Case No. 20220696-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION,
Respondent.

Amicus Brief of Pro-Life Utah

Interlocutory appeal and motion to stay from the trial court's grant of a preliminary injunction, in the Third Judicial District, Salt Lake County, the Honorable Andrew H. Stone presiding

MELISSA HOLYOAK
Utah Solicitor General
Utah Attorney General's Office
Email: melissaholyoak@agutah.gov

TROY L. BOOHER
Zimmerman Booher
Email: tbooher@zbappeals.com

Counsel for Parties

THOMAS R. LEE (5991)
JOHN J. NIELSEN (11736)
JAMES C. PHILLIPS (17302)
LEE | NIELSEN
299 S. Main Street, Suite 1300
Salt Lake City, UT 84111
Telephone: (801) 683-6880
Email: tom@leenielsen.com

Counsel for Amicus Pro-Life Utah

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

TERRITORIAL STATUTES

OTHER AUTHORITIES

Case No. 20220696-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION,
Respondent.

Amicus Brief of Pro-Life Utah

INTEREST OF AMICUS CURIAE

Pro-Life Utah was founded upon the idea that people from different faiths and backgrounds can work together to secure and defend the fundamental right to life for society's most vulnerable members: unborn babies. This organization works to provide women with the resources necessary to choose life or to provide healing and support for those emotionally wounded by abortion. It is committed to peaceful, loving, and non-judgmental approaches to promote a culture of life, love, and healing.

Pro-Life Utah has a deep interest in the question here—whether the state constitution protects a right to abortion—because the answer will

determine how much the political branches may protect each baby's right to life.

NOTICE, CONSENT, AUTHORSHIP, AND FUNDING

Pro-Life Utah has given timely notice to the parties, and they have consented to its filing this amicus brief. Neither party's counsel authored this brief in whole or in part or contributed money to fund this brief. No person other than amicus curiae has contributed money that was intended to fund this brief.

INTRODUCTION

In interpreting the Utah Constitution, this Court looks to the original public meaning of the text—what the people understood when it was ratified. Because there is no right to an abortion expressly recognized in the text of the Constitution, such a right could be established only if it was viewed as so societally pervasive that it went without (explicitly) saying. The public record definitively forecloses that.

At the time of ratification, the general public did not view abortion as a protected constitutional right. Quite the opposite. It viewed it as something meriting the utmost condemnation available in our law and society: criminal charge and punishment. This is not just a matter of subjective impression. It

is a conclusion confirmed by systematic, transparent analysis using corpus linguistic tools.

A survey of Utah newspapers from the 1850's up through the 1940's shows that for a century abortion was most often referred to as a crime and was universally considered subject to legislative regulation. Not once was abortion referred to as a right. Appellate decisions from the same period reveal a similar view. And Utah was no outlier as a survey of American English from the same time period likewise shows abortion was associated with crime in the minds of the American people.

ARGUMENT

I.

This Court interprets the State constitution according to the public's understanding of the text at ratification, and corpus linguistics can help reveal that understanding.

Originalism has deep roots in this Court's precedent. *See Richardson v. Treasure Hill Mining Co.*, 65 P. 74, 81 (Utah 1901). And in recent decades, the Court has "repeatedly reinforced the notion that the Utah Constitution is to

be interpreted in accordance with the original public meaning of its terms at the time of its ratification." *State v. Lujan*, 2020 UT 5, ¶ 26, 459 P.3d 992.[1]

The originalist inquiry follows from presuppositions about who makes the laws in our system of government. "The terms" of a written constitution "merit our respect unless and until they are amended or repealed." *Mitchell v. Roberts*, 2020 UT 34, ¶ 51, 469 P.3d 901. And the courts "must enforce the original understanding of those terms whether or not [they] endorse its dictates as a policy matter." *Id*.

