No. 19-1392

In the
Supreme Court of the United States

Thomas E. Dobbs, M.D., M.P.H., in his official capacity as State Health Officer of the Mississippi Department of Health, et al., *Petitioners*

v.

Jackson Women's Health Organization, on behalf of itself and its patients, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Brief of Amici Curiae National Right to Life Committee and Louisiana Right to Life Federation Supporting Petitioners

---

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com
Counsel for Amici Curiae

July 2021

Table of Contents

Table of Authorities

Cases

Constitutions, Statutes, Regulations & Rules

Other Authorities

Interest of Amici Curiae[1]

Founded in 1968, the National Right to Life Committee, Inc. is the nation's oldest, largest, pro-life organization. *See* nrlc.org. NRLC is a federation of 50 state affiliates and over 3,000 local chapters. By education and legislation, NRLC works to restore legal protection to the most defenseless members of our society who are threatened by abortion, infanticide, assisted suicide, and euthanasia. NRLC and related entities have a long history of working to protect maternal health. *See, e.g.*, http://www. nrlc.org/uploads/international/MCCLMaternalMort2012.pdf.[2]

Louisiana Right to Life Federation, Inc., established in 1970, is NRLC's Louisiana affiliate. *See* https://prolifelouisiana.org/. LRTL's pro-life advocacy includes maternal-health protection.

Summary of the Argument

Eliminating "a jurisprudence of doubt" was the goal in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 843 (1992). So this Court pro-

---

[1] Rule 37 statement: All parties consented to filing this brief; no counsel for any party authored it in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than Amici or their counsel funded it.

[2] Counsel for Amici have authored numerous briefs on abortion issues in this and other courts. Mr. Bopp is NRLC's General Counsel. Counsel developed some of the themes herein further in James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Absolute, Anomalous, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181 (1989), *available at* https://digitalcommons.law.byu.edu/jpl/vol3/iss2/2. All links herein were checked and functional at time of filing.

vided a roadmap for abortion jurisprudence, replacing the strict-scrutiny, trimester roadmap of *Roe v. Wade*, 410 U.S. 113 (1973), with a more-deferential, undue-burden (i.e., substantial-obstacle) roadmap.

The need for this Court to provide courts and legislatures a roadmap to avoid a jurisprudence of doubt is especially true of abortion jurisprudence, which is built on legal anomalies that create the abortion-distortion effect, whereby normal rules are bent to make *Roe*'s abortion right more absolute. This effect was evident in the soon replacement of *Casey*'s substantial-burden test with burden-benefit balancing in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the results of which were followed by a splintered Court in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020). Now a jurisprudence of doubt again exists, with lower courts even more confused over what sliver of *June Medical* controls under *Marks v. United States*, 430 U.S. 188, 193 (1977).

The new roadmap should guide the way back from *Roe*'s tangential departure from normal legal norms by fully embracing relevant state interests and normal rules. First, it should reject *Casey*'s viability line, which lacks justification in logic or biology, by answering the question before the Court with a clear "no." Second, the new roadmap should make clear that, because there is no categorical viability line, all state interests may be considered pre-viability (as also post-viability) and that courts should consider the assertion of such interests and supportive evidence. The new roadmap should reaffirm as legitimate all the interests asserted by Petitioners—in protecting maternal health, preborn human life, the medical profession, and civil society—but make clear that other interests may be

asserted and considered with evidence not being barred by any categorical viability line. Third, the new roadmap should then clarify that courts should consider the weight of any asserted state interests to determine if the state interests justify the abortion regulation at issue under the appropriate level of scrutiny to which the law is subject, i.e., there are no categorical lines precluding this normal court function. Fourth, the new roadmap should emphasize that normal rules of law must be applied by courts and will be by this Court, which will begin to reverse the anomalies on which *Roe*'s tangent from normal legal norms was built.

Finally, this case should be remanded to apply this Court's new roadmap to the Mississippi statute at issue here.

Argument

I.

Courts and legislatures need a roadmap to avoid "a jurisprudence of doubt."

Eliminating "a jurisprudence of doubt" was the goal in *Casey*. 505 U.S. at 843.[3] Accordingly, while reaffirming "*Roe*'s essential holding," *Casey* also provided a new three-part roadmap, *id.* at 846, including a pre-viability "undue interference" test, *id.*, and the express rejection of *Roe*'s strict-scrutiny, trimester roadmap, *id.* at 872-73 (plurality). Emphasizing the "importan[ce of] clarify[ing] what is meant by an undue burden," *id.* at

[3] This plurality opinion controlled under *Marks*, 430 U.S. at 193. *See June Medical Services*, 140 S. Ct. at 2135 n.1 (2020) (Roberts, C.J., concurring in judgment) ("joint opinion is ... the holding ... under *Marks* ....").

