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.

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

**BRIEF FOR PROFESSORS MARY ANN GLENDON AND O. CARTER SNEAD AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

HEATHER GEBELIN HACKER
*Counsel of Record*

HACKER STEPHENS LLP
108 Wild Basin Rd., Suite 250
Austin, Texas 78746
heather@hackerstephens.com
(512) 399-3022

## QUESTION PRESENTED

Whether all previability prohibitions on elective abortions are unconstitutional.

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## INTEREST OF AMICI CURIAE

*Amici curiae* are professors of law with extensive experience in teaching, research, and public service concerning the governance of science, medicine, and biotechnology in the name of ethical goods both domestically and internationally.[1]

Mary Ann Glendon is the Learned Hand Professor of Law, emerita, at Harvard Law School. She served as U.S. Ambassador to the Holy See, chaired the U.S. State Department Commission on Unalienable Rights, was a member of the Commission on International Religious Freedom, and the U.S. President's Council on Bioethics. She led the Holy See's delegation at the 1995 U.N.'s Women's Conference in Beijing. She is the author of numerous award-winning and widely translated works including *The Forum and the Tower* (2011), *Rights Talk* (1991), and *Abortion and Divorce in Western Law* (1987). She received the National Humanities Medal and was an elected member of the American Academy of Arts and Sciences.

O. Carter Snead is Professor of Law, Concurrent Professor of Political Science, and Director of the de Nicola Center for Ethics and Culture at the University of Notre Dame. He is author, most recently, of *What It Means to be Human: The Case for the Body in Public Bioethics* (Harvard University Press 2020). He served as General Counsel to the U.S. President's Council on Bio-

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[1] Petitioner and Respondent provided blanket consent for the filing of *amicus* briefs. Rule 37.3(a). No person other than *amici curiae* or their counsel authored the brief in whole or in part nor made a monetary contribution intended to fund the preparation or submission of the brief. Printing fees were paid by the law firm of Tracey Fox King & Walters, where Professor Snead is Of Counsel.

ethics, as U.S. Permanent Observer to the Council of Europe's Steering Committee on Bioethics, led negotiations on behalf of the United States government at UNESCO for the Universal Declaration on Bioethics and Human Rights, and served a four-year appointed term on UNESCO's International Bioethics Committee, the only bioethics advisory body in the world with a global mandate. He is an elected fellow of the Hastings Center.

*Amici* write to explain how the Supreme Court's current abortion jurisprudence entrenches in the law a vision of human identity and flourishing that is not only constitutionally unwarranted, but is also false and pernicious, erecting an insuperable obstacle to the provision of needed care, protection, and support to vulnerable mothers, children, and families. The "manifestly absurd [and] unjust"[2] precedents that comprise this jurisprudence should be overruled, and the American people should be permitted to join the supermajority of nations around the world where citizens themselves have been allowed to deal with this contested matter through ordinary democratic political processes.

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[2] *Cf. Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part) (quoting 1 Blackstone, *Commentaries on the Laws of England*, at 70).

## SUMMARY OF ARGUMENT

Mississippi's 2018 Gestational Age Act, which prohibits abortions after 15 weeks gestational development (with exceptions for medical emergency or fetal abnormality) is quite modest in impact[3], more permissive than the vast majority of the laws on abortion around the world (including in all but three European nations[4]), and appears to be broadly popular.[5] But it seems to clearly violate the Supreme Court-made law of abortion, which forbids the State from imposing an "undue burden" on a woman's ultimate authority to obtain an abortion prior to fetal viability. While it has never been clear what constitutes an "undue burden" in the context of abortion, it seems that a previability ban runs afoul of this standard. This case thus offers the cleanest opportunity since *Roe v. Wade* was decided in 1973 for the Court to revisit its deeply flawed and harmful jurisprudence.

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[3] *See, e.g.*, Ctrs. for Disease Control, Katherine Kortsmit et al., *Abortion Surveillance – United States*, 2018, 69 MMWR Surveillance Summaries 1, 23 tbl.9 (2020), https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm#T9_down (showing the percentage of abortions 16 weeks and later in Mississippi to be 0.7%).

[4] *See, e.g.*, Angelina B. Nguyen, "Mississippi's 15 Week Gestational Limit on Abortion is Mainstream Compared to European Law," Charlotte Lozier Inst., https://lozierinstitute.org/wp-content/uploads/2021/07/On-Point-63.pdf (July 2021).

[5] *See, e.g.*, David Leonhardt, *How Abortion Views are Different*, N.Y. Times (May 19, 2021), https://www.nytimes.com/2021/05/19/briefing/abortion-debate-public-opinion.html (noting that "less than 30 percent of Americans say that abortion 'should be generally legal' in the second trimester, according to Gallup.").

