Nos. 18-1323 & 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., on behalf of its patients, physicians, and staff, d/b/a HOPE MEDICAL GROUP FOR WOMEN; JOHN DOE 1; JOHN DOE 2,

Petitioners,

v.

DR. REBEKAH GEE, in her Official Capacity as Secretary of the Louisiana Department of Health,

Respondent.

DR. REBEKAH GEE, in her Official Capacity as Secretary of the Louisiana Department of Health,

Cross-Petitioner,

v.

JUNE MEDICAL SERVICES L.L.C., on behalf of its patients, physicians, and staff, d/b/a HOPE MEDICAL GROUP FOR WOMEN; JOHN DOE 1; JOHN DOE 2,

Cross-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF RESPONDENT AND CROSS-PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Americans United for Life (AUL) is a pro-life non-profit organization dedicated to advocating for comprehensive legal protections for human life. Founded in 1971, before this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has nearly 50 years of experience relating to abortion jurisprudence. AUL attorneys are highly-regarded experts on the Constitution and legal issues touching on abortion and are often consulted on various bills, amendments, and ongoing litigation across the country.

SUMMARY OF ARGUMENT

The six traditional stare decisis factors weigh strongly in favor of overruling *Roe* at the earliest practical opportunity. Scholarly and judicial criticism of *Roe* have been unremitting. After abandoning the constitutional rationale for the abortion right espoused in *Roe*, a majority of the Court has not settled on a coherent rationale, and the centralization of the abortion issue in the Court has made the Court and the Justices the focus of ferocious campaigns of personal destruction. Changes in law, especially growing legal protection for prenatal human life, have upended major assumptions on which *Roe* was based. These and other political, legal, and social factors have kept *Roe* radically unsettled 47 years after it was decided, and call for its reexamination.

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1 No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties have filed blanket consents to the filing of *amicus* briefs in support of either or no party.

ARGUMENT

I. THE STANDARD OF REVIEW IN ABORTION CASES SET OUT IN *ROE* AND *CASEY* HAS PROVEN UNWORKABLE, AND THE COURT SHOULD RECONSIDER THOSE PRECEDENTS AT THE EARLIEST PRACTICAL OPPORTUNITY.

The lower courts' struggle to apply the Supreme Court's most recent iteration of the standard of review in abortion cases in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) was caused by the unworkable role that the Supreme Court fashioned for itself in *Roe v. Wade*, which cannot be resolved until *Roe* is reconsidered and overruled. In considering whether to adhere to precedent (*stare decisis*), the Supreme Court has traditionally examined six primary factors: 1) whether the precedent is *settled*; 2) whether the precedent was *wrongly decided*; 3) whether the prior decision is *workable*; 4) whether *factual changes* have *eroded* the original decision; 5) whether *legal changes* have *eroded* the original decision; and 6) whether *reliance interests* in the precedent are substantial. Experience and precedent demonstrate that all of the six traditional stare decisis factors weigh in favor of reconsidering *Roe* at the earliest practical opportunity.

First, *Roe* remains unsettled forty-seven years after it was decided. The original decision in *Roe* was divided, and most abortion decisions since then have been closely divided. The application of the standard of review across numerous abortion decisions has been inconsistent. Judicial criticism continues. Scholarly

criticism has been frequent, repeated, intense, and continuous. The Court's abortion decisions have spawned ceaseless confusion among the lower federal courts. The search by a majority of the Court for a coherent constitutional rationale for the abortion right continues. The current presidential administration, as have numerous previous administrations, campaigned on and calls for the overruling of *Roe*. As demonstrated by the 2019 state legislative sessions, the increasing expectations—on both sides of the issue—is that the Court will eventually overturn *Roe*. [2]

Second, *Roe* is widely regarded as having been wrongly decided. Over the past forty-six years, *Roe* has been subjected to regular, severe, and continuing criticism by renowned legal scholars for its lack of any constitutional foundation, including Alexander Bickel, Archibald Cox, John Hart Ely, Philip Kurland, Richard Epstein, Mary Ann Glendon, Gerald Gunther, Robert Nagel, Michael Perry, and Harry Wellington.[3] As Professor Mark Tushnet has written, "[i]t seems to be generally agreed that, as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful." Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretavism and Neutral*

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[2] See Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 Geo. J. L. & Pub. Pol. 445 (2018) (discussing the factors and their application to *Roe*).

[3] Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 Tex. Rev. Law & Pol. 301, 313–16 nn.62–72 (2005) (citing sources).

