No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,
Respondents.

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

BRIEF OF AMICI CURIAE CHRISTIAN LEGAL SOCIETY AND ROBERTSON CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici share profound commitments to the value of human life and the rule of law. They grieve the grave harm wrought by our abortion jurisprudence—both to the lives directly affected and to our life together as a nation.

For over three millennia, Jewish and Christian teaching has uplifted the sanctity of human life. This traditional understanding is firmly grounded in Scripture. *See, e.g.*, *Jeremiah* 1:5 ("Before I formed you in the womb, I knew you."); *Psalms* 119:73 ("Thy hands made me and fashioned me."). Religious faith both convicts and inspires tens of millions of diverse Americans to advocate for protecting human life, including life in the womb. In their view, they can do no other than obey that compelling call. *See, e.g.*, *Romans* 1:5.

Their faith-inspired voices should be heard in the marketplace of ideas. And they should be heard where they count—in the democratic discussion and debate that produces governing law. This case presents the Court with a singular opportunity to restore democratic authority to where it belongs—the bedrock sovereignty of We the People.

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[1] The parties have filed blanket consents regarding the submission of amicus briefs in this case. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No such monetary contributions were made by anyone other than amici and their counsel.

The Christian Legal Society is a nonprofit, non-denominational association of Christian attorneys, law students, and law professors with members in every state and chapters on ninety law school campuses. Its Center for Law and Religious Freedom has long defended the sanctity of human life in the courts, the legislatures, and the public square.

The Robertson Center for Constitutional Law is an academic center within the Regent University School of Law. Established in 2020, the Center pairs advocacy and scholarship to advance first principles in constitutional law, including separation of powers, religious liberty, and the rule of law. The Center has represented former members of Congress, Christian ministries, and others in matters before the U.S. Supreme Court and circuit courts of appeals.

INTRODUCTION & ARGUMENT SUMMARY

America's Constitution "is made for people of fundamentally differing views." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Few issues divide Americans like abortion. These divisions will endure long after this case. The Court cannot craft a social-and-health policy that will resolve these differences and mend our disunion. But national healing can begin by restoring our constitutional traditions and returning this long-running debate to the people.

That is, we must return to the solution provided by our Constitution: A confident federalism that allows for differences and fosters vigorous debate. Federalism has long protected liberty and sustained our pluralistic society. It remains potent and valuable

today, affording space for debate, experimentation, and consideration of competing interests.

But open-ended conceptions of substantive due process undermine the fundamental principles of federalism. Abortion jurisprudence provides a singular example of the harms that result when courts sever our history and traditions from substantive due process analysis.

This Court cannot serve the rule of law by preserving precedents that subvert the rule of law and erode democratic discourse. *Roe* and *Casey* should therefore not be retained for reasons of *stare decisis*. Those decisions have had far-reaching negative consequences, turning this Court into a political and policy-making body, undermining its legitimacy, and corrupting *stare decisis* itself.

"[T]he process of trial and error" has long since run its course. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407–08 (1932) (Brandeis, J., dissenting). *Roe* and *Casey* remain grievous wounds to our Constitution and to the nation. Bitter experience has demonstrated that a Court-imposed national solution engenders rancor and division that poisons our polity and debases the judiciary. The time has come to restore principles of federalism, repair substantive due process analysis, and return to the people and the Court their traditional roles in our constitutional republic.

ARGUMENT

I. Federalism Has Long Protected Liberty And Sustained Our Life Together.

Our constitutional system of dual sovereignty protects liberty for all. *See Alden v. Maine*, 527 U.S. 706, 758 (1999) ("[F]reedom is enhanced by the creation of two governments, not one."). The Constitution commits our polity to "the idea that matters should be decided at the lowest or least centralized competent level of government." Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, *in Federalism and Subsidiarity* 123, 125 (James E. Fleming & Jacob T. Levy eds., 2014). This idea is not an American invention. Its roots extend back to ancient Greece and were carried forward by Locke, Montesquieu, and others who influenced the Founders. *Id.* at 126.

The Constitution provides for a national government of limited powers. *See* U.S. Const. art. I § 8. In our republic, the states retain "a residuary and inviolable sovereignty" over subjects not otherwise delegated to the federal government. The Federalist No. 39 (J. Madison); *see also* U.S. Const. amend. X. Through this arrangement, "[t]he Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." *NFIB v. Sebelius*, 567 U.S. 519, 536 (2012) (quoting The Federalist No. 45 (J. Madison)).

Roe and *Casey* abandoned this structural imperative. Happily, principles of federalism have enjoyed a

renaissance in the years following *Roe* and *Casey*. For example, in *United States v. Lopez*, the Court refused "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 514 U.S. 549, 567 (1995). Five years later, the Court invalidated the Violence Against Women Act, reaffirming that the general police power "has always been the province of the States." *United States v. Morrison*, 529 U.S. 598, 618 (2000) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426, 428 (1821) (Marshall, C.J.)). "The Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617–18.