The Court's abortion jurisprudence is completely untethered from the Constitution's text, history, and tradition. It has imposed an extreme, incoherent, unworkable, and antidemocratic legal regime for abortion on the nation for several decades (pursuant to constantly shifting rules, standards, and rationales). Fidelity to the Constitution, the rule of law, and the institutional integrity of the Court warrant reversal of those precedents (including *Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood v. Casey*), and principles of *stare decisis* present no obstacle in doing so. In addition to suffering from these fatal defects, American abortion jurisprudence imposes on the nation a particular vision of human identity and flourishing that is constitutionally unjustified and pernicious: It systematically prevents the elected branches of government from adopting measures that address the needs of vulnerable mothers, children, and families. The Court's abortion jurisprudence grafted onto the Constitution a vision of what it means to be and flourish as a human being that isolates mother and child, pitting them against one another in a narrative of zero-sum conflict among strangers, thus depriving them of much needed sources of protection, support, and care.

## ARGUMENT

### I. American Abortion Jurisprudence Is Untethered from the Text, History, or Tradition of the Constitution.

Because of its unstable legal and normative foundations, the constitutional right to abortion is, to borrow a phrase from Chief Justice Roberts, "a rule in search of a justification." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019). Despite multiple decades and attempts by various combinations of Justices, it has never been successfully grounded in the text, history, or tradition of the Constitution. It has been variously treated as a "fundamental right," (in *Roe*) then as a seemingly less robust "protected liberty" (in *Casey*). *See Roe v. Wade*, 410 U.S. 113, 152–53 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992). Significantly, the Court avoided using the term "right to abortion" until years after *Roe*.[6] The abortion license has been grounded alternatively in the different goods of "privacy" (in *Roe*), then

[6] *See, e.g.*, *Maher v. Roe*, 432 U.S. 464, 473 (1977) ("Roe did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 (1977) ("[T]he same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely."); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 427 (1983) ("But restrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest."); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 749 (1986) (The "reporting requirements raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy.")

"liberty" (in *Casey*), and later "equality" (in Justice Ginsburg's dissent in *Gonzales v. Carhart*). *See Roe*, 410 U.S. at 152–53; *Casey*, 505 U.S. at 846; *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). It has been operationalized pursuant to the "trimester framework" of *Roe*, later discarded for the pre- versus post-viability "undue burden" analysis of *Casey*, transformed yet again into an open-ended "burden vs. benefit" calculus in *Whole Woman's Health v. Hellerstedt*, and then finally remade into its current iteration in *June Medical Services v. Russo*, which seems to combine a "substantial obstacle" assessment with a "rational basis test." *See Roe*, 410 U.S. at 163; *Casey*, 505 U.S. at 873; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016); *June Medical Servs., LLC v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in judgment). Despite these decades of attempts at post-hoc rationalization, there has never been a defensible connection between the putative right to abortion and the Constitution itself.

### A. *Roe v. Wade* and *Doe v. Bolton* are unjustifiable as a matter of constitutional law.

1. The process of inventing a constitutional right to abortion began in earnest with the 1970 decision of a three-judge panel of a U.S. District Court in Texas in 1970.[7] *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970). "Jane Roe" and other parties challenged Texas's law

[7] A more detailed history and critique of the genesis of the right to abortion can be found in O. Carter Snead, *What It Means to be Human: The Case for the Body in Public Bioethics*, Chapter 3, pp. 106–85 (Harvard U. Press 2020).

banning abortion (except when necessary to save the life of the mother). Relying upon Justice Goldberg's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 486–99 (1965), the trial court concluded—without any evidentiary hearing—that the law was an unconstitutional violation of the right "to choose whether to have children" guaranteed by Ninth Amendment (made applicable to Texas via the Fourteenth Amendment).[8] *Roe*, 314 F. Supp. at 1219. But the trial court declined to enjoin the law on abstention grounds, as it would interfere in the process of state criminal procedures. *Id.* at 1224. By operation of the Three-Judge Court Act, the matter was appealed directly to the Supreme Court of the United States. *See* 28 U.S.C. § 2284.[9]

The Supreme Court issued its opinion by Justice Blackmun on January 22, 1973. *Roe*, 410 U.S. 113. Put succinctly, the Court held that the unenumerated fundamental right to privacy announced in *Griswold* "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. The Court did not embrace the Ninth Amendment as the source of authority for this right, but rather the Fourteenth Amendment's Due Process Clause, under the still-controversial doctrine of "substantive due process." *Id.* at 164. As will be explained further below, the Court created the right to abortion as a response to the burdens before and *after* the child is born both for the mother and "for all concerned, associated with the unwanted child." *Id.* at 153. Moreover, the State's countervailing interests in what

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[8] The district court also found Texas's law to be unconstitutionally vague. *Roe*, 314 F. Supp. at 1223.

[9] The relevant provisions of this statute were repealed soon after *Roe v. Wade* in 1976. Pub. L. 94–381, 90 Stat. 1119 (1976).