Principles, 96 Harv. L. Rev. 781, 820 (1983). That criticism continued on *Roe*'s fortieth anniversary.[4]

The unsettled status of *Roe*'s doctrine can be traced back to its creation. *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973)—the companion case to *Roe*—were originally accepted for review by this Court to decide a procedural question, the application of *Younger v. Harris*.[5] *Roe* and *Doe* were decided by lower courts on motions to dismiss or for summary judgment, without any trial or evidentiary record on abortion, its risks, or its implications. Those cases were directly appealed to the Supreme Court, with no intermediate appellate review.[6]

Consequently, all the sociological, medical, and historical premises cited in the Court's opinions in *Roe* and *Doe* were assumptions, mostly derived from interest group briefs filed for the first time in the Supreme Court. Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. Miami L. Rev. 21, 37 (1978) (The *Roe* Court concluded "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth" but that was based on "materials not of

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[4] Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 Hastings Const. L.Q. 187, 194 n.42 (2016) (citing symposia); Colloquium, *The Fortieth Anniversary:* Roe v. Wade *in the Wilds of Politics*, 74 Ohio St. L.J. 1 (2013); Symposium, Roe v. Wade *at 40*, 24 Stan. L & Pol. Rev. 1 (2013); Symposium, Roe *at 40: The Controversy Continues*, 71 Wash. & Lee L. Rev. 817 (2014).

[5] 401 U.S. 37 (1971).

[6] See Clarke D. Forsythe, ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE 17–24 (2013).

record in the trial court, and that conclusion constituted the underpinning for the holding that the asserted interest of the state 'in protecting the woman from an inherently hazardous procedure' during the first trimester did not exist."). This error contradicted a long line of precedents, before and since *Roe*, that this Court will not decide a constitutional claim without an "adequate, full-bodied record." *Witters v. Wash. Dept. of Services for the Blind*, 474 U.S. 481, 486 n.3 (1986) ("Nor is it appropriate . . . for us to consider claims that have not been the subject of factual development in earlier proceedings."); *Associated Press v. Nat'l Labor Relations Bd.*, 301 U.S. 103, 132 (1937) ("Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.").

Roe also lacked any support in precedent.[7] Cases preceding *Roe* did not establish a right to abortion and the Court's opinion in *Roe* conceded as much. The Court cited a string of cases for the *ipse dixit* that the "right of privacy" is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *Roe*, 410 U.S. at 152–53, but then

[7] See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting). See also Philip Bobbitt, CONSTITUTIONAL FATE 159 (1982) ("The two principal propositions on which it [*Roe*] rests are neither derived from precedent nor elaborated from larger policies that may be thought to underly such precedent. And the precedent it establishes is broader than the questions before the Court, while at the same time disclaiming having decided issues that appear logically necessary to its holding."); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159 (1973).

conceded six pages later that a woman "carries an embryo and, later, a fetus" and that "[t]he situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned." *Id*. at 159. The *Roe* Court strung together a group of cases and called them "privacy" cases, even though "privacy" was not the rationale relied upon in those decisions. In fact, the Court in *Maher v. Roe* referred to them as "a group of disparate cases restricting governmental intrusion, physical coercion, and criminal prohibition of certain activities." 432 U.S. 464, 471 (1977).

Roe adopted a historical rationale for a substantive due process right to abortion that has been subjected to intense, exhaustive, and sustained criticism.[8] If the *Roe* Court had applied the proper analysis for a fundamental constitutional right, abortion would not have qualified, because there is no evidence that any right to abortion was "deeply rooted

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[8] See, *e.g.*, Joseph W. Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY 15, n.71–72 (citing sources), 97–110, 125–84, 687–695 (2006); John Keown, *Back to the Future of Abortion Law:* Roe*'s Rejection of America's History and Traditions*, 22 Issues L. & Med. 3 (2006); Paul Benjamin Linton, Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15, 38 (1992); Dennis J. Horan et al., *Two Ships Passing in the Night: An Interpretavist Review of the White-Stevens Colloquy on* Roe v. Wade, 6 St. Louis U. Pub. L. Rev. 229, 272–73 (1987) (compiling existing scholarly criticism).

in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Legal and historical criticisms of *Roe* have provided considerable data that the English common law prohibited abortion at the earliest point that the law could detect that a developing human being was alive pre-natally. Numerous English common law cases treated abortion as a crime before the crime was first codified in the English abortion statute of 1803 (Lord Ellenborough's Law).[9] As one leading scholar has noted, "the authors of the [nineteenth] century's two leading American treatises on the law of crimes (Joel Prentiss Bishop and Francis Wharton) both concluded that abortion at any stage of pregnancy was a common law crime."[10] What is more, the *Roe* Court overlooked the many State protections provided to prenatal life in tort, criminal, property, and equity law.[11] These numerous problems likely explain why the Court abandoned any historical justification for *Roe* by the time of its decision in *Webster*. Instead, the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* relied almost exclusively on stare decisis for its

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[9] See Dellapenna, supra note 8, at 127–49, n.18; John Keown, ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982 (1988); Eugene Quay, *Justifiable Abortion: Medical and Legal Foundations*, 49 Geo. L.J. 395 (1961).