876, *Casey* explained that the new pre-viability "undue burden" test was a "substantial obstacle" test, *id.* at 873-79. The roadmap was summarized in five "guiding principles." *Id.* at 877-79. This was a recognition that courts and legislatures *need* a roadmap to avoid a jurisprudence of doubt. So though Petitioners here asked this Court to "grant certiorari and clarify that the right to a pre-viability abortion is not absolute," Cert. Pet. 15, Amici encourages the Court to provide roadmap *sufficient* to avoid a jurisprudence of doubt.

A *new* roadmap is required because the Court abandoned *Casey*'s roadmap in *Whole Woman's Health*, 136 S. Ct. 2292, and *June Medical Services*, 140 S. Ct. 2103. Just returning to *Casey*'s roadmap is inadequate because the "undue burden" "is a standard ... not built to last"—for reasons set out by four members of this Court. *Casey*, 505 U.S. at 964-65 (Rehnquist, C.J., with White, Scalia & Thomas, JJ., concurring in the judgment in part and dissenting in part). These reasons include the problem that "substantial obstacle" is subjective and results in differing opinions, as illustrated by disagreements in *Casey* itself over various provisions, *id.* at 965-66, so "[u]nder the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code," *id.* at 965.[4]

---

[4] *Cf. Planned Parenthood of Indiana and Kentucky v. Box*, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., with Sykes, J., concurring in the denial of rehearing en banc) ("How much burden is 'undue' is a matter of judgment ....Only the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute ....").

The underlying problem with prior roadmaps from *Roe* and *Casey* is that abortion jurisprudence is built on legal anomalies, as explained next. So only a roadmap that charts the way back from the tangent away from normal rules that *Roe* began will ultimately eliminate the jurisprudence of doubt.[5]

A. Abortion law is built on anomalies.

The anomalous abortion-distortion effect—whereby normal legal rules are bent to advance an absolute abortion right—has characterized abortion jurisprudence from the beginning. *See, e.g.*, Bopp & Coleson, *supra* note 2, at 183.[6] *Cf. June Medical*, 140 S. Ct. at

---

[5] While Amici believe that the logical and inevitable end of the road of applying normal rules to abortion cases will be to restore to the States and to the People the power to protect unborn life throughout pregnancy, this Court need not reach the end of the road in this case to establish the required and appropriate roadmap. The decision on whether to reach the end of the road will likely rest with future Courts, as they apply normal legal rules once again in considering abortion cases.

[6]

> [A]reas of the law related to abortion—privacy rights, fetal rights, medical regulation, and procedural and adjudicatory issues—will be examined in the context of abortion cases. As will be seen, the normal rules in these areas are distorted when the case involves abortion. This abortion distortion factor is present throughout abortion case law. The distortions consistently occur in the direction of making the abortion right more absolute.

Id. (article established such abortion-jurisprudence anomalies from *Roe*, 410 U.S. 113, through *Thornburgh v. ACOG*,

2471 (Alito, J., with Gorsuch, J., dissenting) ("The decision in this case like that in *Whole Woman's Health* twists the law ....").

For example, shortly after *Roe*, and relying on what *Roe* said was permissible, a three-judge court upheld a post-first-trimester-hospitalization requirement, and this Court summarily affirmed. *Gary-Northwest Indiana Women's Services v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd sub nom. Gary-Northwest Ind. Women's Services v. Orr*, 451 U.S. 934 (1981). In *Bowen*, abortion providers said dilation-and-evacuation procedures had so improved that, for the first half of the second trimester, a hospitalization requirement was not reasonably related to the health interest. 496 F. Supp. at 897. The court rejected that argument as contrary to *Roe*'s express language about what is permissible. *Id.* at 898-89. It rejected an analysis that "would result in repeated relitigation of the constitutionality of the same statute. It is the policy of the Supreme Court to avoid, if possible, the creation of rules of law which increase litigation." *Id.* at 901. The court said the "ultimate test" was "whether the legislature acted reasonably in determining that the regulation would promote maternal health." *Id.* at 902. And it rejected the test of "whether the statute has the statistically demonstrable result of decreasing maternal morbidity or mortality for specific groups of abortions." *Id.* This Court's summary affirmance, 451 U.S. 934, was widely viewed as permitting such hospitalization require-

---

476 U.S. 747 (1986)). *See also, e.g.*, Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law*, 6 U. St. Thomas J. Law & Pub. Pol'y 141 (2012) (fetal rights in non-abortion contexts, which generally reject viability line).

ments and endorsing the goals of reducing litigation and keeping the federal judiciary out of the medical-board role.