Justice Blackmun described as "health and potential life" were not sufficiently compelling to warrant Texas's restrictions. *Id.* at 156. No mention was made of the interest of members of the medical profession concerned about potential liability for their increasing, but legally dubious, practice of "therapeutic" abortions.

Without much argument, and without reliance on any evidentiary record (for there was none), the Court held that the Fourteenth Amendment's protections did not apply to unborn human beings, while simultaneously claiming not to take a position on the moral or ontological status of the unborn human child. *Id.* at 157–59. It declared that Texas was not permitted to embrace "one theory of life," and "override the rights of the pregnant woman that are at stake." *Id.* at 162. Thus, by forbidding Texas from protecting unborn children as persons and making their status entirely dependent on whether they were wanted by their mothers, it effectively declared them to be beyond the bounds and protection of our legal system. That is, the Court forbade lawmakers throughout country from treating the unborn as persons.

Then, relying in part on a law review article written by counsel for the abortion rights advocacy organization NARAL (though not identified as such), the majority embraced a novel and now thoroughly debunked[10] (though regrettably oft-repeated) account of American history which suggested that abortion restrictions were an innovation of the mid-nineteenth century undertaken for the sake of policing the professional boundaries of physicians rather than out of concern for the unborn child. The majority asserted that "at common law, at the

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[10] *See, e.g.,* Joseph W. Dellapenna, *The Historical Case Against* Roe v. Wade, NLA Rev. 11–13 (Spring 1988).

time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most states today." *Roe*, 410 U.S. at 140. But "[a] more recent trawl of the authorities . . . confirms that abortion was an offense at common law both in England and its American colonies . . . [and] precedents unearthed hitherto (in Connecticut, Delaware, Maryland, Rhode Island and Virginia) show that the prohibition on abortion was at least as strict as in England." John Keown, *Back to the Future of Abortion Law:* Roe*'s Rejection of America's History and Traditions*, 22 Issues in L. & Med. 3, 11 (2006) (citing Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* ch. 3–5 (2006)).

Based on his own research and speculation regarding the relative safety of abortion and childbirth, untested for reliability or accuracy by the adversarial process, Justice Blackmun next announced the infamous "trimester framework," which no party had ever argued for. *Roe*, 410 U.S. at 163. He concluded that the State may not interfere at all with the woman's right to choose abortion in the first trimester of pregnancy. The State's interest in promoting maternal health becomes "compelling" in the second trimester when abortion is no longer (in his judgment) safer than childbirth. The State's interest in "potential life" becomes compelling at the beginning of the third trimester, after which it can restrict abortion, but must include exceptions for cases in which the life or "health" of the mother was threatened. *Id.*

The Court did not define what sort of health conditions might be sufficient to warrant such an exception,

but the previous discussion of the burdens of unwanted pregnancy and parenthood are instructive. The majority opinion makes note of not just physical and mental health concerns associated with the pregnancy, but adverse effects of various kinds *subsequent to the child's birth*, including "a distressful life and future," mental and physical health "taxed by childcare," "distress, for all concerned, associated with the unwanted child," the problem of bringing an additional child into a family unwilling or unable to care for it, and the "stigma of unwed motherhood." *Roe*, 410 U.S. at 153. In the companion case, *Doe v. Bolton*, which the Court said "must be read together" with *Roe*, the Court articulated additional factors relevant to medical judgment regarding health concerns, including "physical, emotional, psychological, familial, and the woman's age." 410 U.S. 179, 191–92 (1973). In this way, Justice Blackmun's conception of health (triggering an exception to third trimester abortion restrictions) is capacious to the point of effectively nullifying any restriction, since it depends on the abortion doctor's definition of well-being.

2. Put bluntly, *Roe* and *Doe* were breathtaking departures from the text, history, and tradition of the U.S. Constitution. First, and most damning, neither the framers of the Fourteenth Amendment, the States that ratified it, nor any member of the American public at that time with knowledge of its contents could have intended or understood that the Amendment precluded states from protecting unborn children or otherwise legally proscribing abortion. To the contrary, in the year it was ratified (1868), thirty of thirty-seven states explicitly criminalized abortion by statute. *See* Dellapenna, *Dispelling the Myths of Abortion History*, *supra*, at 315. Moreover, and contrary to the assertions of Justice Blackmun

in the majority opinion, abortion was a longstanding common-law crime (both in Colonial America and in England) prior to the codification of these laws in the nineteenth century. *See, e.g.*, Keown, *supra*, at 11 ("the common law consistently prohibited abortion; the early common law from fetal formation, the later from quickening."). The majority of American laws codifying abortion at the time of the Fourteenth Amendment's ratification—27 of 30 states—prohibited abortion before and after quickening. *Id.* at 27. No one suggested at the time that the Fourteenth Amendment nullified or even modified these laws. To the contrary, four months after ratification, the Ohio Legislature passed a law criminalizing abortion from the moment of conception, which its Senate Committee on Criminal Abortion equated with "child murder." Snead, *supra*, at 117.