[10] Dellapenna, supra note 8, at 425.

[11] Gregory J. Roden, *Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence*, 16 St. Thomas L. Rev. 207 (2003); James Bopp Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. Pub. L. 181 (1989); David Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 Mo. L. Rev. 639 (1980).

reaffirmation of *Roe*, hoping that *Roe* could be fixed, as substantially modified. 505 U.S. 833, 854–69 (1992). The Court's new rationale for *Roe* switched from history to sociology and the claim of "reliance interests." *Id*. at 855.

Casey's failure to justify *Roe* as an original matter and its reliance on stare decisis was severely criticized by numerous scholars.[12] The rationale for *stare decisis* that the Court created in *Casey* was largely ad hoc and has not been followed in subsequent cases. As in *Roe*, the *Casey* Court had no record evidence by which to assess "reliance" and initially declined to hear the overruling question at the time it granted review.[13] The Court ended up citing just two pages from one book to support "reliance."[14]

All of these factors demonstrate that *Roe* was not derived from text, history, tradition, structure, or

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[12] See, *e.g.*, Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 Const. Comment. 311 (2005); Morton J. Horowitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 Harv. L. Rev. 30, 71 (1993) (criticizing the plurality's characterization of *Lochner v. New York*, 198 U.S. 45 (1905) and *Plessy v. Ferguson*, 163 U.S. 537 (1896)); Linton, supra note 8; Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 Notre Dame L. Rev. 11 (1992).

[13] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1056–57 (1992).

[14] *Id*. at 856 (citing Rosalind P. Petchesky, ABORTION AND WOMAN'S CHOICE 109, 133 n.7 (rev. ed. 1990)).

precedent, which are the only sources of constitutional legitimacy that might have authorized the Court to impose *Roe* on the nation. Since abortion is not a right derived from the federal constitution, it is a matter for the people to decide through the democratic process in the States.[15]

Third, the *Roe/Casey* standard has proven *unworkable*. In spite of the fact that the practice of medicine has been regulated by the States since before the Founding,[16] this Court has prescribed a national rule and assumed a unique role of judicial administration over just one medical procedure—one never exercised before or since—"as the Nation's '*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.'" *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting).[17]

Roe announced that there were two major state interests in regulating abortion: fetal life and maternal health.[18] But there was no evidentiary record to guide the Court's recognition or understanding or definition of these state interests, or the value to be given to them, or whether any other state interests existed.

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[15] See *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

[16] *Dent v. West Virginia*, 129 U.S. 114 (1889).

[17]) See also *Hellerstedt*, 136 S. Ct. at 2326 (Thomas, J., dissenting) (noting the significance of *Hellerstedt* resurrecting appointment as "the nation's ex officio medical board").

[18] 410 U.S. at 164–65.

The application of *Roe* to state regulations of abortion to protect the state interests in fetal life and maternal health has been difficult and haphazard. The fact that *Roe* has been unworkable was immediately demonstrated in *Doe* where the Court did not apply the same standards as the Court purported to apply in *Roe*, as Justice Powell pointed out in his concurring opinion in *Carey v. Population Services International*.[19]

As the application of *Roe* and *Doe* in many subsequent cases has demonstrated, the Court has no capacity to assume or exercise such a role as the nation's medical review board of abortion. The Court has no capacity to oversee operative procedures or to assess safety. The Court cannot regulate or monitor or intervene. It cannot anticipate medical developments or medical data. Instead, the Court, through *Roe*, *Doe*, *Casey*, and *Hellerstedt*, has tied the hands of state and local public health officials who do have the capacity to create and effectively enforce adequate health and safety standards at the local level.

The five-month limits on abortion passed since *Gonzales v. Carhart*, 550 U.S. 124 (2007), by the U.S. House and twenty-one states highlight the contradictions in the *Roe* Court's construction of the so-called state interest in maternal health. The Court created the viability rule in *Roe* based largely on the mistaken factual assumption that abortion is safer

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[19] 431 U.S. 678, 704 (1977) (noting that, in contrast to what *Roe* purported to adopt, *Doe* did not refer to the "compelling interest" standard but instead used the "reasonably related" test).

than childbirth.[20] The viability rule allows abortion beyond the point where abortion is more dangerous than childbirth, at least in the vast majority of cases.[21] And yet when states have asserted their interest in maternal health to limit abortion before viability at 20 weeks, the federal courts following *Roe* and *Casey* have invalidated those limits by rigidly applying the viability rule.[22]

The enterprise of applying a standard—whether undue burden or some other standard—to a public health issue such as abortion, with all its complexity, is not suited to the federal courts. Federal courts are not public health agencies and cannot serve that role. *Roe* and *Casey* have been repeatedly criticized by

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[20] See Brief Amicus Curiae of the Am. Ctr. for Law and Justice and the Am. Acad. of Med. Ethics in Support of Respondent-Cross-Petitioner, *June Med. Servs. L.L.C. v. Gee*, Nos. 18-1323 & 18-1460 (2019) (demonstrating that the claim that abortion is safer than childbirth is based on no reliable medical data).

