No. 19-1392

In the
Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., in his official capacity as state health officer of the Mississippi Department of Health., et al., Petitioners

v.

JACKSON'S WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients, et al., Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

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Amicus Brief of Human Coalition Action and Students for Life of America in Support of Petitioners

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INTEREST OF AMICI CURIAE[1]

Students for Life of America ("SFLA") is the nation's largest pro-life, youth organization that uniquely represents the generation most targeted for abortion. SFLA, a 501(c)(3) charity, exists to recruit, train, and mobilize the Pro-Life Generation to abolish abortion and provide policy, legal, and community support for women and their children, born and preborn. Headquartered in Fredericksburg, VA, SFLA has more than 1,250 student groups with thousands of members on middle, high school, college, university, medical and law school campuses in all 50 states. The organization was founded in 1977 as a student-run organization, but in 2005 it was launched as a full-time operation and now has a nationwide network of staff and volunteers, including more than 127,000 pro-life advocates trained by SFLA.

SFLA trains and equips pro-life advocates for the purpose of changing the culture and passing pro-life legislation—missions made more difficult by the impossibility of knowing how different courts may interpret the law and precedent. A legal prejudice in favor of abortion prevents women from having access to all the information about how abortion harms women and preborn children and what services and support can be made available to them. SFLA and its members are uniquely harmed as the generation most

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[1] All parties were given timely notice of and have consented to the filing of this *amicus curiae* brief pursuant to S. Ct. R. 37.3(a). Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

targeted for abortion. SFLA thus works to overcome the bias in favor of abortion in critical social institutions, including the courts. As an organization made up primarily of women, many who are working mothers, the mission to build up each generation of women to succeed at home and at work is undermined by misogynist presuppositions—including statements in court findings—that abortion contributes to women's prosperity. The current legal environment of abortion, polluted with false information and roadblocks to advocacy, creates a daily obstacle to the work of SFLA.

Students for Life has previously submitted amicus briefs in: CHIKE UZUEGBUNAM, ET AL., Petitioners, v. STANLEY C. PRECZEWSKI, ET AL., No. 19-968; WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS v. JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL., RESPONDENTS, No. 15-274; VERONICA PRICE, et al., Petitioners v. City of Chicago, Illinois, et al., No. 18-1516. STATE OF FLORIDA, by and through Attorney General Pam Bondi, et al., Plaintiffs-Appellees / Cross-Appellants, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants-Appellants / Cross-Appellees, Nos. 11-11021 & 11067

Human Coalition Action, a Texas 501(c)(4) corporation, is a public policy advocacy organization advocating for preborn children and their pregnant mothers by advancing pro-life policies, informing voters about pro-life candidates and supporting pro-life legal arguments in the courts. Human Coalition Action advocates for rescuing children, serving families, and ending abortion by reaching abortion-determined women with life-affirming messages and tangible, individualized services. Human Coalition Action aims to create a culture of collaboration; provide policy expertise; and generate momentum from the grassroots to the government in order to solidify victory over abortion.

SUMMARY OF ARGUMENT

No issue before this Court bears greater import than the one before it today. From the time *amici* file this brief until the end of Supreme Court October Term 2021, approximately 620,000 unborn children will be killed by abortion.

When the Court constructed a right to abortion in 1973 it exclusively preempted the abortion field. Correcting mistaken constitutional co nstructs relating to abortion is "practically impossible" and society's only practical recourse is through judicial reconsideration today.

This Court's landmark abortion precedents, *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, categorically fall under the weakest echelon of *stare decisis*.

To overrule a constitutional precedent, the Court requires something "over and above the belief that the precedent was wrongly decided." A case may be "egregiously wrong when decided," or may be "unmasked as egregiously wrong based on later legal or factual understandings or developments."

Notably, *Roe* and *Casey* are egregiously wrong under both categories.

The ever-increasing scientific knowledge we have about the development of the child in the womb, its humanity, and life affirm *Roe*/*Casey* were decided on erroneous grounds. Unlike *Roe* and Casey, *Dobbs* presents this Court with the opportunity to consider the full scientific and factual spectrum about the most overlooked abortion participant—the human child.

Continued fidelity to the *Roe*/*Casey* regime is extraordinarily disruptive to a functioning and healthy society. The evils wrought by a half-century of legalized abortion are vast, impacting nearly every facet of society. The Court must conduct a sober appraisal of the undesirable consequences its jurisprudence wrought.

The time has come for the Court to rectify the disastrous *Roe* and *Casey* framework and, through fidelity to the Constitution it guards, restore our ability to protect the most vulnerable among us.