In short, until *Roe*, no serious legal authority suggested that the Fourteenth Amendment created a right to abortion. Some jurists, including the iconic Judge Henry Friendly, concluded that even if there is a general right to privacy in the Constitution, it does not include abortion. *See* A. Raymond Randolph, *Before* Roe v. Wade*: Judge Friendly's Draft Abortion Opinion*, 29 Harv. J.L. & Pub. Pol'y 1037 (2006).

3. The absurdity of *Roe*'s reasoning becomes even more apparent when one considers the complexity of the trimester framework. According to the majority's argument, the Due Process Clause does not only imply a right to privacy that includes abortion. It also requires a byzantine sliding-scale framework that continually recalibrates the balance between a woman's right to reproductive autonomy versus the State's interest in maternal health and in protecting prenatal human life. Moreover, the majority's argument depends on assertions about the

relative safety of abortion that were not presented (much less demonstrated) at trial and that have been forcefully challenged in subsequent studies.[11]

It is not surprising, therefore, that commentators of all ideological stripes have criticized *Roe v. Wade* as uniquely badly reasoned and disconnected from the Constitution.[12] John Hart Ely, who was a supporter of abortion rights as a matter of legislative policy, wrote that *Roe* "was not constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 947 (1973). He continued:

> What is frightening about *Roe* is that this superprotected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-à-vis the interest that legislatively prevailed over it. . . . At times the inferences the Court has

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[11] *See, e.g.*, Byron Calhoun, *The Maternal Mortality Myth In the Context of Legalized Abortion*, 80 Linacre Q. 264, 264–76 (2013) (arguing, for example, that the claim that "the risk of death associated with childbirth is fourteen times higher than with abortion" is "unsupported by the literature and there is no scientific basis to support it.").

[12] Journalist Tim Carney of the *Washington Examiner* aggregated several quotes in this regard from prominent progressive legal figures. Timothy P. Carney, *Honest pro-choicers admit* Roe v. Wade *was a horrible decision*, Wash. Exam'r, Jan. 22, 2011, https://www.washingtonexaminer.com/honest-pro-choicers-admit-roe-v-wade-was-a-horrible-decision.

> drawn from the values the Constitution marks for special protection have been controversial, even shaky, *but never before has its sense of an obligation to draw one been so obviously lacking.*

*Id.* at 935–37 (emphasis added).

In short, there is no theory of constitutional interpretation respectful of the text, history, or tradition of the Constitution that can justify the rule and reasoning of *Roe v. Wade*.

### B. *Casey* effectively overruled *Roe* and further disconnected the abortion jurisprudence of the Court from the Constitution.

These fundamental errors were not corrected nineteen years later when the Court issued its opinion in *Casey*, 505 U.S. 833. In a 5-4 decision, the three-judge plurality affirmed what it described as the "essential holding of *Roe*" for both substantive reasons (relating to the constitutional right to abortion), and for prudential reasons (concerning the principle of *stare decisis* and the Court's institutional reputation). *Id.* at 845–46.

Despite its statements to the contrary, it is fair to say that *Casey* overruled *Roe* in nearly every key respect. It downgraded the right to abortion from "fundamental" to a protected "liberty interest." *Id.* at 876. Accordingly, it repudiated the "strict scrutiny" standard of review for evaluating abortion restrictions, as required by *Roe,* and abandoned the trimester framework. *Id.* at 873. Instead, it provided that prior to viability, states may not impose an "undue burden," where the law's "purpose or effect is to place a substantial obstacle" in the way of a woman seeking a previability abortion, or to deprive her of "the ultimate decision to terminate her pregnancy" up to the

point of fetal viability. *Id.* at 877. After viability, the State is free to prohibit abortion, so long as it includes exceptions for the life or health of the mother. *Id.* at 879.[13]

Despite these dramatic changes, the Court's decision in *Casey* did not succeed in grounding its rule and reasoning in the text, history, or tradition of the Constitution. To the contrary, it doubled down on *Roe*'s freewheeling derivation of a constitutional right merely from its own normative balancing of the goods of (1) a woman's freedom to make intimate, personal, and self-defining reproductive choices that also enable her to participate equally in the economic and social life of the nation, versus (2) the State's interest in defending prenatal life, defending the integrity of the medical profession, and promoting respect for life more generally.[14] In short, *Casey* fully embraced *Roe's* method of constitutionally untethered philosophizing and wholesale legislation from the bench. Again, to borrow a recent phrase from Chief Justice Roberts, the Court's reasoning in *Casey* theorized the right to abortion from its own "weigh[ing] the State's interests in 'protecting the potentiality of human life' and the health of the woman, on the one hand, against the woman's liberty interest in defining her 'own concept of

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[13] *Casey* did not, however, modify the overbroad definition of "health" for these purposes set forth in *Roe* and *Doe*. Instead, the Court directly quoted the language from *Roe* asserting that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. at 164–65).