[21] See Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology 729 (2004) ("Compared with women whose abortions were performed at or before 8 weeks of gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes."); see Clarke Forsythe, *The Medical Assumption at the Foundation of* Roe v. Wade *and Its Implications for Women's Health*, 71 Wash. & Lee L. Rev. 827, 873 (2014) (containing three appendices listing over 270 international, peer-reviewed medical studies finding increased, long-term medical risks after abortion).

[22] See, *e.g.*, *Isaacson v. Horne*, 884 F. Supp. 2d 961 (D. Ariz. 2012) (upholding state's 20-week limit), rev'd, *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013) (invalidating state's 20-week limit), cert. denied, 571 U.S. 1127 (2014).

numerous federal judges for standards that cannot be consistently applied.[23]

Before *Hellerstedt*, federal courts had difficulty in applying the state's interest in maternal health when it seemingly conflicted with access to abortion. Which value were federal courts to adopt? In *Planned Parenthood Southeast, Inc. v. Bentley*,[24] the court recognized that the American medical profession has largely abandoned abortion practice, that abortion providers are diminishing, that providers are often flown in from out of town, or out of state, or out of the country to do abortions, precisely the reason to require admitting privileges to protect patient follow-up and the physician-patient relationship.

Hellerstedt exemplifies this Court's inability to administer the standards laid down in *Roe* and *Casey*.[25] Twenty-four years after *Casey*, members of the Court disputed fundamental elements of *Roe*'s abortion doctrine in *Hellerstedt*.[26] The majority in *Hellerstedt* casually endorsed the district court's findings against the regulations, although the record contained medical evidence showing that the regulations were reasonably related to protecting

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[23] See Forsythe, supra note 2, at 491–493 for a compiled list current as of 2018.

[24] 951 F. Supp. 2d 1280 (M.D. Ala. 2013) (granting temporary restraining order against challenge to Alabama law requiring local hospital admitting privileges law for abortion-performing physicians).

[25] *Hellerstedt*, 136 S. Ct. 2292 (2016).

[26] *Id*. at 2321 (Thomas, J., dissenting) (questioning level of scrutiny and third-party standing).

maternal health. The Court in *Gonzales* questioned the propriety of facial challenges to state abortion regulations,[27] but the majority in *Hellerstedt* distorted prior facial challenge doctrine to resurrect a claim that the plaintiffs did not ask for.[28] The *Hellerstedt* Court exalted an interest in unfettered "access" to abortion against the state's interest in maternal health, in a case where the generally-applicable state regulations were reasonably related to protecting maternal health.[29] The Court also did not apply normal severability principles.[30]

Hellerstedt shows that the Court cannot perform its role as the "ex officio medical review board" because it cannot scrupulously examine the "benefits and burdens" of individual regulations. When faced with the obligation to carefully review multiple regulations, the Court invalidated all of the clinic regulations without specific findings against each, even generally-applicable medical regulations that are unquestionably sound and reasonable. *Hellerstedt* exemplifies the problem that, under the Court's

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[27] *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) ("[T]hese facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge.").

[28] *Hellerstedt*, 136 S. Ct. at 2339 (Alito, J., dissenting) ("There is simply no reason why petitioners should be allowed to relitigate their facial claim.").

[29] See Brief of Association of American Physicians and Surgeons, Inc. as Amicus Curiae in Support of Respondent, *June Med. Servs. L.L.C., v. Gee*, Nos. 18-1323, 18-1460 (2019) (detailing the long practice, based on objective medical standards, of physician credentialing and admitting privileges for current competence and patient health)

[30] *Hellerstedt*, 136 S. Ct. at 2350 (Alito, J., dissenting).

abortion doctrine, judges can use facial challenges to broadly sweep away abortion regulations because of the difficulty of analyzing the specific impact of regulations.