"[T]he Utah Constitution is not a 'free-wheeling constitutional license' for this court to 'assure fairness on a case-by-case basis." *Lujan*, 2020 UT 5, ¶ 26. It is a written charter of government that is fixed by its original meaning.

"[E]volving social science and legal scholarship" are not proper grounds "for establishing fixed principles of constitutional law." *Id*. at ¶ 28. Policy judgments on these grounds are left to political or rulemaking

[1] *See, e.g., Randolph v. State*, 2022 UT 54, ¶ 57, 515 P.3d 444; *State v. Soto*, 2022 UT 26, ¶ 21, 513 P.3d 684; *Patterson v. State*, 2021 UT 51, ¶ 91, 504 P.3d 92; *Matter of Adoption of B.B.*, 2020 UT 52, ¶ 25, 469 P.3d 1083; *Utah Dep't of Trans. v. Boggess-Draper Company, LLC*, 2020 UT 35, ¶ 45 n.14, 467 P.3d 840; *Salt Lake City Corp. v. Haik*, 2020 UT 29, ¶ 12, 466 P.3d 178; *Lujan*, 2020 UT 5, ¶ 26; *South Salt Lake City v. Maese*, 2019 UT 58, ¶ 19, 450 P.3d 1092; *Richards v. Cox*, 2019 UT 57, ¶ 13, 450 P.3d 1074; *Sandoval v. State*, 2019 UT 13, ¶ 16, 441 P.3d 748; *Neese v. Utah Bd. Of Pardons & Parole*, 2017 UT 89, ¶ 95, 416 P.3d 663; *Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 62, 416 P.3d 635; *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶ 10, 140 P.3d 1235.

processes, which are "subject to nimble reformulation and revision in response to changes in prevailing scientific and legal scholarship of relevance to" the question presented. *Id*. at 29.

The originalist inquiry avoids the risk of the Court confusing its policy preferences with those that undergirded the ratification of a given provision of the Utah Constitution in the first place. *See Mitchell*, 2020 UT 34, ¶ 51 n.27 (noting "that 'a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels") (quoting *A.M. v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting)). And it leaves judgment on the wisdom of constitutional changes to the people, who retain the right of amendment. Utah Const. art. 23, § 1.

These premises of originalism are particularly salient in the realm of implied rights. The Court has long warned of the perils of judicial recognition of new "rights unknown at common law" and "not mentioned in the Constitution"—as with the perils of "substantive due process innovations undisciplined by any but abstract formulae." *In re J.P.*, 648 P.2d 1364, 1375 (Utah 1982). And it has limited recognition of unenumerated "fundamental" rights to those so deeply ingrained in our history that they can be said to have "form[ed] an implicit part of the life of a free citizen in a free society" at the

time of ratification. *Tindley v. Salt Lake City Sch. Dist.*, 2005 UT 30, ¶ 29, 116 P.3d 295.

The framework for this analysis must be focused and objective. It does not suffice to point to "[a] general tradition of respect" for a vaguely framed right or interest. *In re Adoption of J.S.*, 2014 UT 51, ¶ 55 n.20, 358 P.3d 1009 (plurality opinion of Lee, J., joined by Durrant, C.J.). That sort of showing "comes nowhere close to establishing a fundamental right" under the Constitution. *Id.* To establish an unenumerated right, there must be a showing that "*the precise interest at stake* is fundamental in the sense of being justified not by [a] mere 'abstract formula[]' informed by a judge's instincts of fairness, but by a clear indication that that interest is 'deeply rooted in this Nation's history and tradition and in the history and culture of Western civilization.'" *Id.* ¶ 52 (quoting *In re J.P.*, 648 P.2d at 1374–75).

A carefully focused originalist analysis can frame the basis for this sort of inquiry. Under this analysis, the Court asks "'how the words of the [Constitution] would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment.'" *Maese*, 2019 UT 58, ¶ 19 n.6 (citation omitted). And it bases that inquiry on a transparent review of all "historical sources" that are informative—evidence

of "the shared linguistic, political, and legal presuppositions and understandings of the ratification era.'" *Id*. (quoting *Neese*, 2017 UT 89, ¶ 98).