But *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), changed that. Lower courts had upheld a post-first-trimester-hospitalization requirement in reliance on *Roe*'s roadmap. *Id.* at 426. *Akron* reversed because medical organizations said hospitalization for all post-first-trimester abortions was no longer required. *Id.* at 437.[7] Justice O'Connor decried the Court acting as "Platonic Guardians," substituting their judgment for legislators' by assuming the "medical board" role. *Id.* at 453 (citation omitted).

Thornburgh, 476 U.S. 747, was a high-water mark of the abortion-distortion effect. Dissenting, Justice O'Connor decried the Court being an "ad hoc nullification" machine. *Id.* at 814. And Chief Justice Burger switched sides and called for *Roe*'s reconsideration, noting that *Roe* rejected on-demand abortion and allowed state medical regulation, but *Thornburgh* abandoned that and him. *Id.* at 472-83. He noted that *Roe* established a compelling interest in protecting maternal health, "[y]et today the Court astonishingly goes so far as to say that the State may not require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure ...." *Id.* at 783. He said *Roe* recognized a compelling interest in protecting viable fetal life, but the Court's willingness to strike a second-physician requirement (to care for a born-alive

---

[7] *Akron* also struck (inter alia) requirements for a *physician* to conduct the informed-consent dialogue, *id.* at 449, and for a 24-hour waiting period thereafter, *id.* at 451.

child) made *Roe* "mere shallow rhetoric." *Id.* at 784. "Undoubtedly," he said, "the Pennsylvania Legislature added the ... requirement on the mistaken assumption that this Court meant what it said in *Roe* concerning the 'compelling interest' of the states ...." *Id.*

Casey tried to resolve this "jurisprudence of doubt," 505 U.S. at 843, by reaffirming an abortion right while rejecting *Roe*'s trimester scheme and strict scrutiny, *id.* at 873. It said scrutiny turns on whether laws place a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877 (plurality opinion).[8] It allowed banning abortion after viability (with exceptions) and recognized legitimate interests throughout pregnancy in protecting maternal health and preborn human life. *Id.* at 846. It justified reaffirming *Roe*'s abortion right—while reversing *Roe*'s roadmap—based on institutional integrity, stare decisis, and avoiding doubt. *Id.* at 843, 845-46, 854-69. In particular, *Casey* stressed repeatedly the damage to the Court of "frequent overruling" and "vacillation," *id.* at 866, which would cause "both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law," *id.* at 869.

But institutional integrity, stare decisis, and avoiding doubt didn't stop the soon displacement of *Casey*'s more deferential substantial-obstacle test by a near-

---

[8] *See* Brief of Amici Curiae National Right to Life Committee and Louisiana Right to Life Federation at 9-27, *June Medical*, 140 S. Ct. 2103 (No. 18-1323) (analyzing *Casey*'s test in light of its adaptation of Justice O'Connor's threshold test and noting affirmation and application of the test in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), and *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

strict-scrutiny, burden-benefit-balancing test in *Whole Woman's Health*, 136 S. Ct. 2292—with such "vacillation" and "overruling" doing "profound ... damage" to this Court and the rule of law according to the *Casey* joint opinion. *Whole Woman's Health* created doubt because, inter alia, (i) it did not follow *Casey*'s test, (ii) similar regulations in different states could be treated differently due to different local facts, and (iii) provisions in formerly settled areas of abortion jurisprudence could be challenged under the new balancing, increasing lawsuits.

June Medical Services, 140 S. Ct. 2103, exacerbated the doubt with a 4-1-4 decision. A four-Justice plurality relied on *Whole Woman's Health* to vote to strike abortion-clinic and abortion-provider regulations. *Id.* at 2112, 2130 (Breyer, J., with Ginsburg, Sotomayor & Kagan, JJ.). Four Justices called for *Whole Woman's Health* to be "overruled insofar as it changed the *Casey* test." *Id.* at 2154 (Alito, J., with Thomas, Gorsuch & Kavanaugh, JJ., dissenting).[9] Chief Justice Roberts provided the fifth vote to strike down the provisions, citing their similarity to those in *Whole Woman's Health* and stare decisis, *id.* at 2134, 2139, 2141-42

---

[9] "Unless *Casey* is reexamined—and Louisiana has not asked us to do that—the test it adopted should remain the governing standard." *Id.* In the present case, Petitioners said "the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*," though "[i]f the Court determines it cannot reconcile *Roe* and *Casey* with other precedents or scientific advancements showing a compelling interest in fetal life far earlier in pregnancy than those cases contemplate, the Court should not retain erroneous precedent." Cert. Pet. 5 & n.1 (citation omitted).