[14] *See* Snead, *supra*, at 142–44 (quoting *Casey*, 505 U.S. at 846–53).

existence, of meaning, of the universe, and of the mystery of human life on the other." *June Med.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in judgment) (quoting *Casey*, 505 U.S. at 851). Whatever this process might be, it is *not* constitutional interpretation. And, as Chief Justice Roberts further noted, "there is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *Id.*

### C. Precedents following *Casey* have moved yet further from the Constitution's text, history, and tradition, and have caused more confusion in the lower federal courts.

After *Casey*, the two Supreme Court decisions in 2000 and 2007 involving the constitutionality of partial-birth abortion bans did not re-tether the Court's reasoning to the Constitution, but rather dealt with ancillary questions associated with the State's authority to prohibit a particularly grisly and controversial method of abortion. *See Gonzales*, 550 U.S. 124; *Stenberg v. Carhart*, 530 U.S. 914 (2000). Ultimately, the Court declared in *Gonzales* that the government can prohibit such methods of abortion (even without a health exception), so long as there are alternative, safe methods of abortion available. While this at least had a moderating impact on the extremism of the Court's abortion jurisprudence in practice, it did nothing to reconcile it with the Constitution itself.[15]

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[15] It is worth noting that in her dissent in *Gonzales*, Justice Ginsburg invoked yet another normative good (aside from privacy and liberty) to ground the right to abortion: equality. 550 U.S. at 172

In 2016, the Court drifted even further away from the text, history, and tradition of the Constitution in its abortion jurisprudence. In *Whole Woman's Health v. Hellerstedt*, the Court retheorized its *Casey* framework and adopted an even broader, more open-ended analytic approach, claiming for itself the authority to weigh (without meaningful deference to legislative factual findings) the benefits of a challenged law versus its burdens on the right to abortion. 136 S. Ct. at 2309. The Court concluded that the Texas law at issue, which aimed at advancing maternal health by requiring abortion providers to have admitting privileges at hospitals within a particular geographic radius of the abortion and to comply with strict regulations for ambulatory surgical centers, was not sufficiently beneficial to justify the limits it imposed on abortion access. *Id.*; *see also* Snead, *supra*, at 159–63.

A short four years later, in his concurring opinion in *June Medical* (the fifth vote in a 5-4 decision), Chief Justice Roberts rejected the reasoning in *Hellerstedt* as inconsistent with *Casey* and articulated his own understanding of what the latter required. 140 S. Ct. at 2133 (Roberts, C.J., concurring in judgment). He was, however, careful to note that he was merely applying the precedent and not re-evaluating its constitutional validity and thus, *a fortiori*, not reaffirming it. *Id.* Chief Justice Roberts read *Casey* as simply asking whether a challenged limitation is an "undue burden" or "substantial obstacle" to a woman seeking an abortion prior to viability. *Id.* at 2135. If not, then the challenged law will survive so long as it advances a legitimate state interest via

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(Ginsburg, J, dissenting). That is, she argued that abortion is a necessary mechanism to secure a woman's participation in the economic and social life of the community on an equal footing with men.

rational means—a very low bar known as the "rational basis test" that states nearly always satisfy. *Id.* Chief Justice Roberts concluded, however, that *stare decisis* required the invalidation of the law at issue because it was "nearly identical" to the law struck down in *Hellerstedt* a mere four years earlier. *Id.* at 2133.[16]

Thus, as it currently stands, *Casey*, the controlling legal authority for the law of abortion in America, appears to create an insuperable right to choose abortion prior to viability. This implicit right, it would seem, is stronger and more inviolable than any enumerated right in the Constitution. After viability, the State's law must yield whenever the abortion provider invokes any aspect of what he considers a woman's well-being (including "familial" interests) to justify an exemption. It is thus unsurprising that the Court has never upheld any ban on abortion *as such*, and has only permitted ancillary limits such as informed consent, parental involvement (with judicial bypass), waiting periods, and restrictions on especially controversial methods of abortion.

In short, the story of American abortion jurisprudence is a tortured narrative of successive failed attempts to justify the invention of a near-absolute right to abortion that is not warranted by the U.S. Constitution. Despite decades of trying, the Court has never produced a coherent defense of this naked power grab, nor has it

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[16] Lower federal courts have disagreed as to whether Chief Justice Roberts' concurrence constitutes the binding precedent of the Court. *Compare EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 433–34 (6th Cir. 2020) and *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) *with Whole Woman's Health v. Paxton*, 978 F.3d 896, 903–04 (5th Cir. 2020), *reh'g en banc granted, opinion vacated*, 978 F.3d 974 (5th Cir. 2020) and *Planned Parenthood of Ind. and Ky. v. Box*, 991 F.3d 740, 752 (7th Cir. 2021).

relinquished its grip on its self-proclaimed authority to be the ultimate arbiter of abortion regulation in America. It should take the opportunity to do so now.