Lopez and *Morrison* are part of a broader pattern. Congress may not commandeer state officials to carry out federal policies. *Printz v. United States*, 521 U.S. 898, 935 (1997). Congress lacks authority to override states' sovereign immunity. *Alden*, 527 U.S. at 712; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996). Congress may not "attempt a substantive change in constitutional protections" exercising its Fourteenth Amendment remedial power. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). More recently, the Court rebuffed a congressional attempt to shape state policy through coercive use of the Spending Clause. *NFIB*, 567 U.S. at 582 (opinion of Roberts, C.J.); *see also South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

This Court's abortion jurisprudence profoundly departs from our deep-seated history of federalism. It instead burdens the federal judiciary with the task of fashioning compulsory social policy for the entire nation. Many of its bases for doing so, though weighty,

concern matters of health care and family law traditionally left to the states.[2] For example, every state has enacted statutes prohibiting child abuse and neglect. Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 Buff. L. Rev. 405, 412 n.26 (1994). Every state imposes on parents an obligation to financially support their children. *Ibid.*

Children obviously depend on adults for their survival and well-being. Once born, they receive special consideration under the laws of every state. But before viability, this Court's precedents require that the unborn child's dependence on its mother render the child unworthy of protection. Indeed, those precedents require that all states allow the mother to end her unborn child's life.

This arrangement allows for no consideration of other important state interests, such as Mississippi's profound concern about preventing "gratuitous pain." *See Jackson Women's Health Org. v. Dobbs*, 945 F.3d

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[2] Specifically, the *Roe* Court cited concerns over women's "[m]ental and physical health," which "may be taxed by child care," "the distress . . . associated with [an] unwanted child," and the stigma of illegitimacy. *Roe v. Wade*, 410 U.S. 113, 153 (1973). A number of organizations track state laws in these areas. The National Conference of State Legislatures, for instance, compiles research on enacted laws across many areas, including health care and family law. *See, e.g.*, *Health Innovations State Law Database*, Nat'l Conf. State Legislatures (June 24, 2021), https://www.ncsl.org/research/health/health-innovations-database.aspx; *2020 Enacted Child Support and Family Law Legislation*, Nat'l Conf. State Legislatures (Apr. 20, 2021), https://www.ncsl.org/research/human-services/ncsl-s-summary-of-2020-enacted-legislation.aspx.

265, 280 (5th Cir. 2019) (Ho, J., concurring in the judgment). A state's interest "increases progressively and dramatically" as the child develops a capacity to feel pain. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 552 (1989) (Blackmun, J., concurring in part and dissenting in part) (quoting *Thornburgh v. Am. Coll. Obstetricians & Gynecologists*, 476 U.S. 747, 778 (1986) (Stevens, J., concurring)).

But viability and fetal pain are entirely independent considerations. The point at which the unborn child feels pain precedes viability by twelve weeks or more. *See Jackson Women's Health*, 945 F.3d at 279–80 (Ho, J., concurring in the judgment) (citing record evidence that the child may feel pain as early as the tenth week of pregnancy). So, under current abortion law, federal courts must disregard the state interest in preventing fetal pain. So too for the developmental point at which an unborn child has "taken on 'the human form' in all relevant respects"—by twelve weeks' gestation. Pet.App.66a (quoting *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007)).

One can imagine a host of other interests the people of a state might consider when regulating abortion. Take, by way of example, abortion's impact on women's physical and psychological health; its effect on paternal responsibility for children; and the effect that the dilation and evacuation procedure—most common after fifteen weeks' gestation—which "involves the use of surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb" might have on the medical profession. Pet.App.66a; *see also* Pet'rs' Br. 36–38 (describing the objectives of Mississippi's law as protecting unborn life, protecting

women's health, and protecting the medical profession's integrity). Federalism allows for respect and consideration of all these interests—from all perspectives.

II. A Proper Conception Of Substantive Due Process Does Not Support Existing Abortion Jurisprudence.

A. A moral-philosophy driven approach to substantive due process undermines our constitutional structure.

Judicial review is an "antidemocratic and antimajoritarian" process that "require[s] some justification in this Nation, which prides itself on being a self-governing representative democracy." William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 695–96 (1976). Invalidating an act of a democratically elected legislature remains "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927) (opinion of Holmes, J.).

These concerns are particularly serious when the Court invokes the doctrine of substantive due process. That doctrine's "guideposts for responsible decisionmaking . . . are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). "[E]xtending constitutional protection[s]" under its open-ended mantle "place[s them] outside the arena of public debate and legislative action." *Ibid.* Thus, unmoored understandings of substantive due process provide "a formula for an end run around popular government." Rehnquist, *supra* at 706.