(concurring in judgment), but he eschewed *Whole Woman's Health*'s balancing and said *Casey*'s test controlled, *id.* at 2135-38. So no majority actually did such balancing (despite the argument that the regulations should be upheld due to different facts[10]) and a majority rejected such balancing.

B. A jurisprudence of doubt persists.

As a result of the foregoing anomalies (and more not discussed), a jurisprudence of doubt persists. One example suffices to establish the point. After *June Medical*, this Court remanded a case (involving an appeal of a preliminary injunction against an Indiana parental-notice requirement for minors seeking abortion) for reconsideration in light of *June Medical*. *Box v. Planned Parenthood of Indiana and Kentucky*, 140 S. Ct. 2103 (2020). On remand, the three-judge appellate panel split over what was the "narrowest ground" in *June Medical* under *Marks*, 430 U.S. at 193.

The Seventh Circuit majority began by noting that abortion-case "standards ... are not stable, but they have not been changed, at least not yet, in a way that would change the outcome here." *Planned Parenthood of Indiana and Kentucky v. Box*, 991 F.3d 740, 741 (7th Cir. 2021), *petition for cert. filed* (U.S. Mar. 29, 2021) (No. 20-1375). It said "[t]he Chief Justice's concurring

---

[10] *See, e.g.*, *June Medical*, 140 S. Ct. at 2157 (Alito, J., with Thomas & Kavanaugh, JJ., dissenting) ("There is no reason to think that a law requiring admitting privileges will necessarily have the same effect in every state."); *id.* at 2158 ("The suggestion that *Whole Woman's Health* is materially identical to this case is ironic, since the two cases differ in a way that was critical to the Court's reasoning in *Whole Woman's Health* ....")

opinion ... offered the narrowest basis for the judgment in that case, giving stare decisis effect to *Whole Woman's Health* ... on the essentially identical facts in *June Medical*. *Id.* But, after a lengthy discussion of models for applying *Marks*, *id.* at 741, 743-50, the Seventh Circuit decided that both the *June Medical* plurality opinion and the Chief Justice's language in *June Medical* dissenting from *Whole Woman's Health* balancing were dicta, *id.* at 749, and the controlling part of *June Medical* was "one critical sliver of common ground," i.e., "*Whole Woman's Health* was entitled to stare decisis effect on essentially identical facts," *id.* at 748. So "*June Medical* did not overrule *Whole Woman's Health*." *Id.*

The Seventh Circuit dissent noted that "the Supreme Court has held several times that such parental-notification laws are constitutional," *id.* at 752 (Kanne, J., dissenting), which for present purposes highlights the doubt created by *Whole Woman's Health* and *June Medical* as to previously established areas of abortion law. Regarding *Marks*, the dissent said "the finding of a 'substantial obstacle' is the common denominator" in *June Medical*, so abortion jurisprudence should "abandon[] the weighing of benefits that Chief Justice Roberts explicitly rejected," *id.* at 753, i.e., the "critical sliver of common ground" in *June Medical* was "*Casey*'s requirement of 'a substantial obstacle before striking down an abortion regulation,' and the Court's prior determination that 'Texas's law imposed a substantial obstacle,' compelled 'the same determination about Louisiana's law,'" *id.* at 755 (citation omitted). The dissent supported its analysis at length, including showing why the Chief Justice's rejection of burden-benefit bal-

ancing was not dicta. *Id.* at 756.

The foregoing suffices to establish that abortion law is currently, as in the past, a jurisprudence of doubt. And *Marks* doesn't save it. The extended debate between the Seventh Circuit majority and dissent, including the scholarly literature and case opinions cited, establishes that *Marks* itself is an insufficient solution for the abortion-law jurisprudence of doubt. *See also* Brief *Amicus Curiae* of Americans United for Life in Support of Petitioners, *Box v. Planned Parenthood of Indiana and Kentucky* (No. 20-1375) (on petition for writ of certiorari) (further detailing "unsettled" nature of abortion law). A new, clear, and sufficient roadmap is required.

II.
This case should provide a new, clear, and sufficient roadmap.

The Court should provide a new roadmap as part of its "duty ... to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This new roadmap should (**A**) be clear, (**B**) be sufficient and (**C**) guide the way back from *Roe*'s tangential departure, particularly by focusing on state interests and normal rules.