When properly constructed, the originalist inquiry is transparent and "objective." *Mitchell*, 2020 UT 34, ¶ 51 n.27 (quoting Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 237 (2010)). It fixes the meaning of the Constitution in the judgments "ratified by the voice of the people" at the time of ratification. *Mitchell*, 2020 UT 34, ¶ 51. And it avoids the prospect of cherry-picking isolated "fact[s] about Utah history" as a basis for a "Rorsarch test" that enshrines in the Constitution whatever a court may be "inclined to see" as good policy. *Maese*, 2019 UT 58, ¶ 20.

Corpus linguistic tools help the courts deliver on these aims. In a given case, a court may be inundated with competing sources of evidence of "the shared linguistic, political, and legal presuppositions and understandings of the ratification era." *Richards*, 2019 UT 57, ¶ 13. Corpus tools help the court sort and organize such evidence. They can help identify patterns in the historical record and quantify support for each party's position. They do this by assembling evidence of how the relevant language was "actually used in written or spoken English" using "large bodies of real-world language." *Id*.

¶ 19 (quoting *State v. Rasabout*, 2015 UT 72, ¶57, 356 P.3d 1258 (Lee, J., concurring)). And they thus allow judges to avoid the risk of confirmation bias or motivated reasoning in the analysis of historical evidence. *See id*. ¶ 20 (noting that corpus tools can help judges "check" their "intuition").

II.

Historical linguistic analysis shows that the ratifying public considered abortion a legal and moral wrong subject to legislative regulation.

Corpus tools may not always present a clear picture of the original understanding of the text of the Utah Constitution. In some cases, relevant evidence of "the shared linguistic, political, and legal presuppositions and understandings of the ratification era," *Maese*, 2019 UT 58, ¶ 19 n.6 (quoting *Neese*, 2017 UT 89, ¶ 98), may cut in different directions.

But this is not a close case. The record is clear and one-sided on the originalist question presented: At the time of ratification of the Utah Constitution, no "competent and reasonable speaker" of English, *id*., could have viewed access to abortion as a matter so "deeply rooted in this Nation's history and tradition and in the history and culture of Western civilization," *In re Adoption of J.S.*, 2014 UT 51, ¶ 52 (quoting *In re J.P.*, 648 P.2d at 1374–75), that it "form[ed] an implicit part of the life of a free citizen in a free society," *Tindley*, 2005 UT 30, ¶29, 116 P.3d 295. Evidence of "'the shared linguistic,

political, and legal presuppositions" of the era consistently cuts the other way.

The historical record does more than just establish a *lack of recognition* of a legal right to abortion. It demonstrates that abortion fell at the opposite end of the legal spectrum—as a matter subject to the harshest condemnation available in our society, in *criminal prohibition*.

This conclusion is clearly established by three forms of corpus linguistic analysis: (1) a corpus of historical Utah newspapers, which can be used to assess the ordinary language of the general public at the time of ratification of the Utah Constitution, *see Patterson*, 2021 UT 52, ¶¶ 134-35 (considering articles from Utah newspapers to determine original public meaning); (2) a corpus of appellate judicial opinions from this era, which can be used to assess the understanding and status of abortion in Utah law, *see In re Estate of Heater*, 2021 UT 66, ¶36, 498 P.3d 883 (assessing the legal meaning of "natural parent" through a corpus of Utah appellate opinions); and (3) historical corpus analysis comparing these uses to those in the nation at large, *see Richards*, 2019 UT 57, ¶ 21 (consulting Corpus of Historical American English).