Justice Brandeis described substantive due process as a "grave responsibility." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). He counseled, "[W]e must be ever on our guard, lest we erect our prejudices into legal principles." *Ibid.* Other justices similarly have warned that the Court "is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

This Court has set guardrails to mitigate these risks. Substantive due process protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed.'" *E.g.*, *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore*, 431 U.S. at 503 (plurality opinion) and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).[3]

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[3] This Court frequently turns to history and tradition to guide its analysis of statutory, constitutional, and prudential issues. *See, e.g.*, *Yellen v. Confederated Tribes of the Chehalis Rsrv.*, — U.S. —, — (2021) (slip op., at 3–5) (tracing the "unique" history "of Alaska and its indigenous population"); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395–97 (2020) (assessing the historical significance of jury unanimity); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2082–83 (2019) (discussing historical significance of monuments and symbols when applying the Establishment Clause); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v.*

This approach balances competing concerns: the need "to prevent future generations from lightly casting aside important traditional values," *Michael H.*, 491 U.S. at 122 n.2 (plurality opinion), while avoiding the "serious consequences" associated with denying states "the right to experiment." *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting). The Due Process Clause does not mandate any economic or social policy. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."); A. Raymond Randolph, *Before* Roe v. Wade*: Judge Friendly's Draft Abortion Opinion*, 29 Harv. J.L. & Pub. Pol'y 1035, 1039, 1058 (2006) ("No more did [the Fourteenth Amendment] enact J. S. Mill's views on the proper limits of law-making."); *see also* Richard A. Posner, *Sex and Reason* 339 (1994) ("[T]he Constitution does not enjoin the states or the federal government to steer by the light of Jeremy Bentham.").

EEOC, 565 U.S. 171, 182–85 (2012) (discussing historical tension between church and state); *McDonald v. City of Chicago*, 561 U.S. 742, 767–80 (2010) (summarizing *Heller*'s historical discussion and adding further evidence that the right to keep and bear arms was "deeply rooted in this Nation's history and tradition" at the time the Fourteenth Amendment was ratified); *California v. Hodari D.*, 499 U.S. 621, 624–25 (1991) (relying on historical definition of "seizure" in the Fourth Amendment context); *Powell v. McCormack*, 395 U.S. 486, 522–48 (1969) (relying on history to determine the scope of congressional power under Article I Section 5); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 598–602 (1952) (Frankfurter, J., concurring) (describing the history of congressional authorizations of "executive seizure of production, transportation, communications, or storage facilities" to assess executive power to seize steel mills).

Some of this Court's most ignominious decisions emerged from expansive and unchecked conceptions of substantive due process. The "most salient instance . . . was, of course, the case that the [Fourteenth] Amendment would in due course overturn, *Dred Scott v. Sandford*." *Glucksberg*, 521 U.S. at 758 (Souter, J., concurring in the judgment). A half-century later, *Lochner v. New York* inspired a line of "deviant economic due process cases" that "harbored the spirit of *Dred Scott* in their absolutist implementation of" substantive due process. *Id.* at 761. *Roe* fares no better under a proper constitutional analysis.

B. Our history and traditions do not establish a fundamental right to abortion.

"[N]o credible foundation exists" upon which to rest a fundamental right to abortion using substantive due process. *See* Brief for the United States as Amicus Curiae in Support of Respondents at 9, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902). Before 1821, the states generally embraced the common law rule that prohibited abortion after "quickening"—a moment that typically precedes viability. *Id.* at 10.

Between 1821 and the ratification of the Fourteenth Amendment, most states adopted laws banning or restricting abortion. *See* James Mohr, *Abortion in America* 200 (1979). By the beginning of the twentieth century, America had fully transitioned from the common law rule to "a nation where abortion was legally and officially proscribed." *Id.* at 226. At that time, statutes outlawed or curtailed abortion in every state except Kentucky, where courts had banned the practice. *Id.* at 229–30. This "basic

legislative consensus" remained unchanged until the 1960s. *Id.* at 229.

This history reveals "a societal tradition of enacting laws denying" the right to abortion. *Michael H.*, 491 U.S. at 122 n.2 (plurality opinion) (emphasis omitted). On these facts, one could hardly argue that a right to abortion had any roots at all in America when *Roe* was decided—much less the deep roots that would justify it as "fundamental."

1. *Roe* and *Casey* create doctrinal incoherence among the Court's substantive due process cases.