Casey conceded that *Roe* was not workable as applied, overruling *Akron* and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) and announcing a new standard. But the "undue burden" standard applied since *Casey* has not been workable, because, among other reasons, it unavoidably motivates judges to apply their policy preferences and subordinates all state interests to "access." Due to the inherent institutional limits on this Court and its inconsistent application of the abortion doctrine over forty-five years, *Roe* has been demonstrated to be unworkable. The undue burden standard has done nothing to improve predictability, consistency, or coherence. The experience since *Casey* demonstrates that *Casey*'s re-engineering of *Roe* has not made *Roe* any more workable.[31] Clearly, *Roe* has never been a "simple limitation."[32] This has been a failure in judicial administration and it does not serve the rule of law. "[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009).

Fourth, changes in fact justify a reconsideration of *Roe*. The *Casey* Court declared that no facts had

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[31] Paul C. Quast, *Respecting Legislators and Rejecting Baselines: Rebalancing* Casey, 90 Notre Dame L. Rev. 913 (2014).

[32] *Casey*, 505 U.S. at 855 (describing Roe as a "simple limitation beyond which a state law is unenforceable.").

changed that justified overruling *Roe*.[33] But *Roe* established no reliable baseline from which to judge a change in facts, since there was no trial or evidentiary record in *Roe*. Much, if not all, of *Roe* rested on sociological "assumptions."[34] It is those assumptions that have been seriously challenged with the passage of time.

Moreover, the *Casey* Court deferred briefing on the overruling of *Roe* when it limited the questions to be addressed and side-stepped a searching analysis of changes in *Roe*'s assumptions.[35] The *Casey* Court simply issued an *ipse dixit* that change had not occurred. However, to the objective observer, *Roe*'s assumptions have changed considerably since 1973. Biological and technological developments, including the development of in vitro fertilization since the 1970s, have reinforced the medical conclusion of the 19th century that the life of the individual human being begins at conception.[36] The states have increasingly relied on this biological evidence to increase legal protection from conception in prenatal injury, wrongful death, and fetal homicide law. The

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[33] *Id*. at 864.

[34] *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 430 n.12 (1983) ("the validity of Roe's factual assumption"); *Casey*, 505 U.S. at 860 ("We have seen how time has overtaken some of Roe's factual assumptions. . . .").

[35] *Casey*, 505 U.S. at 860–61.

[36] Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and the Terminology Revisited*, 8 U. St. Thomas J. L. & Pub. Pol'y. 44 (2013); Dellapenna, supra note 8, at 256–61 & nn.241, 282, 298 (describing the evolution in medical understanding that influenced judicial and legislative protection from conception in the nineteenth century).

widespread clinical use of ultrasound, a technological development that the *Roe* Court did not anticipate, came to the commercial market shortly after *Roe* and substantially affected medical practice and public understanding of prenatal development.[37] *Roe* was premised on the assumption that legalization of abortion would end the "the back alley butchers"[38] and allow abortion to be treated as "a medical procedure . . . governed by the same rules as apply to other medical procedures . . . with reasonable medical safeguards."[39] Repeated and continuing scandals involving clinics and providers have contradicted that

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[37] Malcolm Nicolson & John E. E. Fleming, IMAGING AND IMAGINING THE FETUS: THE DEVELOPMENT OF OBSTETRIC ULTRASOUND 1–7 (2013) ("Ultrasonic imaging has also had a momentous social impact because it can visualize the fetus. Fifty years ago, the unborn human being was hidden, enveloped within the female abdomen, away from the medical gaze . . . . [T]he scanner had become widely deployed within the British hospital system by 1975 . . . . By the late 1970s, the ultrasound scanner had become a medical white good, a standardized commodity in a mass marketplace."); *id*. at 213 ("By the early 1970s, some American hospitals were beginning to equip themselves with ultrasound scanners."); Laurie Troxclair, et al., *Shades of Gray: A History of the Development of Diagnostic Ultrasound in a Large Multispecialty Clinic*, 11 Oschner J. 151 (2011) (describing introduction of ultrasound for clinical use in 1975).

[38] Randy Beck, *Prioritizing Abortion Access over Abortion Safety in Pennsylvania*, 8 U. St. Thomas J.L. & Pub. Pol'y 33, 40–41 (2013).

[39] *Id*. at 34 n.4 (quoting Brief for Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians as Amici Curiae supporting Respondents, in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) (Nos. 70-18, 70-40)).

assumption.[40] And there is a growing body of international medical data involving women from dozens of countries finding increased long-term risks to women from abortion.[41]

Most abortions today are not performed by doctors from the Mayo Clinic or by a woman's "own doctor."[42] American medicine has largely abandoned abortion, so only a small percentage of doctors perform abortions.[43] Abortion is largely separated from the rest of obstetrical and gynecological care and

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[40] Ams. United for Life, UNSAFE: AMERICA'S ABORTION INDUSTRY ENDANGERS WOMEN (2018 ed.) (documenting that 227 abortion providers in 32 states were cited for more than 1,400 health and safety deficiencies between 2008 and 2016), https://aul.org/wp-content/uploads/2018/10/AUL-Unsanfe-2018-Final-Proof.pdf; Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 Vill. L. Rev. 45, 65–70 (2012).