The results paint a clear picture: Utahns at the time of ratification viewed abortion not just as a general subject of legislative regulation but as a

basis for criminal prohibition. *See Maese*, 2019 UT 58 ¶29 (comparing clear historical record to a "Norman Rockwell painting—a poignant, straightforward, and easy to interpret representation"). And Utah was no outlier—national sources from the era produce similar results.

To prevail here, Planned Parenthood would have to do much more than assert that a particular form of abortion (like use of some abortifacient,[2] as they discussed before the court below) was not criminal. It would have to establish that it was *beyond the people's power* to make it criminal. On the spectrum of subjects ranging from what the framing public agreed ought to be punished to what the framing public agreed ought to be constitutionally protected, abortion fell firmly in the former. Abortion was not a right—it was

[2] Whatever was the availability of abortifacients during territorial days, it was unlawful to send abortifacients through the mail, to discuss or promote their use, or to use them unless the woman's life was in danger. 18 U.S.C. § 334 (1925) (making it a federal crime to send any item for "producing abortion" through the mails; in existence since 1876); Compiled Laws of Utah, Vol. I (1888), § 5389, available at https://tinyurl.com/6dvybrct (forbidding circulation of obscene literature, which included any representation or writing about "any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion"); Compiled Laws of Utah, Vol. I (1888) § 4507, available at https://tinyurl.com/mwn7vvp6 (making it a crime punishable by 2-10 years in prison to "provide[], suppl[y], or administer[] to any pregnant woman . . . any medicine, drug or substance . . . with intent to procure the miscarriage of such woman, unless the same is necessary to preserve her life").

a wrong, legally and morally. The people did not understand the Utah Constitution to protect what they abhorred and criminalized.

A. Historical newspapers show that Utahns did not understand abortion to be a legal right.

To canvas historical newspapers, we used the advanced search function in the Utah Digital Newspapers database (https://newspapers.lib.utah.edu/search), searching for "abortion OR abortions." For the most relevant decade of the 1890s, we viewed and analyzed all entries. For decades in the 20th Century—given the larger sample size—we randomly sampled 100 from each of three alternate decades: the 1900s, 1920s, and the 1940s. The relevant use of the term "abortion" here is the intentional killing of an unborn child. For each instance of this sense, we looked at whether it referred to abortion (1) as a crime; (2) as a moral wrong; (3) to argue for reforming abortion law; or (4) as a legal right.

1. 19th-Century Utah newspapers show that the ratifiers viewed abortion as criminally and morally corrupt—abortion was not a right; it was a wrong.

Because the Utah Constitution was drafted and ratified in the 1890s, this decade is the most relevant for ratification-era public viewpoints on abortion. With that in mind, we considered every relevant use of "abortion" in newspaper articles in this decade—482 in all. And we found no support for an understanding of abortion as a legal right.

Of the newspaper articles from this era discussing abortion as the intentional killing of an unborn child, *all* classified abortion in one (or both) of the first two categories: as a legal and/or moral wrong.[3] Not a single article spoke of abortion as a matter of a legal right—even in an argument for reformation of the law.

On this record, there is no basis for finding a societally pervasive understanding of abortion as an unenumerated constitutional right. Quite the contrary, the public considered abortion a moral and legal wrong that was subject to criminal prohibition. *See* "A People's Crime," *Salt Lake Herald-Republican*, Jan. 20, 1891, p. 4, available at https://tinyurl.com/35tkyke4 (opining that declining birthrates and national abortion statistics showed that "we have become a nation of murderers" by killing "unborn innocents . . . at the shrine of this modern Moloch of ours—love of ease, of luxury, of pleasure."); "A Note of Warning," *Salt Lake Herald-Republican*, Mar. 2, 1893, p.

[3] Given that in 19th Century, that which was viewed as immoral was also legally prohibited, there was significant overlap between these two categories.