Even within the broad conception of substantive due process employed by some contemporaneous cases, *Roe* and *Casey* are outliers. Instead of starting with the constitutional text and working toward its holding, the *Roe* Court disregarded constitutional text and started with precedent that made no mention of abortion.[4] It explained that "the Court has recognized

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[4] *Roe* placed itself within a line of cases that purported to establish a constitutional right to privacy. *Roe*, 410 U.S. at 152–53. Some of these cases—particularly those decided during the *Lochner* era—grounded their holdings in the Due Process Clause. *E.g.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *But see* Brief for the United States as Amicus Curiae Supporting Appellants at 12 n.8, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) (noting that *Pierce* and *Meyer* also find roots in the First Amendment). In other cases that *Roe* cited, the Court grounded its holdings elsewhere in the constitutional text. Those cases that mentioned substantive due process did so in conjunction with other constitutional provisions. *E.g.*, *Eisenstadt v. Baird*,

that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." 410 U.S. at 152. It mused that the "right of privacy" might "be founded in the Fourteenth Amendment's concept of personal liberty" or, alternatively, "in the Ninth Amendment's reservation of rights to the people." *Id.* at 153. Finally, it held that the right of privacy, wherever it might be found in the Constitution, "is broad enough to encompass" a fundamental right to abortion. *Ibid.*

The Court offered no guideposts for future courts as to *why* the right of privacy encompasses abortion. Instead, it simply explained that ill effects might flow from state restrictions on abortion—an unbounded approach to defining constitutional rights. *Ibid.* Two decades later, the Court emphasized the "intimate and personal" nature of a woman's decision to terminate her pregnancy, noting that this choice is "central to personal dignity and autonomy." *Casey*, 505 U.S. at 851. As in *Roe*, the Court in *Casey* offered no guidance to future courts on applying its conception of substantive due process.

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405 U.S. 438, 454–55 (1972) (Equal Protection Clause); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (mentioning substantive due process summarily and only after holding that the challenged law violated the Equal Protection Clause); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (the penumbras of the First, Third, Fourth, and Fifth Amendments); *Prince v. Massachusetts*, 321 U.S. 158, 164 n.8 (1944) (analyzing substantive due process only insofar as it coincided with the Free Exercise Clause); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (Equal Protection Clause).

Neither case's analysis comports with an approach to substantive due process informed by, much less grounded in, history and tradition. *Casey* did not engage in *any* historical discussion. *Roe*'s historical analysis extends to ancient Greece to portray restrictions on abortion as being "of relatively recent vintage." 410 U.S. at 129–30. The errors in *Roe*'s historical discussion are well-documented.[5] But even if it were flawless, that discussion could not possibly establish an interest in pre-viability abortion as an "interest traditionally protected by our society." *Michael H.*, 491 U.S. at 122 (plurality opinion).

2. This Court's abortion precedents are in fundamental conflict with its right-to-die precedents.

Contrast this free-wheeling analysis with *Glucksberg*, where this Court considered substantive due process issues in the context of physician-assisted

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[5] Judge Posner criticized *Roe*'s historical analysis as "sophomoric." Richard A. Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 U. Chi. L. Rev. 1421, 1434–35 (1995). Others have noted that *Roe*'s historical account of abortion laws "was dictated by an uncritical acceptance of two law review articles by [an] abortion advocate." Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807, 814 (1973). For thorough critiques of *Roe*'s historical analysis, *see generally*, James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985); John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood" and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1; Robert Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 Population Stud. 53 (1974); Byrn, *supra*, at 814–39.

suicide. Relying on *Roe* and *Casey*, the Ninth Circuit concluded that the right to die was fundamental. The appellate court cited notions of "personal dignity and autonomy" and the threat of harm to individuals deprived of a right to assisted suicide. *Compassion in Dying v. Washington*, 79 F.3d 790, 813–14 (1996) (quoting *Casey*, 505 U.S. at 851).

But this Court unanimously reversed. *See Glucksberg*, 521 U.S. at 720–21. After examining the history of legal prohibitions on assisted suicide, the Court held that there was no fundamental right to die. *Id.* at 723. The history of abortion regulations, as described in *Roe*, leads to the same conclusion concerning a fundamental right to pre-viability abortions. *Roe*, 410 U.S. at 177 (Rehnquist, J., dissenting).

Glucksberg followed logically from *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). The laws of Missouri required a surrogate to produce clear and convincing evidence of a patient's desire to forego life-sustaining treatment before withdrawing such treatment. *Id.* at 269. Unable to meet this burden, Nancy Cruzan's parents—relying on *Roe*'s logic—sought recognition of a fundamental right to end treatment for their daughter, who was in a vegetative state. *Ibid.* This Court, finding no history or tradition that squarely protected surrogate decision-making in matters of life and death, deferred to Missouri's asserted interest in protecting life and upheld Missouri's law. *See id.* at 280–84.

