability of humans to thrive on the planet. Our youngest generations will need political energy to address these. Roe and Casey may be imperfect, but overturning them will suck massive amounts of political energy out of the civic arena. That energy isn't in unlimited supply.

The three views on abortion can never be reconciled. Not by this Court. Not by fifty very diverse States. Upholding Roe will allow any individual female in the U.S. to follow her conscience for a very personal decision she will have to live with the rest of her life. I urge each of you to have the courage to allow this issue, which will never have clear legal footing no matter which way you decide, to be dealt with within the heart, mind, and soul of each person in this Nation who is female and bears the Unalienable Burden.

Thank you for considering my arguments.

Sincerely,

Emily Eisenlohr