A. The new roadmap should be clear.

Regarding the roadmap's nature, the long history of anomalies and doubt in abortion jurisprudence requires that it contain a *clear* explication of this Court's current abortion jurisprudence with careful attention to avoiding any terminology enabling litigators to reintroduce doubt after the effort to remove it, as happened with *Casey*'s joint opinion in *Whole Woman's Health*

and *June Medical*, as explained.[11]

B. The new roadmap should be sufficient.

The new roadmap should be *sufficient*, i.e., it should provide enough detail and direction to courts and legislatures to stop and reverse the abortion-distortion problem that began with *Roe*'s tangent from normal jurisprudence. In arguing for such sufficiency, Amici are mindful of the debate over minimalism, *see, e.g.,* Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999), versus the need to establish and follow rules, *see, e.g.*, Antonin Scalia, *The Rule of Law Is a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989); Cass R. Sunstein, *Problems with Minimalism*, 58 Stan. L. Rev. 1899 (2006) ("*Problems*").

But in abortion jurisprudence, there are strong precedents in *Roe* and *Casey* for establishing detailed roadmaps to guide lower courts and legislatures. In *Roe* this Court provided a roadmap summary, distilling the trimester framework and stating approval for states to establish qualifications for who may be a "physician" allowed to perform abortions. 410 U.S. at 164-65. And *Casey* distilled the new roadmap into five "guiding principles." 505 U.S. at 877-79 (controlling plurality). In other contexts, too, this Court has issued such roadmaps. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); *Miranda v. Ari-*

[11] For example, *Whole Woman's Health* changed *Casey*'s substantial-obstacle test into a burden-benefits-balancing test based on *Casey* language about benefits. *See, e.g.*, *June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring in judgment) (While "the Court at times discussed benefits," "in the context of the governing standard, these benefits were not placed on a scale opposite the law's burdens.").

zona, 384 U.S. 436, 467-74 (1966). And though Justice O'Connor was "the Court's leading minimalist," Sunstein, *Problems*, 58 Stan. L. Rev. at 1907, and though she decried *Roe*'s trimester framework, including the viability line, as being "on a collision course with itself," *Akron*, 462 U.S. at 458 (O'Connor, J., with White & Rehnquist, JJ., dissenting), she coauthored the joint *Casey* opinion that retained a viability line in its new roadmap.

Also, this Court has a unique role regarding dictum:

> [T]his Court's unique role means that even dictum is accorded substantial weight. *See Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399, 5 L. Ed. 257 (1821) (Marshall, C.J.); *United States v. Dorcely,* 454 F.3d 366, 375 (D.C. Cir. 2006) ("[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." (quotation marks omitted)).

Wagner v. FEC, 717 F.3d 1007, 1015 (D.C. Cir. 2013). And in *Mazurek*, 520 U.S. 968 (upholding denial of preliminary injunction sought by a physician-assistant against a law allowing only physicians to perform abortions), this Court itself relied on the fact that *Roe* had said the state may define the "physician" who performs an abortion as the state chooses, "although it was not necessary to our holding." *Id.* at 974 (citing *Roe*, 410 U.S. at 165). *Mazurek* similarly relied on a statement in *Akron* restating what *Roe* had said about restricting abortions to physicians, *id.* at 974-75 (citing 462 U.S. at 447).

Furthermore, the nature of the sole issue on which this Court granted review—"Whether all pre-viability

prohibitions on elective abortions are unconstitutional," Cert. Pet. i—lends itself to providing a roadmap because it implicates a line incorporated in the *Roe* and *Casey* roadmaps, so simply answering with a minimalist "no" would provide little guidance as to why that feature of two prior roadmaps is being abandoned and what the law is now.

Finally, the roadmap that is needed here is well justified because what is required is *not* one creating new lines without constitutional support (as in *Roe*'s trimester framework and *Casey*'s viability line) but *rather* an instruction to lower courts to return to normal rules in abortion cases and a strong declaration to courts and legislatures that this Court will be doing so too. That creates no Article III or other obiter-dictum problems but rather is like this Court's declaration that (in other areas of the law) it would abandon the "Lochnering" of the sort this Court did in *Roe*. *See* Bopp & Coleson, *supra* note 2, at 197-200) (discussing such critiques of *Roe* and showing comparisons with abortion law and calling for a similar abandonment as happened with *Lochner v. New York*, 198 U.S. 45 (1905)). So a sufficient roadmap is proper.

C. The new roadmap should guide the way back from *Roe*'s tangent from normal rules by fully embracing relevant state interests and normal rules.

The new roadmap should guide the way back from the tangential departure of abortion jurisprudence from normal jurisprudence that was launched by *Roe*, 410 U.S. 113. As a central focus of that, it should establish that (**1**) pre-viability application does not preclude elective-abortion prohibitions; (**2**) all relevant

state interests, and their evidentiary support, should be considered in pre-viability applications; (**3**) courts must consider if asserted state interests satisfy relevant scrutiny applied to the abortion law; and (**4**) normal legal rules apply.