Cruzan and *Glucksberg* illustrate the virtues of judicial restraint. The Court avoids unnecessary entanglement in controversy. The process of debate and

state-by-state experimentation proceeds. And the Court steps in only to avoid extreme results.[6]

One cannot reconcile *Cruzan* and *Glucksberg* with *Roe* and *Casey*. All involve life-and-death "decision[s] of obvious and overwhelming finality." *Id.* at 281. *Cruzan* and *Glucksberg* uphold state laws that guard against surrogates who might not have the patient's best interests in mind. *Glucksberg*, 521 U.S. at 732; *Cruzan*, 497 U.S. at 281. But *Roe* and *Casey* categorically prohibit state laws that would safeguard the best interests of the unborn child before viability. *Casey*, 505 U.S. at 851.

The upshot is this: An individual lacks a constitutional right to decide when *her own life should end* but possesses an absolute constitutional right to decide when *another's life should end*. How can "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" extend to the latter instance, but not the former?

Likewise, the distinction between a mother's absolute power to terminate life and her affirmative duty to care for that same life straddles an arbitrary line. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting). Without the benefit of consensus among any of "the respective disciplines of medicine, philosophy, and

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[6] History, tradition, and the concept of ordered liberty establish some checks on legislative authority in this area. *See Cruzan*, 497 U.S. at 278–79 (majority opinion). The Equal Protection Clause provides additional assurance against irrational or oppressive laws. *Id.* at 300–01 (Scalia, J., concurring).

theology," the Court appropriated this sensitive moral judgment for itself. *Roe*, 410 U.S. at 159.

That was a mistake. The Constitution provides no concrete guidance in this area. History and tradition do not suggest the abortion right is fundamental. And courts are ill-suited to answer this question. *Cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2499–500 (2019) (concluding that the Court is ill-equipped to define "fairness" in the context of legislative map-drawing (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004) (plurality opinion))). The matter should have been left to the democratic process.

3. Even those who favor *Roe*'s result reject its reasoning.

The abortion right has been "a rule in search of a justification" for nearly fifty years. *Cf. Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019). Even those who support *Roe*'s outcome as a matter of policy agree that its holding is difficult, if not impossible, to defend as a matter of substantive due process.

The critiques began soon after the Court decided *Roe*. Professor John Hart Ely labeled it "a very bad decision." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 947 (1973). He explained, "It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." *Ibid.* (emphasis in original). Professor Laurence Tribe observed that "the substantive judgment on which [*Roe*] rests is nowhere to be found." Laurence H. Tribe, *Forward: Toward a Model of Roles*

in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 7 (1973).

The criticism has not lessened with time. On *Roe*'s thirtieth birthday, Professor Kermit Roosevelt described *Roe* as "barely coherent" and a "creaky anachronism," and the fundamental right to abortion as "pulled . . . more or less from the constitutional ether." Kermit Roosevelt, *Shaky Basis for a Constitutional 'Right'*, Wash. Post (Jan. 22, 2003).[7] Edward Lazarus asserted that "[a] constitutional right to privacy broad enough to include abortion has no meaningful foundation in constitutional text, history, or precedent . . . if those sources are fairly described and reasonably faithfully followed." Edward Lazarus, *The Lingering Problems with* Roe v. Wade*, and Why the Recent Senate Hearings on Michael McConnell's Nomination Only Underlined Them*, FindLaw (Oct. 3, 2002).[8]

Others who agree with *Roe*'s result have sought firmer footing for the right. The Equal Protection Clause has been invoked, most prominently by then-Judge Ruth Bader Ginsburg, as a possible source. *See generally* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985). Others resort to the Thirteenth Amendment's prohibition on involuntary

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[7] Available at https://www.washingtonpost.com/archive/opinions/2003/01/22/shaky-basis-for-a-constitutional-right/dd30d42e-188d-42f6-8fb2-b935394e63aa/.

[8] Available at https://supreme.findlaw.com/legal-commentary/the-lingering-problems-with-roe-v-wade-and-why-the-recent-senate-hearings-on-michael-mcconnells-nomination-only-underlined-them.html.

servitude. *See, e.g.*, Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 Colum. L. Rev. 1917, 1936–37 (2012) (explaining the argument); *id.* at 1917 n.1 (noting two other works by Koppelman advancing this theory). Professor Jack Balkin published a collection of attempts by constitutional scholars to rewrite *Roe*, titling the work "*What* Roe v. Wade *Should Have Said*." Tellingly, no post-decision rationale has lent to *Roe* and *Casey* any constitutional legitimacy.

At best, *Roe* was "[h]eavy-handed judicial intervention [that] was difficult to justify." Ginsburg, *supra* at 385. At worst, *Roe* is a "judicial atrocit[y]" akin to *Dred Scott* and *Korematsu*. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1001 (2005). Neither characterization bodes well for this Court's substantive due process doctrine or its institutional legitimacy.