4, available at https://tinyurl.com/mry42b2c (calling for stricter enforcement of and severe punishment under criminal abortion laws).[4]

Nor was this usage of *abortion* in Utah newspapers an outlier compared to the rest of the country during this time period. To consider that question, we performed a collocate search in the Corpus of Historical American English (COHA). Collocation is a corpus linguistic tool that looks at how frequently words occur—or co-locate—near other words. Put another way, collocates are essentially word neighbors with the target word.[5] And COHA is the

[4] Entries from the 1850's through the 1880's show the same pattern: abortion was always referred to as a crime or a moral wrong—not once was it deemed an object of legal reform or a legal right. The Utah articles roundly condemn abortion and consider it a proper subject for legislative regulation. *See Deseret Evening News*, Jan. 24, 1872, p. 2, available at https://tinyurl.com/4dx5bhas (editorial suggesting that "more stringent laws be enacted upon the subjects of abortion and seduction"); *see also* "A Rightful Subject for Legislation," *Ogden Semi-Weekly Junction*, Sep. 13, 1871, p. 2, available at https://tinyurl.com/yckyaexn (discussing New York proposal to make tougher penalties for abortion); "Telegraphic," Salt Lake Tribune, Jan. 15, 1872, p. 3, available at https://tinyurl.com/23rspaas (similar).

[5] For example, one would expect the word *apple* to collocate more frequently with words like *fruit*, *pie*, and *tree*, but not words like *perfume*, *soccer*, or *ocean*. The law has long recognized this linguistics phenomenon in the canon of construction called *noscitur a sociis*: a term is "is known by its associates." *Noscitur a sociis*, Black's Law Dictionary (10th ed. 2014). Linguists just put it slightly differently: "you shall know a word by the company it keeps." John Rupert Firth, *A Synopsis of Linguistic Theory, 1930-1955*, *in* STUDIES IN LINGUISTIC ANALYSIS 11 (1957).

largest structured corpus of historical American English in the world. *See https://www.english-corpora.org/coha/*.[6]

We looked at the most frequent collocates[7] of *abortion*[8] in COHA from the 1850s-1890s, the same time period which we examined in Utah newspapers. The top collocates include "hideous," "crime," and "miserable":

Rank	Collocate	Frequency
1.	XVI[9]	4
1.	hideous	4
1.	crime	4
4.	miserable	3
4.	produce	3
4.	nature	3
4.	woman	3

These collocates provide some evidence of how 19th-Century Americans viewed abortion. What is more, of the top 200 collocates of *abortion*

[6] COHA consists of newspapers, magazines, non-fiction books, fiction, and television/movie transcripts.

[7] We set the collocation range in COHA to be five words to the right or left.

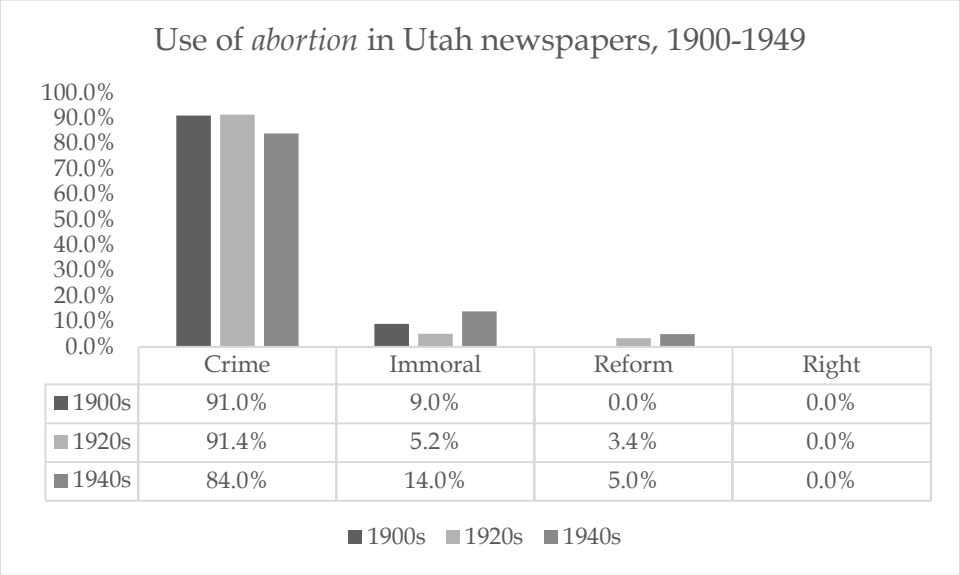
[8] We used the search term *abortion**, which would have looked for collocates of *abortion, abortions, abortionist,* and *abortionists*.