ARGUMENT

This Court's virtue and strength lie in its adherence to constitutional principles. This fidelity leads our nation towards a more extraordinary America—a society where the most vulnerable and underrepresented factions in our history receive equal protection of the law.[2] For over 200 years, the Court's constitutional fidelity has guarded our people, often from ourselves. It leads us with a quiet and consistent strength towards freedom and, in this case, very existence.

I. The Supreme Court's venerable duty to faithfully uphold the Constitution requires abrogating errant precedents, rather than reaffirming or extending them.

"It is the Constitution which [a Justice] swore to support and defend, not the gloss which his predecessors may have put on it."[3]

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[2] *See, e.g., Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954); *Olmstead v. United States*, 277 U.S. 438 (1928), overruled by *Katz v. United States*, 389 U.S. 347 (1967); overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Scott*, 437 U.S. 82 (1978).

[3] Douglas, William O., *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

To faithfully interpret Mississippi's Gestational Act[4] on the narrowest grounds, the Court must first faithfully interpret the Constitution. Evaluating the constitutionality of the judicially created right to abortion is "indispensably necessary" to resolving the question presented—whether all pre-viability prohibitions on elective abortions are *unconstitutional*.[5]

The Court's duty to correctly interpret the Constitution outweighs its duty to adhere to its precedents. "The Court has authority to depart from its precedent, but it has never asserted the authority to depart from the Constitution. The unbroken practice in the United States is to treat interpretations of the Constitution, in contrast to the Constitution itself, as provisional and subject to change."[6]

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[4] Miss. Code Ann. § 41-41-191.

[5] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 375 (2010).

[6] *See* Hartnett, Edward A., *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 146–59 (1999); Merrill, Thomas W., *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 44 (1993); Calabresi, Steven G., *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 639 (2006) (drawing on history to argue that the Court is willing to abandon "even deeply seated precedents because it became persuaded they were unfaithful to the best reading of our constitutional text, of its structure, or of the first principles embodied in that text").

While the Court's precedents "warrant our deep respect,"[7] *stare decisis* has never been treated as "an inexorable command."[8] *Stare Decisis* cannot be "a mechanical formula of adherence to the latest decision," especially in constitutional cases.[9]

II. Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey categorically fall under the weakest echelon of stare decisis.

This Court's landmark abortion precedents, *Roe v. Wade*[10] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[11], categorically fall under the weakest echelon of *stare decisis* for four doctrinal reasons.

First, the doctrine of abortion rights is an interpretation of the Constitution. And the Supreme Court held that *stare decisis* is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment".[12] As a judicial invention, abortion rights "rely not on constitutional text, but on a doctrine of unenumerated, judicially created rights."[13] As Justice

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[7] *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020).
[8] *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (internal quotation marks omitted).
[9] *Id.*
[10] *Roe v. Wade*, 410 U.S. 113 (1973).
[11] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[12] *Agostini v. Felton*, 521 U.S. 203, 235 (1997).
[13] *Id.* ("Justice Blackmun once said, for example, that doctrines "[l]ike the Roe framework . . . are not, and do not purport to be,

Thomas' powerful dissent *June Medical Services* emphasized, "[t]he Constitution does not constrain the States' ability to regulate or even prohibit abortion." [14] "Nothing in the text or original understanding of the Constitution establishes a right to an abortion. Rather, what distinguishes abortion from other matters of health care policy in America—and uniquely removes abortion policy from the democratic process established by our Founders—is Supreme Court precedent."[15]

When the Court constructed a right to abortion in 1973 it exclusively preempted the abortion field. Correcting mistaken constitutional constructs relating to abortion is "practically impossible" and society's only practical recourse is through judicial reconsideration today.[16]

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rights protected by the Constitution."); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 548 (1989); see also *Casey*, 505 U.S. at 847 (1992); *Roe*, 410 U.S. at 152–53 (admitting that "[t]he Constitution does not explicitly mention" rights like abortion); *Washington v. Glucksburg*, 521 U.S. 702, 756, 763 (1997).

[14] *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2149 (2020).

[15] *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 277 (5th Cir. 2019).

[16] *Agostini*, 521 U.S. at 235; *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (internal quotation marks omitted).

Second, *stare decisis* as applied to Mississippi's Gestational Act is weaker because the Court must evaluate Mississippi's sovereign legislative enactment. Invalidating a legislative enactment is an extreme measure only to be taken upon a clear showing of unconstitutionality.[17] The convoluted and ever-shifting nature of abortion jurisprudence presents a lack of "plain showing"[18] where the lines for exceeding constitutional bounds fall. Stronger deference should be granted to Mississippi's Gestational Act because it is a legislative enactment.