III. This Court Should Not Perpetuate These Grievously Wrong And Harmful Precedents.

In *Casey*, the Court attempted to "call[] the contending sides of a national controversy to . . . accept[] a common mandate rooted in the Constitution," 505 U.S. at 867. But *Casey* has not ushered in the peace it promised. This Court cannot bring peace where there is no peace.

Casey elevated the Court's legitimacy above the Constitution itself. In doing so, it sacrificed both. The resulting institutional harms manifest themselves most painfully in our broken judicial confirmation

process and the Court's vacillating precedent on precedent. Although many claim that reliance interests require this Court to maintain its abortion precedents, those reliance interests are not particularly strong in this setting. In short, *stare decisis* concerns should not prevent a profoundly needed course correction in this broken area of the law.

A. The Court cannot serve the rule of law by preserving decisions that subvert the rule of law.

Stare decisis is "a principle of policy," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)), not "an inexorable command" *ibid.* This policy is "weakest" when reevaluating constitutional decisions "because a mistaken judicial interpretation of that supreme law is often 'practically impossible' to correct through other means." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quoting *Payne*, 501 U.S. at 828).

Stare decisis should not shield precedents that undermine the very rule-of-law ideals that the doctrine serves. *See Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). Prior decisions that overstep the Court's constitutional role and evade the Article I process for legislation—or the Article V process for amending the Constitution—undermine those ideals. *See Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 465–66 (2015) (Alito, J., dissenting) (declaring that policymaking precedents should not receive the benefit of *stare decisis*). The Court best protects its legitimacy when it calls the game squarely and without regard to who might win.

The rule of law also suffers under a precedent that "impedes the stable and orderly adjudication of future cases." *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring). Such impediments may arise "when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases" or when its "underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake." *Ibid.*; *see also Knick*, 139 S. Ct. at 2178; *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) (*stare decisis* does not control when adherence to the prior decision requires "fundamentally revising its theoretical basis").

"[*S*]*tare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Ramos*, 140 S. Ct. at 1405. *Roe* and *Casey* cannot be defended using normal rule-of-law principles. *See* Part II.B.3, *supra*. Instead, departure from those principles has significantly undermined the Court's legitimacy.

B. *Roe* and *Casey* have had far-reaching negative consequences.

1. *Roe* and *Casey* transformed the Court into a political superweapon.

The negative consequences flowing from this Court's abortion jurisprudence cannot adequately be cataloged in a single brief. But *Roe* and *Casey*'s effect on the public perception of the judicial role bears special mention. "A Court that rests decisions of extraordinary social importance on 'the right to define one's own concept of existence, of meaning, of the universe,

and of the mystery of human life'" promotes a public perception of the Court as a partisan actor unconstrained by the Constitution it purports to interpret. Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 Yale L.J. F. 93, 105 (2019) (quoting *Casey*, 505 U.S. at 851). It transforms the Court into "a superweapon" more powerful than any other in our polity. *Id.* at 106.

Roe and *Casey* increased exponentially the stakes in the "battle for control" over the Supreme Court. Consider where things stand. Not long ago, a prominent senator stood on the steps of the Supreme Court and threatened to make the Court "pay the price" if the Court didn't adopt his preferred view of third-party standing.[9] Today, partisans call for members of the Court to retire when "their party" controls the levers of power. Many of these calls expressly invoke *Roe* and *Casey*.[10] All of this debases the American people's perception of the Court.

But those slights are small when compared to how *Roe* and *Casey* have injected venom into our judicial confirmation process. For more than three decades, the issue of abortion has "consumed Supreme Court nominations and confirmation proceedings." Jan

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[9] Editorial Board, *Schumer Threatens the Court*, Wall St. J. (Mar. 4, 2020), https://www.wsj.com/articles/schumer-threatens-the-court-11583368462.

[10] *E.g.*, Erwin Chemerinsky, *Much Depends on Ginsburg*, L.A. Times (Mar. 15, 2014) (calling for Justice Ginsburg and Justice Breyer to retire as a means to protect *Roe* and *Casey*), https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-ginsburg-should-resign-20140316-story.html.

Crawford Greenburg, *Supreme Conflict* 221 (2007); *see also* Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 Harv. L. Rev. 308, 310 (2020) (observing that "every Supreme Court nominee [is] quizzed about her views on the role of precedent in decisionmaking and, indirectly, the continued vitality of *Roe*"); Stephen Carter, *The Confirmation Mess*, 101 Harv. L. Rev. 1185, 1191 (1988).

This is the predictable result of *Roe* and *Casey*. The Court invites divisive public policy issues into the confirmation process when the Court accepts invitations to constitutionalize those very issues. "Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward." *Casey*, 505 U.S. at 1001 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also id.* at 943 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today.").