1. Pre-viability application does not preclude elective-abortion prohibitions.

The issue for review here is "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." Cert. Pet. i. This Court should hold clearly that the answer is "no," so that there should never again be a case where the state is not allowed to put on evidence supporting its state interests applicable before viability, as happened in this case.

The viability line was nonsensical in *Roe*, and its reaffirmation in *Casey* made no more sense. *Roe* purported to justify the line thus:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.

410 U.S. at 163. But that second sentence is a mere *definition* of viability, not an explanation of *why* viability restricts the interest in protecting preborn human life from being compelling before that line is reached. So it gave no "logical and biological justifications."

In *Casey*, the plurality's defense of the viability line was no better, featuring (i) *Roe*'s definitional approach, (ii) workability ("there is no other line ... more workable"), and (iii) "an element of fairness" (based on

women waiting so long). 505 U.S. at 870.

Regarding (i) the *definitional* approach, it fares no better in *Casey* than it did in *Roe* because a viability definition is not a logical, biological, constitutional justification for a viability line categorically excluding state protection of preborn human beings. Unless preborn humans are delivered at viability, the fact that they can then survive outside the womb is no more meaningful than the fact that if left alone in the womb they will continue to be living individual human beings—both before and after the time they would be viable beyond the womb. Before and after the external-viability line, a preborn human is fully viable in the womb. Nothing about the viability line, which varies based on current medical technology, makes a preborn human more or less a preborn human being.

The interest in protecting preborn humans, therefore, is as strong before as after viability. *Cf. Akron*, 462 U.S. at 461 (O'Connor, J., dissenting) ("potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward"). And at no time are preborn humans "*potential* life" because (a) at all times they are living, individual human beings—as known since cell biology was discovered in the 1800s, *see, e.g.*, Bopp & Coleson, *supra* note 2, at 256 & n.538[12]—and

[12] The cited material documents (1) the cell-biology discovery that individual human life begins when sperm and ovum unite and (2) the subsequent "physicians' crusade" to gain legal protection for preborn humans from abortion, beginning at fertilization instead of the old, unscientific quickening line. Several states explicitly affirmed (and others implied) that protection of the unborn child was a purpose of their abortion-prohibition laws, not just protecting

(b) there would be no abortion debate at all if preborn humans were not alive. "Potential" implies that preborn, living humans aren't alive until birth, which is nonsensical and against science.

Regarding (ii) *workability*, the lack of a more workable line doesn't justify the viability line. Rather, it merely shows that the joint-opinion Justices wanted a line and so picked one—based on no other justification than the desire to create one. The same thing happened with *Roe*'s trimester framework, which *Casey* rejected while adopting *Roe*'s sloppy, irrational approach of drawing unjustified lines.

Regarding (iii) *fairness*, the *Casey* plurality's principle that delay in seeking an abortion justifies prohibiting abortion at viability under a fairness rationale equally justifies prohibiting most abortions after fifteen weeks, as in Mississippi's Gestational Age Act. After all, most European Union countries say fairness requires limiting most abortions to *twelve* weeks. *See* Right to Life of UK, *What are the abortion time limits in EU countries?*, https://righttolife.org.uk/what-are-the-abortion-time-limits-in-eu-countries; BBC, *Europe's abortion rules*, BBC News (Feb. 12, 2007), http://news.bbc.co.uk/2/hi/europe/6235557.stm. And in considering fairness, fairness to preborn children must be put on the scale too since they are individual human lives, an interest essentially ignored in *Roe* and *Casey*.

This Court has begun the process of rejecting the viability line, so there is already precedent for doing so. In *Gonzales*, 550 U.S. 124, this Court recognized a legitimate interest "in protecting ... the life of the fetus

---

maternal health as Justice Blackmun claimed in *Roe*. *Id.* (citing *Roe*, 410 U.S. at 151 & n.48)).

that may become a child" "from the outset of the pregnancy," *id.* at 145 (citing *Casey*, 505 U.S. at 846), and thus upheld a partial-birth-abortion ban without regard to its application both pre- and post-viability, *id.* at 147 ("a fetus is a living organism ... whether or not it is viable"). Justice Ginsburg recognized that the Court had abandoned the viability line at the time. *Id.* at 171, 186 ("blurs the line"). So reverting to *Casey's* reliance on the viability line would be inconsistent with *Gonzales*.

Because Petitioners address proffered evidence of factual developments since *Roe* concerning states' interests before viability, Amici don't address that. But Amici agree with Petitioners that recent facts about fetal pain, maternal-health risk, and protecting the medical profession and society undercut the argument for delayed abortions inherent in a viability line. Such evidence was certainly not at issue in *Roe*, where the viability line wasn't even at issue and so not subject to argument and evidence, further undercutting any reason to follow the viability-line dictum here.