Third, the Court should assign less weight to *Roe* and *Casey*'s precedential value because *Dobbs v. Jackson Women's Health*[19] presents the Court with the first direct constitutional challenge to *Casey* since it was rendered.[20] When asked to reconsider a precedent's validity for the first time, "it is entirely appropriate for the Court….to address the matter with a greater willingness to consider new approaches capable of restoring [] doctrine to sounder footing."[21]

The constitutional validity of *Casey* was not specifically raised in abortion jurisprudence before *Dobbs*. Similar to the Court's *stare decisis* analysis in *Citizens United*, the Court's unwillingness to overturn *Casey* in prior abortion cases cannot be

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[17] *See United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").
[18] *Id.*
[19] Pet. Brief. 12.
[20] *See Citizens United*, 558 U.S. at 377.
[21] *Id.* at 380.

understood as a reaffirmation because its constitutionality was not directly before the Court in those decisions.[22] This significantly weakens the precedential strength of *Casey* as applied to *Dobbs*.

Finally, *stare decisis* is a "principle of policy."[23] When determining "whether to reexamine a prior erroneous holding," the Court "must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*."[24] This necessitates a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other."[25] "In conducting this balancing, *stare decisis* is not an end in itself…Its greatest purpose is to serve a constitutional ideal—the rule of law."[26]

As Petitioner's argue, *Roe* and *Casey* are egregiously wrong.[27] This *amicus* brief contends that continued fidelity to the *Roe*/*Casey* regime is extraordinarily disruptive to a functioning and healthy society. The Court must conduct a sober appraisal of the disadvantages of abortion as set forth below.

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[22] *Id*.
[23] *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).
[24] *Citizens United*, 558 U.S. at 378.
[25] *Id*.
[26] *Id*.
[27] Petitioners Brief, 12.

Next, "[a]brogating these errant precedents, rather than reaffirming or extending them," is necessary not only to curtail their disruptive effects and damaging, undesirable consequences but above all to faithfully uphold the Constitution.[28]

III. Developments have eroded the Court's assumptions and the decisions which rested on them—the considerable cost to following them far outweighs the benefit.

In order to overrule a constitutional precedent, the Court requires something "over and above the belief that the precedent was wrongly decided."[29] A case may be "egregiously wrong when decided,"[30] or may be "unmasked as egregiously wrong based on later legal or factual understandings or developments."[31]

Notably, *Roe* and *Casey* are egregiously wrong under both categories.

A. Scientific and technological developments in the last 50 years reveal *Roe* and *Casey*'s fundamental error, warranting full reconsideration.

The Supreme Court identified several factors to consider in analyzing the validity of precedent: the quality of the decision's reasoning; its consistency

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[28] *See e.g.*, *Citizens United*, 558 U.S. at 378–79.
[29] *Ramos*, 140 S. Ct. at 1414.
[30] *Id.* at 1415 (*see,* e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Plessy*, 163 U.S. at 537.
[31] *Id.*

with related decisions; factual and legal developments since the decision; and reliance on the decision.[32]

Significantly, considerable changes in law and fact developed in the decades following the Supreme Court's decisions in both *Roe* and *Casey*. These developments evince the fallacy of the Court's abortion decisions when rendered as well as the assumptions underlying them.

The ever-increasing knowledge we have about the development of the child in the womb, its humanity, and life affirm *Roe*/*Casey* were decided on erroneous grounds. Abortion is always fraught with moral and ethical concerns as it always ends a vulnerable innocent human life, at any phase of development.[33] The following scientific facts were equally true in 1973 and 1992 as in 2021 but were unknown or ignored by the Court.

Since *Roe* and *Casey*, medical and technological developments, including the developments of the sonogram and in vitro fertilization, reinforced the conclusion that the life of an individual human being begins at conception.[34] The widespread clinical use of ultrasound, a technological development that the *Roe* Court could not anticipate, came to the commercial market after *Roe* and substantially affected medical

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[32] *See Janus v. State, County, and Municipal Employees*, 138 S.Ct. 2448, 2478–2479 (2018); *United States v. Gaudin*, 515 U.S. 506, 521 (1995); *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

[33] *See Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

[34] Condic, Ph.D., Maureen L., *When Does Human Life Begin? The Scientific Evidence and the Terminology Revisited*, 8 U. ST. THOMAS J. L. & PUB. POL'Y. 44 (2013).

practice and public opinion.[35] Recently, biologists reached the consensus that human life begins at conception—95% of biologists agree.[36]

We now know that from the moment of conception, unborn children possess the seven characteristics that define life: responsiveness to the environment, growth and change, the ability to reproduce, a regulated metabolism and oxygen flow, maintaining homeostasis (the ability to regulate internal bodily functions in response to external changes), composed of cells, and the capacity to pass traits onto offspring—in this case, human offspring.[37] The Department of Genetics at Mayo Clinic confirmed, "[b]y all the criteria of modern molecular biology, life is present from the moment of conception."[38]

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[35] *Id.* at 213; Malcolm Nicolson & John Fleming, *Imaging and Imagining The Fetus: The Development of Obstetric Ultrasound* 1–7 (2013) ("Ultrasonic imaging has also had a momentous social impact because it can visualize the fetus. Fifty years ago, the unborn human being was hidden, enveloped within the female abdomen, away from the medical gaze . . . . [T]he scanner had become widely deployed within the British hospital system by 1975 . . . . By the late 1970s, the ultrasound scanner had become a medical white good, a standardized commodity in a mass marketplace.").