[9] Referring to Chapter XVI of an 1886 book. The book was entitled, "Danger! A True History of a Great City's Wiles and Temptations: The Veil Lifted, and Light Thrown," and the chapter's title was "Abortion and the Abortionists."

in American English during the 1850s-1890s, not once did *right*, *legal*, or *constitution(al)* appear.

2. Utah newspapers in the first half of the 20th Century similarly show no evidence that abortion was a constitutionally protected right.

We also examined the half century after the ratification of the Utah Constitution, looking at Utah newspapers from 1900-1949. Because the numbers were so much greater, our analysis of newspapers in the 1900s was based on a random sample[10] and we examined only every other decade. We used the same four categories: (1) crime; (2) moral wrong; (3) need for reform; and (4) legal right. Below is a chart of the results:



	Crime	Immoral	Reform	Right
1900s	91.0%	9.0%	0.0%	0.0%
1920s	91.4%	5.2%	3.4%	0.0%
1940s	84.0%	14.0%	5.0%	0.0%

[10] We had a random sample of 100 for the 1900s and 1940s, but we were only able to find 58 valid instances in the 1920s.

The results are almost identical to the 19th Century. Over 90% of the time, and in one decade 100% of the time, *abortion* was referred to as a crime or a moral wrong.[11] And not once was it discussed in the context of being a legal right.

Starting in the 1920s, we found some isolated results that we placed in the "reform" category. These referenced abortion being legalized in other countries (Nazi Germany, Bolshevik-era Russia, and Japan). But even these reforms were usually cast in a negative light by the Utah newspapers, and were in contrast with the domestic status of abortion.[12]

In sum, for a century, Utah newspapers were completely silent on a constitutional right to abortion. And for that century the overwhelming view of abortion was that it was a crime, immoral, or both.

American English showed similar patterns to Utah newspapers, as shown in the top collocates of *abortion*[13] in COHA from 1900-1949:

---

[11] The 1940s' results add up to 103% since a couple of times a newspaper article referred to *abortion* in multiple ways, resulting in that article being placed into two categories.

[12] "Under Bolshevism, women are of less value than cattle and are treated accordingly. … Abortion has been legalized." Robert J. Prew, *Great Britain Opens Snappy 20-Day Fight*, Universal Service Cable, Salt Lake Tribune (Oct. 12, 1924), 3, https://tinyurl.com/44a9e8rw.

[13] Again, the search for collocates was of five words to the right and left of *abortion**.

Rank	Collocates	Frequency[14]
1.	therapeutic[15]	15
2.	performed	9
3.	spontaneous	8
3.	case	8
5.	infanticide	7
5.	abortion	7
7.	illegal	6
8.	criminal	5
8.	number	5

Two of the top collocates of *abortion* are *illegal* and *criminal*, and a third top collocate is a crime: *infanticide*. Further, *right* and *constitution(al)* are not in the top 200 collocates of abortion in COHA from 1900-1949. *Legal* does appear twice as a collocate, both instances being a magazine article that referenced how Russia had banned abortion to increase its birth rate, but observing that abortion had been legal in Russia from 1920-1936.