In sum, there is no logical, biological, or constitutional justification for a viability line in abortion jurisprudence. This Court's new roadmap should make clear that *Roe*'s and *Casey*'s categorical viability line is gone and should be disregarded in all further cases, as it will be by this Court. If viability were to have any further possible relevance, it should not be as a categorical matter and should only be employed where actually constitutionally relevant (if such relevance is established), based on consideration of all relevant state interests, subject to evidentiary proof under the relevant scrutiny, under normal rules of jurisprudence.

2. All relevant state interests should be considered in pre-viability applications.

This Court's new roadmap should make clear that all relevant state interests should be considered by courts in pre-viability applications, just as in post-viability applications. This logically follows removal of the categorical, viability-line protection for abortion and is consistent with applying normal rules of law.

Refusal to consider state interests—and disallow evidence for those interests, as happened here—is emblematic of the entire abortion-distortion factor at work in abortion jurisprudence. Consequently, a vital part of beginning removal of the tangent from normal law that *Roe* began is fully recognizing and considering relevant state interests. These interests include the interests asserted by Petitioners here: (**a**) protecting maternal health, (**b**) protecting preborn, individual human life, and (**c**) protecting against harm to the medical profession and civil society. But the roadmap should make clear that (**d**) states may assert and support with evidence *all* other relevant and legitimate state interests in abortion cases to defend laws that apply at any stage of pregnancy.

a. States may assert an interest in protecting maternal health for all periods of pregnancy.

The new roadmap should reaffirm that protecting maternal health is a relevant interest to be considered (with evidence admissible) at all stages of pregnancy without any prior limitation based on artificial lines created by this Court.

Roe created an artificial line at the end of the first trimester after which it declared that state interest in

maternal health could be considered: "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester." 410 U.S. at 163. Before that approximate, movable line (based on current "medical knowledge," which necessitates allowing evidence), *Roe* left all concern for maternal health to the "attending physician": "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. While ignoring the conflict of interest inherent in giving the physician performing an abortion essentially *carte blanche* to determine what protects the maternal patient's health, *Roe* at least allowed states to establish qualifications for who may be a "physician" allowed to perform abortions. 410 U.S. at 165. And that was followed in *Mazurek*, 520 U.S. 968, and *Menillo*, 423 U.S. 9.

But when states required that the "physician" be one with local hospital admitting privileges who operates in a facility that meets the same requirements as similar ambulatory surgical centers, this Court backtracked in *Whole Woman's Health*, 136 S. Ct. 2292, and *June Medical*, 140 S. Ct. 2103, on what *Roe* said was permissible in protecting maternal health. The new roadmap should reaffirm the state's interest in protecting maternal health, which may be asserted to justify abortion regulation, where appropriate.

b. States may assert an interest in protecting preborn, individual human life, including against pain, during all periods of pregnancy.

The new roadmap should reaffirm that protecting preborn, individual human life, including against pain, is a relevant interest to be considered (with evidence admissible) at all stages of pregnancy without any prior limitation based on artificial lines created by this Court. *Roe* held that the state's interest in protecting preborn human life became compelling at viability. 410 U.S. at 164. But this meant little in *Thornburgh*. *Supra* Part I.A. *Casey* abandoned the need for strict scrutiny with its new substantial-obstacle test, so it did not speak in terms of compelling interests, but it "recogni-[zed] that there is a substantial interest in potential life throughout pregnancy." 505 U.S. at 876 (plurality). *Gonzales* recognized this interest without regard to viability. 550 U.S. at 147, 157. As Petitioners develop factually, this interest should be recognized as extending to protecting preborn human beings from pain. These interests should be reaffirmed as interests states may always assert as relevant.

c. States may assert an interest in protecting against harm to the medical profession and civil society during all periods of pregnancy.

The new roadmap should affirm that protecting against harm to the medical profession and civil society is a relevant state interest to be considered (with evidence admissible), regardless of the stage of pregnancy. Petitioners develop this factually, and this Court recognized in *Roe* that states could regulate who

qualifies as a "physician" to perform abortion, though in later decisions this has often been ignored. *See supra* Part I.A.

In *Gonzales*, 550 U.S. 124, however, this Court recited approvingly congressional findings in support of its partial-birth-abortion ban, including that a partial-birth-abortion is "'a brutal and inhuman procedure'" and, by not prohibiting it, it "'will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.'" *Id.* at 157 (citation omitted). This Court noted that "[t]he Act expresses respect for the dignity of human life," and "Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion." *Id.* And the Act's findings continued, noted this Court:

> "Partial-birth abortion ... confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life."