## II. Principles of *Stare Decisis* Counsel Overruling the Precedents That Comprise American Abortion Jurisprudence.

The Court's precedents comprising the foundation of its abortion jurisprudence (e.g., *Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood v. Casey*) were not merely wrongly decided, but uniquely, historically, and notoriously badly reasoned. Principles of *stare decisis* do not counsel keeping them in place in spite of this. Even for those Justices who regard *stare decisis* as part of the "judicial power" grounded in Article III of the Constitution, the doctrine is no obstacle to dismantling the Court's misguided and destructive jurisprudence. To the contrary, fidelity to the very goods served by *stare decisis*—promoting "the evenhanded, predictable, and consistent development of legal principles," fostering "reliance on judicial decisions," and contributing "to the actual and perceived integrity of the judicial process"—impels the Court to finally expunge these damaging precedents from the law. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

*Stare decisis* invites Justices of this Court to consider a variety of factors prior to overruling a prior precedent that they deem to be wrongly decided.[17] It is not, however, an "inexorable command" as this Court has stated

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[17] *See, e.g.*, *June Med.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in judgment) ("The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance

many times. *See, e.g.*, *Casey*, 505 U.S. at 854. Indeed, the doctrine is "at its weakest when [the Court] interpret[s] the Constitution," as precedential errors in this domain are nearly impossible for the political branches to remedy. *Knick*, 139 S. Ct. at 2177. As Justice Frankfurter once said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 355 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

In *Ramos v. Louisiana*, Justice Kavanaugh provided a useful roadmap for the application of *stare decisis* principles. Noting that the Court requires a "special justification" to overrule an erroneous precedent beyond the mere belief that it was "wrongly decided" in the first instance, he enumerated "three broad considerations" to determine whether such a special justification is present. 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part). First, was the prior decision not merely wrong but "grievously or egregiously wrong," including "the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts,

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interests that the precedent has engendered."); *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part) ("The stare decisis factors identified by the Court in its past cases include: the quality of the precedent's reasoning; the precedent's consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent."); *id.* at 1405 (Gorsuch, J., for the Court) ("To balance these considerations, when it revisits a precedent this Court has traditionally considered the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.") (citation omitted).

and workability"? *Id.* at 1414–15. Next, "has the prior decision caused significant negative jurisprudential or real-world consequences," including the "real-world effects on the citizenry, not just its effects on the law and the legal system"? *Id.* at 1415. Third and finally, "would overruling the prior decision unduly upset reliance interests?" *Id.*

1. Contrary to the plurality's reasoning in *Casey*, all of these factors counsel overruling the precedents that comprise current abortion jurisprudence. As explained above, as a matter of constitutional interpretation, *Roe* and *Casey* are not merely mistaken, but "grievously" and "egregiously" so. Moreover, the Court's constantly shifting rationales and standards, along with the general vagueness of the concept of "undue burden," leave state legislatures with little guidance as to what types of restrictions will be deemed valid. Indeed, as Justice Thomas noted in his dissent in *June Medical*, "the fact that no five Justices can agree on the proper interpretation of our [abortion] precedents today evinces that our abortion jurisprudence remains in a state of utter entropy." 140 S. Ct. at 2152 (Thomas, J., dissenting). Lawmakers are left with the sole option of passing a restriction or regulation, and immediately litigating its constitutionality all the way to the Supreme Court to learn whether it passes constitutional muster. As Judge Easterbrook recently complained,

> The "undue burden" approach announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey* does not call on a court of appeals to interpret a text. Nor does it produce a result through interpretation of the Supreme Court's opinions. 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 . . .

*Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., concurring in the denial of rehearing en banc). This is now standard practice in every State that seeks to even modestly limit abortion. Because of the confusion, lower courts have even struck down laws similar to laws this Court has already upheld. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809 (7th Cir. 2018), *cert. granted, judgment vacated sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 184 (2020) (ultrasound and 18-hour waiting period); *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973 (7th Cir. 2019), *cert. granted, judgment vacated sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 187 (2020) (parental consent); *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 994 F.3d 774 (6th Cir. 2021) (48-hour waiting period); *Falls Church Med. Ctr., LLC v. Oliver*, 412 F. Supp. 3d. 668 (E.D. Va. 2019) (ambulatory surgical center requirement for second-trimester abortions).

But this lack of workability is an inexorable consequence of the Court's self-proclaimed, but constitutionally unwarranted, role as the nation's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting). The Court lacks the constitutional authority and institutional competence for such a role.