[41] See, *e.g.*, Erika Bachiochi, THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION, 63–102 (ed., 2004); Forsythe, *The Medical Assumption at the Foundation of* Roe v. Wade *and Its Implications for Women's Health*, supra note 21 (citing dozens of international, peer-reviewed medical studies finding increased medical risks after abortion).

[42] See, *e.g.*, Debra B. Stulberg et al., *Abortion Provision Among Practicing Obstetricians-Gynecologists*, 118 Obstetrics & Gynecology 609 (2011) ("Among practicing ob-gyns, 97% encountered patients seeking abortions, whereas 14% performed them.").

[43] Steven H. Aden, *Driving Out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion*, 8 U. St. Thomas J.L. & Pub. Pol'y 14 (2013); *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280 (M.D. Ala. 2013) (challenge to Alabama admitting privileges law), subsequent decision, *Planned Parenthood Se., Inc. v. Strange*, 9 F. Supp.3d 1272 (M.D. Ala. 2014).

practice.[44] Abortion does not involve the medical judgment that *Roe* assumed; in more than 90% of cases, abortion is not a medically-indicated procedure, but an elective procedure chosen for social reasons.[45] Contraception devices and methods have expanded,[46] and the shame previously associated with non-marital childbearing and with single parenting has been largely eliminated from American life.[47] Nations face population implosion, not explosion. Population in the U.S. in 2016 "grew at its lowest rate since the Great

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[44] See *Stenberg v. Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting) ("Dr. Carhart has no specialty certifications in a field related to childbirth or abortion and lacks admitting privileges at any hospital."); *Akron*, 462 U.S. at 473 (1983) (O'Connor, J., dissenting) ("It is certainly difficult to understand how the Court believes that the physician-patient relationship is able to accommodate any interest that the State has in maternal physical and mental well-being in light of the fact that the record in this case shows that the relationship is nonexistent.").

[45] Cf. *Roe*, 410 U.S. at 165–66 ("[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision. . . ."); Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual & Reprod. Health 110, 113–14 (2005) (explaining that between 8% and 12% of women cited health concerns as a reason for obtaining an abortion; between 3–4% cited health reasons as the most important reason why they obtained an abortion), https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1931-2393.2005.tb00045.x

[46] See John Bongaarts & Elof Johansson, *Future Trends in Contraception in the Developing World: Prevalence and Method Mix*, 33 Stud. Family Planning 24 (2002).

[47] Helen M. Alvare, *Beyond the Sex-Ed Wars: Addressing Disadvantaged Single Mothers' Search for Community*, 44 Akron L. Rev. 167 (2011).

Depression," below replacement levels (0.7%).[48] The abortion rate has fallen to its lowest level since *Roe*,[49] during the same decades that the female unemployment rate has fallen to its lowest level in nearly 20 years. Clearly, there is less reliance than the *Casey* Court assumed.

Fifth, there have been significant *legal changes* which have eroded *Roe*'s assumptions. The legal roadblocks that affected pregnant women before 1970, on which the *Roe* Court placed considerable emphasis, have been repealed. That can be attributed in part to the significant growth in the number of female legislators who shape State policy—including abortion policy.[50] Employment discrimination against

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[48] Janet Adamy & Paul Overberg, *Census Says U.S. Population Grew at Lowest Rate Since Great Depression This Year*, Wall St. Journal (Dec. 20, 2016) https://www.wsj.com/articles/census-says-u-s-population-grew-at-lowest-rate-since-great-depression-this-year-1482262203; Brady E. Hamilton et al., Div. of Vital Statistics, Nat'l Ctr. for Health Statistics, *Births: Provisional Data for 2017*, Report No. 004 (May 2018) https://www.cdc.gov/nchs/data/vsrr/report004.pdf ("The [Total Fertility Rate] in 2017 was again below replacement—the level at which a given generation can exactly replace itself (2,100 births per 1,000 women). The rate has generally been below replacement since 1971 . . . .").

[49] Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2014*, 49 Perspectives on Sexual & Reprod. Health 17, 20 (2017) https://doi.org/10.1363/psrh.12015 ("This is the lowest rate since abortion was legalized nationally in 1973.").