[36] Jacobs, S. A., *Biologists' Consensus on 'When Life Begins'*, U. OF C. DEP'T OF COMP. HUMAN DEVELOP. (2018).

[37] Wilkin, Douglas, and Niamh Gray-Wilson, *Characteristics of Life*, CK-12 Foundation.

[38] Liberty University, *The Genetic Code*; Principles and Choices, *When Does Human Life Begin?*, available at www.principlesandchoices.com/quick-code-library/pcs344 (current as of July 27, 2021).

Developments in medicine and science undeniably show that a fetus possesses a complete set of DNA from the beginning.[39] A child in the womb possesses an individual and unique set of Chromosomes.[40] At the moment of conception, the zygote—the fertilized ovum—retains full personhood and does so throughout the gestation period: forty-six chromosomes, a carrier of similar DNA to his or her parents, and the same genetic makeup inside the womb that he or she will have outside the womb.[41]

Increased understanding of humanity in the womb spurred states to bolster legal protections for the unborn over the years in prenatal injury, wrongful death, and fetal homicide law. Thirty-eight states passed fetal homicide acts[42], 29 of which apply to the earliest stages of pregnancy. In 1987, courts reiterated the state's legal obligations to protect the unborn because of their humanity[43]—"[c]ourts recently have begun to recognize a duty on the part of a pregnant woman to refrain from acts that will cause harm to her fetus".

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[39] *Id*.

[40] *Id*.

[41] Keith L. Moore and T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology*, 7th ed., Philadelphia: Saunders, 216 (2003).

[42] National Conference of State Legislatures, *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, available at www.ncsl.org/research/health/fetal-homicide-state-laws.aspx (current as of July 27, 2021).

[43] Bambrick, Gerard, *Developing Maternal Liability Standards for Prenatal Injury*, 61 ST. JOHNS LAW REVIEW 4 (1987).

Similarly, the Unborn Victims of Violence Act of 1999 treats injury or death to an unborn child caused by a third party while committing a federal offense against the mother as a separate federal crime.[44]

These developments are emblematic of what the Court failed to acknowledge 48 years ago, a fetus in the womb is a distinct living human person—simply a very small one.

The Court relied on central medical and scientific fallacies when rendering *Roe* and *Casey*. Texas' brief presented medically accurate and detailed information about the developing child in the womb, including the humanity and rights of the unborn child.[45] But *Roe*'s decision ignored Texas' arguments, refusing to "resolve the difficult question of when life begins."[46] Instead, the *Roe* and *Casey* Courts inaccurately referred to unborn in the womb as "a fetus that may become a child," and "potential life".[47]

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[44] National Conference of State Legislatures, *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, available at www.ncsl.org/research/health/fetal-homicide-state-laws.aspx (current as of July 27, 2021).

[45] *Roe v. Henry Wade Dist. Atty. of Dallas Co., Texas*, 1971 WL 134281 (U.S.), 29 (U.S., 2004)(arguing "The fetus implanted in the uterine wall deserves respect as a human life….It is alive because it has the ability to reproduce dying cells. It is human because it can be distinguished from other non-human species, and once implanted in the uterine wall it requires only nutrition and time to develop into one of us.").

[46] *Roe*, 410 U.S. at 159.

[47] *Id*. at 113; *Casey*, 505 U.S. at 875 and 876.

Both principal holdings hinged on refusing to acknowledge the significance of the interests of human life in the womb.[48] This was an egregious error. The matter of when life begins is no longer a philosophic discussion "depending on one's beliefs"[49] but is instead a scientific fact.[50]

Significant developments about the humanity of the child in the womb warrant reconsideration of fateful abortion decisions and their underpinnings. Unlike *Roe* and Casey, *Dobbs* presents this Court with the opportunity to consider the full scientific and factual spectrum about the most overlooked abortion participant—the human child.

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[48] Shah, Mamta K., *Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life*, 29 HOFSTRA LAW REVIEW 3, 93.1-93.2 (2001).
[49] *Casey*, 505 U.S. at 852.
[50] *See* Jacobs, *Biologists' Consensus on 'When Life Begins'*.