A confirmation process focused on preserving bad precedent undermines the rule of law. Yet, some senators "make a litmus test out of one of the most intellectually suspect constitutional decisions of the modern era." Lazarus, *supra*. "They practically require that a judicial nominee sign on to logic that is, at best, questionable, and at worst, disingenuous and results-oriented. In doing so, they select not for faithful, but for unfaithful, constitutional interpreters to people the federal judiciary." *Ibid.*

History vindicates Justice Rehnquist's characterization of haphazard constitutional interpretation as "a formula for an end run" around democracy. Rehnquist, *supra* at 414. When the courts employ loose interpretive methods to uncover fundamental rights, interest groups will opt for litigation over legislation. The civic virtues that accompany the legislative process will atrophy. And the judiciary will become the most, rather than the "least[,] dangerous [branch] to the political rights of the Constitution." The Federalist No. 78 (A. Hamilton).

2. The Court's *stare decisis* doctrine has become unwieldy and unpredictable.

For much of our history, "[t]he [C]ourt bow[ed] to the lessons of experience and the force of better reasoning" when reassessing precedent. That long-lived era saw no multifactor analysis or judicial handwringing. *Burnet*, 285 U.S. at 407–08 (Brandeis, J., dissenting). Had this Court rigidly stood by bad precedent in years past, "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants." *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring).

The traditional (and far simpler) approach to *stare decisis* served us well. For example, this Court famously overruled *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), only three years after it was decided. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Neither the majority nor the dissent attempted to balance reliance interests against workability. The opinions focused on the merits of the question, with two members of the *Gobitis* majority

concurring in *Barnette* to repudiate their earlier decision. *See generally id.* at 643–44 (Black and Douglas, JJ., concurring); *see also Burnet*, 285 U.S. at 409 n.4 (Brandeis, J., dissenting) (compiling earlier *stare decisis* decisions that reflect a similar approach).

"[C]orrect judgments have no need for [*stare decisis*] to prop them up." *E.g.*, *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2309 (2021) (quoting *Kimble*, 576 U.S. at 455). Propping up a demonstrably erroneous decision elevates that precedent above the Constitution and arguably deprives litigants of due process of law. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1013 (2003) (arguing that a "rigid application" of *stare decisis* "unconstitutionally deprives a litigant of the right to a hearing on the merits of her claim"). Only the Constitution is "the supreme Law of the Land." U.S. Const. art. VI § 2.

Casey distorted *stare decisis* in a profoundly misguided attempt to preserve this Court's legitimacy. As a "judge-made rule" on precedent, it is appropriate to consider whether "experience has pointed up [*Casey*]'s shortcomings." *See Pearson v. Callahan*, 555 U.S. 223, 233 (2009). This Court should assess whether *Casey* has "promote[d] the evenhanded, predictable, and consistent development of legal principles, foster[ed] reliance on judicial decisions, and contribute[d] to the actual and perceived integrity of the judicial process." *Payne*, 501 U.S. at 827.

Benchmarked against these criteria, *Casey* has failed. *Casey* ushered in a "somewhat elastic" multifactor *stare decisis* analysis, *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part), that has

produced fractured opinions with shifting rationales for overturning or retaining precedent. *See generally, e.g.*, *id.*, 140 S. Ct. 1390 (applying three different *stare decisis* formulations across five opinions); *Hubbard v. United States*, 514 U.S. 695 (1996).

Today, the Court lacks a "consistent methodology or roadmap for how to analyze" precedent. *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part). This Court has emphasized the need for a "special justification" to overturn precedent. *Kimble*, 576 U.S. at 456. But what counts as a "special justification" rests in the eye of the beholder. Under the "new" *stare decisis* analysis, the Court has divided on what counts as unworkable enough, *Knick*, 139 S. Ct. at 2189 (Kagan, J., dissenting); whether to affirm a flawed precedent in the absence of countervailing reliance interests, *id.* at 2190; what makes reliance interests strong enough to overcome a flawed rule, *e.g.*, *Montejo*, 556 U.S. at 809 (Stevens, J., dissenting); and even on threshold questions regarding the context-dependent durability of *stare decisis*, *Kimble*, 576 U.S. at 470–71 (Alito, J., dissenting).

These factors play no apparent role in the Court's decisions to invalidate the unconstitutional acts of other branches. The Court does not weigh reliance interests when considering claims of racial gerrymanders. *See generally, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017). It does not gauge workability when considering whether Congress encroached on the prerogatives of the Executive Branch, *see generally, e.g.*, *Zivotofsky v. Kerry*, 576 U.S. 1 (2015), or of the states, *Morrison*, 529 U.S. at 617.