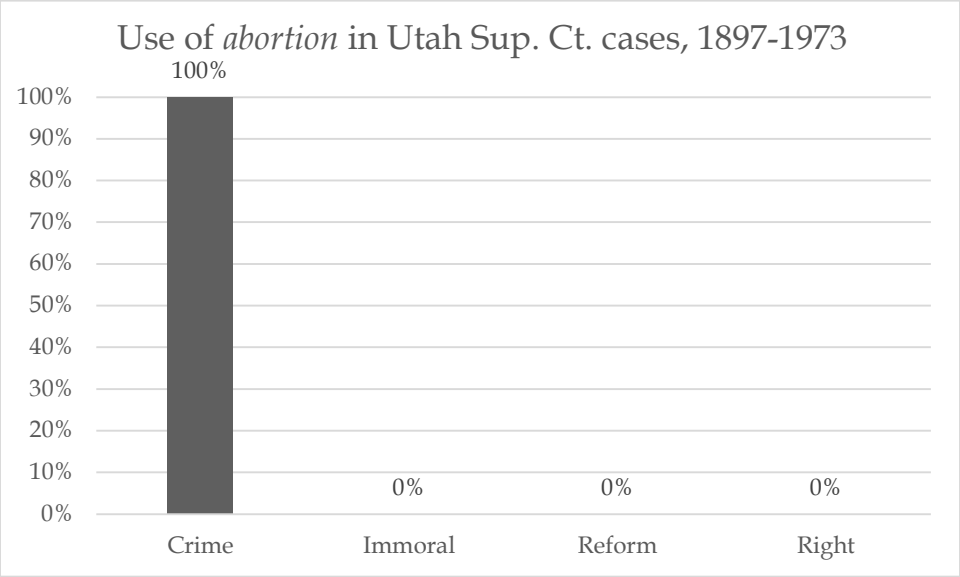
B. Legal decisions from the start of statehood until just before *Roe v. Wade* show that Utahns did not understand abortion to be a protected right.

The language of the law gives even starker results than Utah newspapers. Searching in Westlaw for Utah Supreme Court cases that use some form of the word *abortion*, we found 39 before the date *Roe v. Wade* was handed down. We excluded any cases where (1) *abortion* only appeared in

[14] We only listed those collocates that occurred five times or more.

[15] *Therapeutic* does not emerge as a collocate of *abortion* until the 1930s.

headnotes added by Westlaw, not the actual case itself[16]; (2) *abortion* was used in an irrelevant sense[17]; or (3) there wasn't enough context to code the term into one of the four categories.[18] Below is a chart showing the use of *abortion* in the remaining 25 cases:



Not once from the beginning of statehood until the day *Roe* came down was abortion referred to as anything but a crime.

[16] This eliminated three cases.

[17] In six cases, *abortion* was used in a pejorative/insult sense and in one as a reference to an animal miscarriage sense.

[18] In four cases, *abortion* was (1) referenced in the context of a crime that didn't appear to be about abortion; (2) referenced in the context of a murder that did not appear to be related to abortion; (3) referenced as part of a pattern of abuse where the abuse was not being treated as a crime; and (4) referenced to note that advising someone to have an abortion is evidence of guilt of engaging in improper sexual intercourse.

This pattern is also clear from doing collocate analysis of the term *abortion* and its variants. We uploaded the 25 Utah Supreme Court opinions noted above into corpus linguistic software.[19] We then ran collocate analysis on *abortion* (and its variants) with a search parameter of five words to the right and left of *abortion*. The collocate search found 33 collocates of *abortion*. Three of them—*an*, *other*, and *upon*—are what linguists call "stop words," words that are common in English, and it is usual practice to eliminate those from collocation results as they do not provide any insight into meaning. *See* Kavita Ganesan, "What are Stop Words?", Opinosis Analytics, available at https://www.opinosis-analytics.com/knowledge-base/stop-words-explained/#:~:text=Stop%20words%20are%20a%20set,carry%20very%20little%20useful%20information. So we did, resulting in 30 remaining collocates. Below is a chart ranking them by frequency:

Rank	Collocate	Frequency	Rank	Collocate	Frequency
1.	criminal	32	16.	produce	8
2.	evidence	23	17.	convicted	7
3.	committed	22	17.	perform	7
3.	woman	22	19.	attempt	6
5.	procuring	21	19.	performing	6
6.	her	20	19.	abortions	6
7.	attempted	18	19.	proved	6
8.	procure	17	23.	relevant	5
8.	crime	17	24.	assault	4

[19] *See* AntConc (version 4.1.4), https://www.laurenceanthony.net/software/antconc/.

10.	commit	15	25.	procurement	3
10.	attempting	15	25.	seduction	3
12.	purpose	12	25.	assisting	3
13.	producing	10	26.	morally	3
14.	having	9	29.	court	2
14.	whom	9	30.	state	1

The collocate analysis shows the strong connection in Utah case law from 1897-1973 between abortion and things of a criminal nature. The most frequent collocate is *criminal*, with *crime* also being a top collocate. Other words pointing to this criminal context include *evidence*, *conviction*, and *commit/committed*. Tellingly, neither *right*, *legal*, nor *constitution(al)* are collocates of *abortion*.

* * *

The data are clear: in ordinary language Utahns did not refer to abortion as a legal right for the first century of Utah's history. Instead, abortion was almost always a crime, and when it wasn't that, it was still usually a moral wrong. Furthermore, in the language of the law, before *Roe v. Wade,* Utahns always referred to abortion as a crime, never a right. There is just no evidence that a right to abortion "form[ed] an implicit part of the life of a free citizen in a free society" for any time long before or long after our constitution was ratified. *Tindley*, 2005 UT 30, ¶29.

CONCLUSION

All the available evidence—the constitution's text, the common law, historical sources, and past appellate decisions—points in the same direction: abortion is not a right in the Utah constitution. Quite the opposite; for decades both before and after ratification, it was a legal and moral wrong. This Court should reverse the trial court's grant of a preliminary injunction.

Dated December 9, 2022.

/s/ *Thomas R. Lee*

THOMAS R. LEE
JOHN J. NIELSEN
JAMES C. PHILLIPS
Lee | Nielsen
Counsel for Amicus Pro-Life Utah

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24, Utah R. App. P., this brief contains 4,384 words, excluding tables, addenda, and certificates of counsel.

I also certify that in compliance with rule 21, Utah R. App. P., this brief, including any addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy, with all non-public information removed, will be filed within 7 days.

/s/ *Thomas R. Lee*
THOMAS R. LEE
Counsel for Amicus Pro Life Utah

CERTIFICATE OF SERVICE

I certify that on December 9, 2022, this Brief of Amicus was filed with the Court by email in a searchable PDF attachment, together with any addenda, and served upon counsel at:

MELISSA HOLYOAK
Utah Solicitor General
Utah Attorney General's Office
Email: melissaholyoak@agutah.gov

TYLER R. GREEN
Consovoy McCarthy PLLC
Email: tyler@consovoymccarthy.com

TROY L. BOOHER, J. FREDERIC VOROS, JR., DICK J. BALDWIN
Zimmerman Booher
Emails: tbooher@zbappeals.com; fvoros@zbappeals.com; dbaldwin@zbappeals.com

JOHN MEJIA, VALENTINA DE FEX, JASON M. GROTH
ACLU of Utah
Emails: jmejia@acluutah.org; vdefex@acluutah.org; jgroth@acluutah.org

JULIE MURRAY (pro hac vice), CAMILA VEGA (pro hac vice)
Planned Parenthood Federation of America
Emails: julie.murray@ppfa.org; camila.vega@ppfa.org

In accordance with Utah Supreme Court Standing Order No. 11, paper copies of the brief and addenda will be delivered to the Court no more than 7 days after filing by email.

/s/John J. Nielsen