B. *Roe* and *Casey* initiated considerable undesirable consequences in all facets of society, unmasking the decisions as egregiously wrong.

The evils wrought by a half-century of legalized abortion are vast, impacting nearly every facet of society. Considerable undesirable consequences of the *Roe*/*Casey* regime render continued adherence unjustifiable and unconscionable.[51]

John McGinnis and Michael Rappaport advocated that following deeply rooted nonoriginalist precedents is justified when departing from the original public meaning would wreak havoc. [52] In other words, the Court should adhere to precedent when it yields better consequences than following the original meaning.[53]

But what if it is following a nonoriginalist precedent that wreaks havoc on society? If erroneous constitutional renderings continued to be blindly followed, "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants."[54]

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[51] *See e.g.*, *Janus*, 138 S.Ct. at 2460.
[52] John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 836–38 (2009).
[53] Contra *id.*
[54] *Citizens United*, 558 U.S. at 377.

A precedent may be "unmasked as egregiously wrong based on later legal or factual understandings or developments."[55] Similarly, the fallacy of *Roe* and *Casey* was further "unmasked as egregiously wrong" by catastrophic "legal and factual developments."[56]

i. Abortion's human death toll causes unsustainable population decline.

An estimated 62 million children have been aborted since *Roe*. Abortion is the leading cause of death in America and worldwide.[57] In 2019, abortion accounted for 57% of deaths worldwide.[58] Nations face a historic and alarming population decline. In 2016, the population in the U.S. "grew at its lowest rate since the Great Depression," below replacement levels (0.7%).[59] The rate has generally been below replacement since 1971.[60]

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[55] *See,* e.g., *Nevada*, 440 U.S. at 410; *Ramos*, 140 S. Ct. at 1414–15.

[56] *Ramos*, 140 S. Ct. at 1414–15.

[57] World Ometer, available at https://www.worldometers.info/ (current as of July 27, 2021).

[58] Right to Life, *Abortion was the Leading Cause of Death Worldwide in 2019*, available at https://righttolife.org.uk/news/abortion-was-the-leading-cause-of-death-worldwide-in-2019 (current as of July 27, 2021).

[59] Janet Adamy & Paul Overberg, *Census Says U.S. Population Grew at Lowest Rate Since Great Depression This Year*, WALL STREET J. (Dec. 20, 2016); *see* Hamilton, Brady E. et al., *Births: Provisional Data for 2017*, CDC, https://www.cdc.gov/nchs/data/vsrr/report004.pdf (May 2018) ("The provisional total fertility rate for the United States in 2017 was …the lowest since 1978 . . . . below the level at which a given generation can exactly replace itself.).

[60] *Id.*

ii. Abortion continues to fulfill eugenicists' goals by eliminating disproportional amounts of minority populations.

Nearly half of the African American population is missing due to abortion, more than any other group in the country.[61] Justice Thomas' devastating rendering of the history of eugenics and abortion aptly depicts abortion as a tool eugenicists utilized to extinguish minority populations whom they deemed "unfit".[62] "Whereas Sanger believed that birth control could prevent 'unfit' people from reproducing, abortion can prevent them from being born in the first place. Many eugenicists, therefore, supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher— endorsed the use of abortion for eugenic reasons."[63]

The abortion industry continues to pillage and profit off of communities of color. In fact, 79% of Planned Parenthood's surgical abortion facilities are located within walking distance to communities of

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[61] Congressional Policy Report, *The Effects of Abortion on the Black Community*, available at https://docs.house.gov/meetings/JU/JU10/20171101/106562/HHRG-115-JU10-Wstate-ParkerS-20171101-SD001.pdf; Nelson, Dean, *Why Black Leaders are Demanding Planned Parenthood Publicly Disavow its Founder*, available at https://townhall.com/columnists/revdeannelson/2020/09/19/why-black-leaders-are-demanding-planned-parenthood-publicly-disavow-its-founder-n2576405 (2020).

[62] *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1783 (2019).

[63] *Id*.

color.[64] By ratio, 474 Black preborn lives are terminated in the womb for every 1000 live births.[65] Since 1973, 19 million Black babies have been killed by abortion.[66] These startling statistics expose the vulnerability of minority populations, but no minority life is as vulnerable as the life of an unborn child.

iii. Abortion is fraught with abuse by criminal actors.