Id. (citation omitted). Then this Court held that such concerns are fully legitimate state interests: "There can be no doubt that the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Id.* (citations omitted). As with the other interests this Court has recognized, this interest should be reaffirmed as cognizable (and for which evidence may be admitted) to guide lower courts.

d. States may assert all other relevant interests pre-viability and establish them with evidence.

Beyond reaffirmation of the foregoing interests asserted by Petitioners here, the new roadmap should affirm that courts may consider all other relevant state interests (with evidence admissible) without regard to any viability line. For example, in *Box v. Planned Parenthood of Indiana and Kentucky*, 139 S. Ct. 1780 (2019) (per curiam), this Court denied certiorari to review "whether Indiana may prohibit the knowing provision of sex-, race-, and disability-selective abortions by abortion providers" because only one circuit had held such a law unconstitutional, *id.* at 1782. Justice Thomas concurred in an opinion that developed at length the eugenics movement, its relation to abortion, and the use of abortion for the reasons that Indiana banned such knowing abortions by abortion providers. *Id.* at 1782-93. He noted that "both the District Court and the Seventh Circuit held that this Court had already decided the matter: '*Casey*'s holding that a woman has the right to terminate her pregnancy through viability is categorical.'" *Id.* at 1792 (citations omitted). But, as Justice Thomas and Judge Easterbrook (dissenting) noted, *Casey* didn't consider such an issue. *Id.* (citation omitted).

This Court should hold that *Casey*'s viability line does not preclude prohibitions prior to viability as a categorical matter of the interests represented by such laws (and others) and that states are free to assert such interests and to submit evidence in support of them without regard to any categorical viability line.

3. Courts must consider if established state interests satisfy relevant scrutiny in context.

The new roadmap should also establish that courts must consider whether relevant interests (of the sort just described) satisfy the applicable scrutiny in context, based on evidence. With the artificial, categorical, viability line removed by this Court, there will be no excuse for a district court again to refuse to admit evidence on asserted state interests.

Of course, what *is* the applicable scrutiny must be clarified in the new roadmap if there is to be removal of the jurisprudence of doubt. So at a minimum, the *Casey* language about "benefits" and the like on which abortion advocates relied to persuade courts to abandon *Casey*'s substantial-obstacle test in favor of a burden-benefit-balancing test must be clarified so as to never again be so used.

But whatever scrutiny this Court has established, the new roadmap should focus on fully embracing state interests and allowing states to assert them and submit evidence to meet the relevant scrutiny. Focusing on state interests, along with requiring the application of normal rules, as discussed next, provides the surest means of reversing the anomalous tangent that is *Roe* and its progeny.

4. Normal rules must apply.

The new roadmap should establish that normal legal rules apply in abortion cases and that the abortion-distortion effect is henceforth to be eliminated. And simply applying normal rules, and requiring lower courts to do the same, will begin the process of reversing the anomalous tangent on which this Court

launched in *Roe*.

For example, applying normal rules will restore the facial-challenge test of *United States v. Salerno*, 481 U.S. 739 (1987), to abortion jurisprudence instead of *Casey*'s "large fraction" test that Justice Ginsburg acknowledged "is, in short, no fraction because the numerator and denominator are the same," *Gonzales*, 550 U.S. at 188 n.20 (Ginsburg, J., with Stevens, Souter & Breyer, JJ., dissenting).

Normal rules will also restore the preference for as-applied challenges instead of pre-enforcement, facial challenges, as held in *Gonzales*. *Id.* at 167. Normal rules, if applied faithfully, will eliminate third-party standing for abortion clinics and abortion doctors, which has repeatedly been advocated. *See, e.g.*, Cert. Pet. i (third question presented raised this issue, though review was not granted); Bopp & Coleson, *supra* note 2, at 306-315 (establishing anomalous treatment of standing in abortion jurisprudence, including for third-party standing). Of course, systematically applying normal rules will eventually lead all the way back to *Roe*, which was itself built on anomalies.

III.
This case should be remanded to apply this Court's new roadmap.

After this Court has established the new roadmap, this case should be remanded to the court below to apply the new roadmap to the Mississippi statute before this Court. That too would be the normal rule. The court below would do so properly by recognizing that (i) no viability line precludes abortion prohibitions before viability, (ii) relevant interests, and their evidentiary support, must be considered in defense of state laws

applicable at all pregnancy stages, (iii) courts must consider if state interests satisfy relevant scrutiny, and (iv) normal rules must apply.

Conclusion

This case should be reversed and remanded for further consideration under this Court's new roadmap.

Respectfully submitted,

James Bopp, Jr.
jboppjr@aol.com
Counsel of Record
Richard E. Coleson
rcoleson@bopplaw.com
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 (telephone)
812/235-3685 (facsimile)
Counsel for Amici Curiae