2. *Roe* and *Casey* have had both adverse jurisprudential effects and grave "real-world consequences." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). Justice Scalia famously wrote that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case" about abortion. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J. concurring in the judgment in part and dissenting in part). Examples of the "abortion exception" to the usual rules are many. *See, e.g.*, *Stenberg*, 530 U.S. at 954 (Scalia, J., dissenting) (canons of statutory interpretation); *Hellerstedt*, 136 S. Ct. at 2330 (2016) (Alito, J., dissenting) (rules of civil procedure); *Hill v. Colorado*, 530 U.S. 703, 742–65 (2000) (Scalia, J., dissenting) (First Amendment); *June Med.*, 140 S. Ct. at 2142 (Thomas, J. dissenting) (Article III standing).

The "real-world effects on the citizenry" of *Roe* and *Casey* have been staggering and devastating. *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). First, they have nullified the laws of every State seeking to offer meaningful protections to human beings *in utero* from the lethal violence of abortion. Since 1973, the number of abortions in the United States has exceeded *62 million*.[18] The Court's abortion jurisprudence has made the United States one of only a handful of countries in the world that allows elective abortions after twenty weeks gestation.[19]

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[18] Nat'l Right to Life, *Abortion Statistics: United States Data and Trends*, https://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf, (relying on adjusted data from the Guttmacher Institute, former research arm of Planned Parenthood).

[19] *See, e.g.*, Michelle Ye Hee Lee, *Is the United States One of Seven Countries that "Allows Elective Abortions After Twenty*

America's abortion jurisprudence has likewise gravely damaged our electoral politics (especially elections for the U.S. Presidency and the Senate), making it a bitter and polarized zero-sum contest for control of the Supreme Court because of abortion. Supreme Court confirmation hearings have likewise devolved into a toxic bloodsport. This does not appear to be the case in other nations around the world that have been allowed to govern themselves on the question of abortion through democratic deliberation and compromise rather than having the matter usurped by their Court of last resort.

3. *Casey*'s claim that overturning *Roe* would cause intolerable disruption in American society because for decades of "economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in event that contraception should fail," *Casey*, 505 U.S. at 856, is conclusory, unproven, and appears to be wrong on its face. First, and most obvious, as noted by the plurality in *Casey*, "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." *Casey*, 505 U.S. at 856. Second, *Casey* itself radically reconfigured the Court's rule and rationale in *Roe* and purported to open the door to increased, previously forbidden, types of state abortion regulations. Third, and most important, the plurality cited no authoritative empirical source for its conclusory claims about abortion being the key to women's flourishing and equality. In making this assertion, *Casey* ignored a host of legal and sociological developments aimed at

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*Weeks of Pregnancy?*", Wash. Post, Oct. 9, 2017 (fact check rating this statement as "true").

providing women with protection against discrimination and offering more opportunities for economic and social freedom and equality.[20] All States cover the expenses of pregnancy and childbirth through Medicaid,[21] and all States provide enforceable child-support requirements for delinquent fathers.[22] At the same time, the *Casey* plurality ignores that the abortion license has put women at risk of bearing the burden of unplanned pregnancy alone, since it vests decision-making authority in her alone.

*Casey* was also mistaken in asserting that the "central holding of *Roe*" was deeply rooted in American culture and that Americans have "ordered their thinking and living around [it]." 505 U.S. at 856. This conclusory and unfounded claim is belied by the fact that legislatures around the country (including in Mississippi) have, since 1973, continuously passed laws that directly conflict with this Court's abortion jurisprudence. It is also undermined by the fact that the abortion issue is much less contentious in countries where the matter has been left up to the legislative branch. *Cf.* Nguyen, *supra*.

Finally, the *Casey* plurality was mistaken in suggesting that undoing the Court's abortion jurisprudence

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[20] *See, e.g.*, 42 U.S.C. § 2000e(k) (protecting women in the workplace from pregnancy and sex discrimination).

[21] *See* Kathy Gifford, et al., *Medicaid Coverage of Pregnancy and Perinatal Benefits: Results from a State Survey*, KFF (Apr. 27, 2017), https://kff.org/womens-health-policy/report/medicaid-coverage-of-pregnancy-and-perinatal-benefits-results-from-a-state-survey/ ("By federal law, all states provide Medicaid coverage for pregnancy-related services to pregnant women with incomes up to 133% of the federal poverty line (FPL) and cover them up to 60 days postpartum.").

[22] *See* 18 U.S.C. § 228 (making the willful failure to pay child support a crime).

would cause catastrophic damage to the reputation of the Court. To the contrary, the Court's reputation for integrity is *enhanced* when it remains faithful to Constitution regardless of the political consequences. Its greatest moment thus far was arguably when it followed this pathway in *Brown v. Board of Education*, 347 U.S. 483 (1954). Regardless of the political blowback, the Court repudiated *Plessy v. Ferguson's* noxious doctrine of "separate but equal" discrimination despite the concern that it would disrupt school districts that relied for nearly 60 years on *Plessy*'s authorization of racial segregation. *Id.*

In any event, should the Court overrule *Roe* and *Casey*, there is no reason to believe that Americans would not rise to the challenge of governing themselves on this vexed and contested matter, just as the vast majority of citizens around the world have done through their respective political processes. If the public does not approve of the way their State regulates abortion, it can hold its elected representatives accountable.