Further, abortion is fraught with abuse by criminal actors. The human trafficking industry requires abortion to carry out its horrific activities and hold hundreds of thousands of victims enslaved and working.[67] Women report being coerced through emotional and physical duress to have abortions 64% of the time.[68]

Another undesirable consequence of this Court's abortion doctrine is the negative impact on women's physical security in childbearing. Pregnant women experience an increased rate of assault and battery from unmarried partners.[69] Women who pursue

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[64]Congressional Findings, available at https://docs.house.gov/meetings/JU/JU10/20171101/106562/HHRG-115-JU10-Wstate-ParkerS-20171101-SD001.pdf (current as of July 27, 2021).

[65] *Id*.

[66] *Id*.

[67] Laura J. Lederer and Christopher A. Wetzel, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 THE ANNALS OF HEALTH LAW 1 (2014).

[68] The Elliot Institute, *Forced Abortion in America* (2014).

[69] Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL'Y at 100 (2005).

surrogacy have been subjected to contracts that require them to abort and, or to demands to abort.[70] A growing body of international medical data from dozens of countries established long-term risks to women from abortion.[71]

iv. The unregulated abortion industry benefits from exemptions not provided to others, leading to continual scandal, malpractice and abuse.

Roe incorrectly centered on the assumption that legalizing abortion would end "back alley"[72] abortions. But no evidence indicates that thousands of women died every year in the United States from illegal abortion in the years preceding the Supreme Court's decision. Pro-abortionists continue to "peddle statistics based on data that predates the advent of antibiotics" regarding allegations that undoing *Roe* would result in increased "back alley" abortions. These statistics were widely discredited in 1969 by a

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[70] *See, e.g.*, *Cook v. Harding*, 190 F. Supp. 3d 921 (C.D. Cal. 2016) (donor father requested surrogate mother "reduce the pregnancy by one fetus, citing their surrogacy agreement's 'Selective Reduction' clause"'), aff'd *Cook v. Harding*, 879 F.3d 1035 (9th Cir. 2018).

[71] *See, e.g.*, Bachiochi, Erika, *The Cost of "Choice": Women Evaluate the Impact of Abortion*, 63–102 (2004); Forsythe, Clarke D., *The Medical Assumption at the Foundation of Roe v. Wade and Its Implications for Women's Health*, 71 WASH. & LEE L. REV. 827, 852–69 (2014) (citing dozens of international, peer-reviewed medical studies finding increased medical risks after abortion).

[72] Beck, Randy, *Prioritizing Abortion Access over Abortion Safety in Pennsylvania*, 8 U. ST. THOMAS J.L. & PUB. POL'Y 33, 40–41 (2013).

statistician celebrated by Planned Parenthood. [73] There is no reason for this Court to erroneously continue to rely on disproven arguments.

Roe and *Casey* intended abortion to be governed as "a medical procedure . . . by the same rules as apply to other medical procedures. . . with reasonable medical safeguards."[74] But repeated and continuing scandals involving clinics and providers contradict that assumption.[75] 227 abortion providers in 32 states were cited for more than 1,400 health and safety deficiencies between 2008 and 2016.[76] The wildly profitable abortion industry continues to take advantage of a largely unregulated field, even benefiting in the courts from exemptions others do not enjoy.[77]

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[73] Kessler, Glenn, *Planned Parenthood's False Stat: 'Thousands' of Women Died Every Year before Roe*, Washington Post, 29 May 2019, available at www.washingtonpost.com/politics/2019/05/29/planned-parenthoods-false-stat-thousands-women-died-every-year-before-roe.

[74] *Id*. at 34 n.4.

[75] *Id*.; Clark D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 VILL. L. REV. 45, 65–70 (2012); Americans United For Life, *Unsafe: How the Public Health Crisis in America's Abortion Clinics Endangers Women* (2016), available at www.unsafereport.org (current as of July 27, 2021).

[76] *Id*.

[77] Washington Examiner, *Judges Show Their Concern for Women by Letting Abortionists Operate Unregulated and Unlicensed*, (11 June 2019).

v. Abortion commodifies humans—pregnant mothers and their unborn children.

The magnitude of the consequences initiated by *Roe* and *Casey* also include increased infanticide[78], fetal experimentation[79], the creation of commercial interest in fetal tissue from abortions[80], and human tissue trafficking[81]. Abortion has been largely rejected in American society and medicine.[82]

Abortion commodifies humanity—the unborn and their mothers.

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[78] See Forsythe, *supra*, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. at 85.

[79] The Center for Medical Progress, *Fetal Experimentation at the University of Pittsburgh and Planned Parenthood*, available at www.centerformedicalprogress.org/human-capital/fetal-experimentation-at-the-university-of-pittsburgh-and-planned-parenthood (current as of July 27, 2021).

[80] Gonzalez, Jose L., *The Legitimization of Fetal Tissue Transplantation Research Under Roe v. Wade*, 34 CREIGHTON L. REV. 895 (2001); Reback, Gary L., *Fetal Experimentation: Moral, Legal and Medical Implications*, 26 STAN. L. REV. 1191 (1974).