By elevating workability and reliance over constitutionality, the Court grants greater primacy to its own egregiously wrong precedents than it does the Constitution. "But the Constitution is not the courts' exclusive property." J. Harvie Wilkinson, III, *Cosmic Constitutional Theory* 21 (2012). Though stability in the law serves important values, "[t]here is a difference between judicial restraint and judicial abdication." *Citizens United*, 558 U.S. at 375 (Roberts, C.J., concurring). "[W]hen fidelity to any particular precedent does more to damage [the rule of law] than to advance it," the Court "must be more willing to depart from that precedent." *Id.* at 378.

C. Reliance interests should not prevent this Court from restoring the rule of law.

The *Casey* joint opinion concluded that "people have organized intimate relationships" around *Roe* and "made choices that define their views of themselves and their places in society." *Casey*, 505 U.S. at 856. But it also conceded that the organization of intimate relationships and identity within society "cannot be exactly measured." *Ibid.* Nevertheless, the decision relied on these interests to justify retaining an admittedly wrong precedent. *Ibid.*

Abstract societal interests such as those identified in the joint opinion differ from the more concrete, detrimental reliance interests typically required to compel the Court to affirm an erroneous decision. *See Casey*, 505 U.S. at 855 (acknowledging that *Roe* is not a "classic case" for reliance interests). The Court should have rejected these reliance interests in *Casey*. It should not repeat that mistake.

The interests most at issue here are expectation interests: In the event of an unwanted pregnancy, an individual might want to seek an abortion. This Court has rejected similar reliance arguments. *Compare, e.g.*, *Montejo*, 556 U.S. at 809 (Stevens, J., dissenting) (arguing in dissent that requiring police interrogations to end once a defendant requests counsel created a public interest "in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State"), *with id.* at 793 n.4 (majority opinion) (rejecting this reliance interest). The most direct claims of reliance on *Roe* or *Casey* would fade sometime between five and nine months after a decision changing the status quo. *Cf. Janus v. AFSCME*, 138 S. Ct. 2448, 2485 (2018) (holding that "the short-term nature of collective-bargaining agreements" undercut "the force of reliance" on *Abood*). And certainly no one that performed, obtained, or otherwise participated in an abortion under the old precedent would face adverse consequences. The expectation reliance interests in this case thus provide a weaker basis for reaffirming erroneous decisions than were present in *Janus*, *Ramos*, or *Kimble*. *Id.* at 2484 (evaluating claims of reliance on *Abood* to negotiate labor agreements); *Ramos*, 140 S. Ct. at 1406 (assessing reliance interests on *Apodaca*'s holding that states could obtain convictions based on nonunanimous jury verdicts); *Kimble*, 576 U.S. at 457 (noting reliance on *Brulotte* to structure licensing agreements).

Moreover, a decision overruling *Roe* and *Casey* would simply return the abortion issue to the states. *Cf. id.* at 456. In many states, abortion laws would remain the same. In other states, the law would

change to comport with the political will of the people. And even there, the change may be modest. Take this very case as an example. Mississippi's challenged law would functionally shift the abortion prohibition by only one week. Respondent—the only abortion clinic in Mississippi—does not perform abortions after 16 weeks. Mississippi's challenged law prohibits abortion after 15 weeks. Pet'rs' Br. 8–9.

Viability has never been a stable or fixed constitutional footing to ground reliance interests. It is neither fixed nor the same for every child. *See Roe*, 410 U.S. at 160 (placing viability between twenty-four and twenty-eight weeks). It will continue to shift ever earlier with the passage of time and scientific advancement. *See Casey*, 505 U.S. at 860.

Indeed, this Court has already acknowledged that a viability rule is unworkable because of "the uncertainty of the viability determination." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Viability depends upon medical technology and geography—hardly the sort of factors that are ordinarily constitutionally determinative. *See, e.g., City of Akron*, 462 U.S. at 458 (1983) (O'Connor, J., dissenting) (lamenting a standard "inherently tied to the state of medical technology"); see also *NIH Study Reveals Factors That Influence Premature Infant Survival, Disability*, Nat'l Insts. of Health (Apr. 16, 2008) ("[N]o single tool can precisely predict a given baby's chances of survival or

disability.").[11] In short, viability is neither workable nor constitutionally derived.

Pro-life interests have urged change in the law; pro-choice interests have resisted such change while advocating for other changes. But all have been keenly aware that change is possible.

CONCLUSION

This Court should return the issue of abortion to the democratic process and restore consistency in our doctrine of substantive due process. Doing so would be a first step toward healing a long-festering wound to our life together as a nation and to our judicial institutions.

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[11] Available at https://www.nih.gov/news-events/news-releases/nih-study-reveals-factors-influence-premature-infant-survival-disability.

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