4. The Court may be tempted, in the name of *stare decisis*, to repeat the errors of the past and reinvent *Casey* both to preserve the right to abortion and uphold Mississippi's law this case. It must resist this temptation.

First, it is the opinion of the *amici* professors that basic intellectual honesty and integrity requires acknowledging that *Casey* and the law at issue here are incompatible. *Casey* forbids legal undue burdens on abortion that deprive a woman of the ultimate authority to obtain a previability abortion. 505 U.S. at 879. Mississippi's Gestational Age Act is a categorical ban that applies at 15 weeks' gestation, which is previability according to *Roe* and *Casey*'s standard. The rule announced in *Casey* and the challenged law are irreconcilable.

Second, reinventing *Casey* to preserve a right that lacks any constitutional warrant and that has caused such damage undermines the commitment to the rule of law that *stare decisis* means to serve. On this issue, the wisdom of Chief Justice Roberts is decisively instructive:

> *Stare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.
>
> Doing so would undermine the rule-of-law values that justify *stare decisis* in the first place. It would effectively license the Court to invent and adopt new principles of constitutional law solely for the purpose of rationalizing its past errors, without a proper analysis of whether those principles have merit on their own. This approach would allow the Court's past missteps to spawn future mistakes, undercutting the very rule-of-law values that *stare decisis* is designed to protect.

*Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring).

*Stare decisis* is thus no bar to overruling the egregiously wrong and damaging precedents that comprise current American abortion jurisprudence.

## III. The Court's Abortion Jurisprudence Grafts On to American Law a Constitutionally Unwarranted, False, and Destructive Account of Human Identity and Flourishing.

American abortion jurisprudence is deeply misguided and dangerous in yet another way. It entrenches in our nation's founding document, and by extension, the laws of our nation, a concept of human identity and flourishing that is false, pernicious, and obstructive of needed care for vulnerable mothers, babies, and families:

> The current law of abortion . . . frames the public question as a zero-sum conflict between isolated strangers, one of whom is recognized as a person, with the other deemed a sub-personal being whose moral and legal status is contingent upon the private judgment of others. It offers no comprehensive support for the vulnerable persons involved, including especially the unborn child and her mother. . . .
>
> In response to the bodily, psychic, and financial burdens of unwanted pregnancy and parenthood, American abortion jurisprudence offers nothing more than the license to terminate the developing human life *in utero* . . . . These are the rights and privileges suited to atomized individual wills who inhabit a world of strife. They are limited weapons and tools of rational mastery fit for a lonely, disembodied self to defend and pursue its interests. They are not well-designed to address the com-

> plex needs and wants of a community of embodied, vulnerable, and interdependent human persons.

Snead, *supra*, at 271–72.

The conception of human identity and flourishing as merely that of an atomized individual will seeking to discover and follow its own interior authentic truths—"to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," *Casey*, 505 U.S. at 851—is not required by the Constitution, and is certainly not consistent with the complexity of lived experience or the rich variety of American attitudes. And it biases the Court's analysis to craft a solution for the abortion issue that is more suitable for an individual seeking to repel a stranger from intruding into her interests, namely, by conferring a right to use lethal violence. This may be suitable for adversarial strangers in a world of strife. Not for a mother and a child in crisis.

Nothing in the Constitution or the Court's role requires this mis-framing of a complex human context. The Court has no business in this space. It should remove itself from this domain and allow the American people to pursue law and policies designed to meet the genuine needs of all the vulnerable persons involved in these often tragic situations:

> For such a community, the anthropology at the core of these vital conflicts must be augmented to correspond to the lived reality of embodiment. Issues and laws must be framed according to the categories of connectivity of the networks of giving and receiving that embodied beings need to survive and flourish. Reframing abortion as a con-

> flict involving a mother and her child, thus summoning the support and care of the network in which both are embedded, including the father, extended family, community and polity (including the government itself) opens channels of care, concern, support, and summons the uncalculated giving that *everyone* owes to the mother and her child, before, during, and *after* her birth.

Snead, *supra*, at 273.

It is long past time for the Supreme Court to release the American people from the constitutionally unwarranted shackles of its abortion jurisprudence. The Court must overrule *Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood v. Casey*, and restore to the people's elected representatives the authority to care rightly for mothers, children, and families.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

HEATHER GEBELIN HACKER
*Counsel of Record*

HACKER STEPHENS LLP
108 Wild Basin Rd., Suite 250
Austin, Texas 78746
heather@hackerstephens.com
(512) 399-3022

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