[81] The Center for Medical Progress, *Fetal Trafficking Under Oath*, available at www.centerformedicalprogress.org/fetal-trafficking-under-oath (current as of July 27, 2021).

[82] Smolin, David M., *Cultural and Technological Obstacles to the Mainstreaming of Abortion*, 13 ST. LOUIS U. PUB. L. REV. 261 (1993).

vi. Continued fidelity to *Roe* and *Casey* is extraordinarily disruptive to a functioning and healthy society.

Roe was the catalyst for these unanticipated and undesirable consequences over the past 48 years. Before *Roe* nearly 36 states or territories restricted abortion. By preempting these regulations, *Roe* created a societal experiment where unfettered abortion became widespread and states were required to rebuild abortion frameworks from the beginning. If there was any doubt, these societal developments unmasked the grievous mistake the *Roe*/*Casey* framework present.

Legal developments followed suit. While these vast evolutions occur, the state's compelling interest in regulating abortion exponentially increases. In context, Mississippi has endless compelling interests in regulating pre-viability abortion that it was unaware of when *Roe* and *Casey* were rendered.

As this Court considers "whether to reexamine a prior erroneous holding," it "must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*."[83] This necessitates a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other."[1] "In conducting this balancing, *stare decisis* is not an end in itself…Its greatest purpose is to serve a constitutional ideal—the rule of law."[1]

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[83] *Citizens United*, 558 U.S. at 378.

Abortion erodes the conscience of the American people and the fabric of our society.

Continued fidelity to *Roe* and *Casey* is extraordinarily disruptive to a functioning and healthy society. The Court must consider the breadth of unanticipated disadvantages flowing from its abortion regime and "[a]brogate these errant precedents, rather than reaffirm[] or extend" them to "curtail [their] disruptive effects" and damaging, undesirable consequences.[84]

C. Purported reliance interests on abortion are unnecessary.

It should be obvious. Ending an innocent human life is not justified by convenience, bodily autonomy or purported reliance interests. Second, in light of the considerable damage abortion wreaks on society, as outlined above, any reliance interests are far outweighed by *Roe* and *Casey*'s undesirable consequences.[85]

Amici adamantly reject any pretense that women must rely on abortion to further their circumstances or life. *Amici* advocate on behalf of capable, intelligent, skilled and strong women facing unexpected pregnancies every day. But what is unexpected is not therefore unwelcome or even necessarily surprising and can lead to great joy with the kind of effort that life requires.

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[84] *Id.*

[85] *See Arizona v. Gant*, 556 U.S. 332, 349; *Janus*, 138 S.Ct. at 2484.

Regardless of the sometimes considerable challenges they face, they are able. Able to parent, able to work, able to succeed, able to obtain medical care, able to create incredible lives for themselves and their children. We are women. We believe in women. We serve women. We advocate for women.

Culture has shifted since *Roe* was rendered. To acquiesce that abortion is necessary for women is to ignore 50 years of societal progress. Options for women are more diverse than ever. In 2019 alone, 2,700 pregnancy resource centers across the country, outnumbering abortion clinics 20 to 1, provided nearly $270 million dollars in assistance to 2 million people nationwide.[86]

Pregnant women considering abortion do not want to rely on abortion. 76% of pregnant women seeking abortion report they would choose to parent if their life circumstances were different.[87] Abortion is predominantly driven by socioeconomic concerns pre-existing pregnancy. Alternatively, women equipped with resources often decide to parent their children. Thousands of organizations assist and support pregnant women in need, the majority of whom would prefer to raise their child. Abortion is neither necessary for nor desired by pregnant women.

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[86] Charlotte Lozier Institute, *Pro-Life Pregnancy Centers Served 2 Million People with Essential Medical, Education and Support Services in 2019*, available at https://lozierinstitute.org/pro-life-pregnancy-centers-served-2-million-people-with-essential-medical-education-and-support-services-in-2019/ (current as of July 27, 2021).

[87] Anderson, Ericka, *Greater Level of Desperation: As COVID-19 Rages, Pregnancy Centers See Surge in Demand*, USA Today.

The abortion rate fell to its lowest level since *Roe*[88], indicating abortion is less relied on now than the *Casey* Court assumed.

Assuming, *arguendo*, this Court determines valid reliance interests in unregulated pre-viability abortion exists, returning abortion regulation to the states would leave these reliance interests largely unimpacted. States allowing unfettered abortion, on-demand, through the third trimester would be free to continue to do so after a *Roe*/*Casey* reversal. Likewise, states regulating abortion in some capacity after viability would be unimpacted. The only purported reliance interest that would be affected by reversing *Roe* and *Casey* would be in states aiming to regulate pre-viability abortion.