[50] Ctr. for Am. Women and Politics, *Women in State Legislatures 2018*, http://www.cawp.rutgers.edu/women-state-legislature-2018 ("Since 1971, the number of women serving in state legislatures has more than quintupled.").

pregnant women is prohibited by federal statute and by most states.[51] Women's rights have expanded since the 1960s due to the protections accorded by anti-discrimination statutes, including Title VII of the Civil Rights Act, the Pregnancy Discrimination Act, and a myriad of state civil rights and human rights statutes. "Safe Haven" laws have been enacted in all fifty states and the District of Columbia, allowing a woman to leave her newborn at a safe location.[52] The Family and Medical Leave Act of 1993 has altered the situation for maternity leave in America.[53] *None* of these legislative and judicial changes are due to *Roe*.

As discussed above, the law's protection of human life, exemplified in homicide law, goes back at least eight centuries in Anglo-American law. Legal protection of human life against abortion was considerable before *Roe*, more than the *Roe* Court admitted, in areas of tort, criminal, property, and equity law. Despite *Roe*, states have expanded legal protection for the unborn child, in many states from conception. *Roe* limited what the states could do to protect fetal life in the context of abortion, but *Roe* said nothing about state protection of fetal life outside

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[51] Nat'l Conference of State Legislatures, State Employment-Related Discrimination Statutes (July 2015) http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf (citing 40 states); *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 251 (2015).

[52] Lynne Marie Kohm, Roe*'s Effects on Family Law*, 71 Wash. & Lee L. Rev. 1339, 1354 n.58 (2014) (citing all fifty states' and the District of Columbia's safe haven laws).

[53] Family and Medical Leave Act of 1993, Pub. L. 103-3, 29 U.S.C. § 2601 et seq.

the context of abortion, in the areas of tort, criminal, property, or equity law.[54] The States have increasingly isolated *Roe* as an anomaly in the law's protection of prenatal life. Virtually all of the states now have prenatal injury laws that recognize the unborn child as an independent human being. At least thirty-seven states now have fetal homicide laws, and thirty states have fetal homicide laws that extend protection from conception. At least thirty-six states now have wrongful death laws that protect the unborn child, and at least 10 extend protection from conception. The viability rule has been expressly rejected by most states in the areas of prenatal injury law and in the area of fetal homicide, and it has been increasingly rejected in the area of wrongful death law.[55] And the states have moved ahead with legal protection of fetal life to a greater degree, creating a stark contrast between the Court's abortion doctrine and state protection for fetal life in other areas of American life.[56] *Roe* has become increasingly at odds with state tort law's treatment of the unborn child, with state criminal law's treatment of the unborn child, with limits placed on abortion by the states. This contradiction in *Roe*, and the subsequent developments in state and federal law, have created deep-seated incoherence between the Court's abortion

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[54] Cf. *Webster v. Reprod. Health Servs*., 492 U.S. 490, 506 (1989). (recognizing that "[s]tate law has offered protections to unborn children in tort and probate law.").

[55] *Hamilton v. Scott*, 97 So. 3d 728, 735 (Ala. 2012) (applying state's wrongful death law from conception).

[56] See Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 U. St. Thomas J.L. & Pub. Pol'y 141, 141–43 (2012).

doctrine and all other areas of law affecting prenatal protection.

Simultaneously, a growing number of states have, year after year, adopted stronger and stronger limits on abortion, consciously limited, in turn, by the federal courts. There are numerous ways in which the states discourage or limit abortion through regulations, partial prohibitions, and limits on public funding. Numerous states elected to opt-out of the abortion provisions of the Affordable Care Act: In March 2015, for example, Arizona became the twenty-fifth state to ban most abortion coverage on health care exchanges.[57]

Numerous federal statutes have been enacted to address the unintended consequences of *Roe*. In 2002, Congress passed the Born-Alive Infants Protection Act of 2002 (BAIPA), by unanimous vote in the U.S. Senate.[58] In 2003, Congress enacted the Partial-Birth Abortion Ban Act of 2003 (PBABA).[59] These acts by the People's democratically elected representatives are the most reliable means to determine whether the assumptions underlying *Roe* have come to be understood by the people differently.[60] As reflected in the democratic acts of elected representatives, over four decades, at the state and federal level, the people

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[57] Caitlin Owens, *Abortion Remains Contentious Under Obamacare*, THE ATLANTIC (Apr. 1, 2015), https://www.theatlantic.com/politics/archive/2015/04/abortion-remains-contentious-under-obamacare/452133/

[58] 1 U.S.C. § 8.

[59] 18 U.S.C. § 1531.

[60] Cf. *Casey*, 505 U.S. at 864.

have supported increasing limits on abortion that contradict what *Roe* in fact enacted.

What is more, *Roe* has not been followed internationally. The United States is one of only four nations, of 195 around the world, which allows abortion for any reason after fetal viability, and one of only seven nations that allows abortion after twenty weeks.[61] This puts the Court at odds with both international law and domestic public opinion.