Similar to labor contracts negotiated under *Abood*, reliance on *Roe* and *Casey* is unique in that it cannot be planned for and pregnancy lasts a temporal duration.[89]

Practically, women in states that will ultimately regulate pre-viability abortion will be placed on notice for years in advance, the time it will take states to enact or enforce said regulations.[90] In other words, women will be on notice to take precautions from becoming pregnant, will be able to find one of the numerable alternatives to abortion available should

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[88] The CDC Report, *supra*, 2018; Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States*, 49 PERSP. ON SEX. & REPROD. HEALTH 17, 20 (2017) ("This is the lowest rate since abortion was legalized nationally in 1973.").
[89] *Id*. at 1439.
[90] *See Id*.

they become pregnant, or would be able to travel to neighboring states to obtain an abortion.

The Court "must weigh these disadvantages against" the considerable damage caused by continued adherence to these erroneous precedents.[91] In fact, repudiation of *Roe* and *Casey* would enable states to finally regulate the abortion industry in a meaningful way, freeing millions of women from abuse and coercion and freeing the unborn from death.

IV. Conclusion

Society now understands the catastrophic impact that flows from the Court's abortion regime and the undesirable consequences it wrought. Consequences are so vast and expansive that few societal evils compare. "It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, this Court should depart from that precedent."[92] For this reason, the Court has a grave responsibility to reconsider its abortion precedents here.

As Justice Thomas noted in his *June Medical* dissent that "the Court perpetuates its ill-founded abortion jurisprudence …the right to abortion out of whole cloth, without a shred of support from the Constitution's text. Our abortion precedents are grievously wrong and should be overruled."[93]

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[91] *Janus*, 138 S. Ct. at 2486.
[92] *Citizens United*, 558 U.S. at 378.
[93] *June Med. Servs*, 140 S. Ct. at 2142.

Mississippi is well within its constitutional bounds to defend the rights of the unborn.[94] Scientific, factual, and legal developments since *Roe* and *Casey* require it.[95]

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[94] *Id*. ("The Constitution does not constrain the States' ability to regulate or even prohibit abortion.")(Thomas, J., concurring in part and concurring in judgment).

[95] *Id*. ("Moreover, the fact that no five Justices can agree on the proper interpretation of our precedents today evinces that our abortion jurisprudence remains in a state of utter entropy. Since the Court decided *Roe*, Members of this Court have decried the unworkability of our abortion case law and repeatedly called for course corrections of varying degrees. *See, e.g.*, 410 U.S. at 171–178, 93 S.Ct. 705 (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 221–223 (1973) (White, J., dissenting); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452–466 (1983) (O'Connor, J., dissenting); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 785–797(1986) (White, J., dissenting); *Webster v. Reproductive Health Services*, 492 U.S. 490, 532–537 (1989) (Scalia, J., concurring in part and concurring in judgment); *Casey*, 505 U.S. at 944–966, (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id*., at 979–1002 (Scalia, J., concurring in judgment in part and dissenting in part); *Stenberg*, 530 U.S. at 953–956 (Scalia, J., dissenting); *id*., at 980–983 (THOMAS, J., dissenting); *Whole Woman's Health*, 136 S.Ct., at (Thomas, J., dissenting) (slip op., at 5–11) ("In *Casey*, the majority claimed to clarify this 'jurisprudence of doubt,' but our decisions in the decades since then have only demonstrated the folly of that assertion, *see Stenberg*, 530 U.S. at 953–956") (Scalia, J., dissenting); *id*., at 960–979 (Kennedy, J., dissenting); *Whole Woman's Health*, supra, 136 S.Ct. 2292 (THOMAS, J., dissenting) (slip op., at 5–11) (They serve as further evidence that this Court's abortion jurisprudence has failed to deliver the "'principled and intelligible' " development of the law that stare decisis purports to secure. Ante, at 2134")(opinion of Roberts, C. J.) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

No issue before this Court bears greater import than the one before it today. For example, from the time *amici* file this brief until the end of Supreme Court October Term 2021, approximately 620,000 unborn children will be killed by abortion.[96]

After 48 years, this Court cannot turn a blind eye to the unanticipated devastation its decisions caused. And because this Court exclusively preempted this field in 1973, it is this Court's alone to abrogate.

The time has come for the Court to rectify the disastrous *Roe* and *Casey* framework and, through fidelity to the Constitution it guards, restore our ability to protect the most vulnerable among us.

Respectfully submitted,

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[96] Center for Disease Control, *Abortion Surveillance – United States, 2018*, available at https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm (current as of July 27, 2021).