Finally, the "reliance interests" in *Roe* that *Casey* cited are unproven. *Casey* held that women had come to rely on abortion as a back-up to failed contraception:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[62]

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[61] Randy Beck, Gonzales, Casey, *and the Viability Rule*, 103 NW. U. L. Rev. 249, 261–65 (2009); CTR. FOR REPROD. RIGHTS, THE WORLD'S ABORTION LAWS 1–2 (2009).

[62] 505 U.S. at 856.

Casey was a singular example of reliance interests in a non-commercial context.[63]

But the notion that women had ordered their thinking and living around abortion was not documented in *Casey* or derived from the record.[64] Just as there was no record of evidence in *Roe* for its rationale for the abortion "right," there was no record of evidence in *Casey* for its switch to "reliance interests" as the rationale for keeping *Roe*. And the *Casey* Court never connected women's social or economic advancement to abortion. To support reliance, the *Casey* Court offered nothing in the case record, but merely a citation to two pages in a 1990 book, Rosalind Petchesky's *Abortion and Woman's Choice*.[65] Petchesky never made the claim for which the Court cited her.[66] The *Casey* Court simply got the

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[63] Lucas A. Powe, Jr., *Intragenerational Constitutional Overruling*, 89 Notre Dame L. Rev. 2093, 2095 (2014) ("Thus *Roe* was deemed that rarest of situations where reliance was found outside a commercial context.").

[64] Cf. *Casey*, 505 U.S. at 856.

[65] 505 U.S. at 856; cf. *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004) (Jones, J., concurring) (noting courts cannot consider evidence of impact of abortion on women unless the Court changes the standard of review or invites such evidence).

[66] See Erika Bachiochi, *A Putative Right in Search of a Constitutional Justification: Understanding* Planned Parenthood v. Casey*'s Equality Rationale and How it Undermines Women's Equality*, 35 Quinnipiac L. Rev. 593, 630 (2017) (pointing out that Petchesky does not claim that abortion contributed to women's "increased participation in the workforce.").

facts wrong: if there is any "reliance," it is on contraception, not abortion.

Further, the *Casey* Court assumed, erroneously, that overruling *Roe* would immediately make abortion illegal.[67] This supposition was false then, and it remains false today. Overturning *Roe* will not return the country to the status quo ante. Depending on what state courts and legislatures might do, approximately 16 states have prohibitions on the books during the first trimester. The rest have no prohibitions on the books before 20 weeks or viability. Approximately twenty-one states have prohibitions at twenty weeks. This means abortion will be legal through the twentieth week of gestation unless the states enact new prohibitions. And many large, populous states, like California, Illinois, New York, will keep it legal for the foreseeable future. Reliance interests are weakened by the fact that the overturning of *Roe* would not lead to immediate prohibition of abortion in many states. A number of state courts have created their own versions of *Roe* under the state constitution.[68] Thus, there will be little immediate legal change in most states. The states will clearly adopt a pluralistic approach to abortion policy.

The *Casey* Court conceded that reliance was limited because individuals can change their behavior

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[67] 505 U.S. at 856 (referring to "any sudden restoration of state authority to ban abortions.").

[68] See generally, Paul Benjamin Linton, ABORTION UNDER STATE CONSTITUTIONS (2d ed. 2012); Paul Benjamin Linton, *The Legal Status of Abortion in the States if* Roe v. Wade *Is Overruled*, 27 Issues L. & Med. 181 (2012).

based on a change in the law.[69] Individuals may rely on contraception, their local pharmacy, monetary means, state law, or the local market, but there is little evidence they rely on this Court's decision in *Roe*. There is little evidence—in terms of public opinion polls, state legislation, or public actions since *Roe*—that a majority of Americans have relied on this Court retaining a right to abortion for any reason at any time of pregnancy, or on the viability rule. The consistent practice of three-fifths of our states to adopt limits on abortion contradicts the notion that the sweeping result in *Roe* has "become part of our national culture."[70]

Without a record of evidence, the Court in *Roe* nevertheless put some emphasis on assumptions about the economic and social status of women and the impact of pregnancy and abortion policies. Much has changed in the United States since 1973 due to social practices and state and federal legislation. These social and legal changes will continue even when *Roe* is overturned.

As *Roe*, *Casey*, and *Hellerstedt* have shown, this Court cannot settle the abortion issue. Even if the Court unanimously reaffirmed *Roe*, it would merely preserve the legal schizophrenia that exists between the Court's policy and state and federal law, and do nothing to change the basic social and legal factors that have made *Roe* immune to settlement.

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[69] 505 U.S. at 856 ("[R]eproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.").

[70] *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000).

CONCLUSION

The Court should reconsider *Roe v. Wade* at the earliest practical opportunity.

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