No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL.,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* REP. STEVE CARRA AND 320 STATE LEGISLATORS FROM 35 STATES IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

State legislatures exist to protect the health and welfare of their state's respective citizens. This includes the creation of standards and regulations that protect the most vulnerable in society. However, as demonstrated by the Fifth Circuit's decision below, flawed precedent interferes with this constitutionally delegated duty. Specifically, legislatures across the country have enacted reasonable abortion regulations with the intent of protecting the life and health of *both* mothers and preborn children, yet these regulations have regularly been struck down by this Court and lower courts.

Amicus Curiae is a group of 321 legislators from 35 states[2] acting on behalf of their constituents ("State Legislators"). Each asserts that the Constitution delegates abortion legislation to the political branches, and each seeks to make his or her voice, as well as the voices of their constituents, heard before this Court.

The State Legislators contend that the ruling in this case will have far-reaching consequences for legislatures across the country. In particular, it will affect the State Legislators' ability to propose, enact, and defend future abortion legislation.

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[1] The parties to this action have filed blanket consents to the submission of *amicus* briefs pursuant to this Court's Rule 37.3(a). Further, and in compliance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person made any monetary contribution intended to fund the preparation or submission of this brief.

[2] *See* Appendix A.

For these reasons, the State Legislators have a substantial and unique interest in the disposition of the case that would be considerable help to the Court. Rule 37.1. They now urge the Court to find Mississippi's fifteen-week abortion ban is constitutional.

SUMMARY OF ARGUMENT

This Court should overturn *Roe*[3] because all three prongs of the *stare decisis* analysis support overturning the precedent: *Roe* is egregiously wrong, it has caused negative jurisprudential and real-world consequences, and overturning *Roe* will not necessarily upset reliance interests. Once this Court overturns *Roe*, it should apply rational basis to state laws regulating abortion, as rational basis review conforms to this Court's precedent and the Constitution's structure. The application of rational basis review would once again afford States their proper constitutional role in protecting the health and welfare of their citizens, empowering democratically-elected state legislators, who are your *amici*, to make considered policy decisions carefully crafted to protect the life and health of both the mother and child.

ARGUMENT

The late Justice Scalia's prediction in *Casey* has come to fruition: The undue burden standard has proven to be "inherently manipulable" and "hopelessly unworkable in practice." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 986 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). This case provides the opportunity

[3] *Roe v. Wade*, 410 U.S. 113 (1973)

to begin making a needed course correction. The State Legislators urge this Court to do so.

I. Under this Court's *stare decisis* analysis, *Roe* should be overturned.

While precedent warrants "our deep respect," *stare decisis* is not an "inexorable command." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). This is especially true of constitutional precedent because a mistaken constitutional interpretation is often "'practically impossible' to correct through other means." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

Justice Kavanaugh, in a thorough review of precedent that addresses *stare decisis,* articulated a three-prong standard that should serve as this Court's framework. *Id.* at 1414-1415 (Kavanaugh, J., concurring). First, the Court must assess whether the decision at issue is "grievously or egregiously wrong." *Id.* at 1414. This inquiry includes an examination of the precedent's reasoning, consistency with other precedent, changed law, and changed facts. *Id.* at 1414-1415. Second, the Court should ask whether the precedent has "caused significant negative jurisprudential or real-world consequences." *Id.* at 1415. This prong incorporates workability as well as the "real-world effects on the citizenry." *Id*. The Court lastly must address reliance interests—the "legitimate expectations of those who have reasonably relied on the precedent." *Id.*

The *Ramos* factors weigh against upholding *Roe* as interpreted by *Casey*. *Amicus* State Legislators expressly assert that *Roe* was and is egregiously wrong. It is based on inadequate reasoning; it is at odds with modern law; and it has been undermined

by modern science. *Roe* and its progeny have also caused significant negative jurisprudential and real-world consequences, as this line of jurisprudence is unworkable, has politicized the Court, and undermined the Constitution's structure. Additionally, overturning *Roe* will not unduly upset reliance interests; on the contrary, overruling *Roe* and its progeny will help stabilize the law.

A. ***Roe* is egregiously wrong.**

First and foremost, *Roe*, as articulated by *Casey*, is not supported by the Constitution's text. It is the "province and duty" of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cran. 137, 177 (1803). But in "an exercise of raw judicial power," *Roe*, 410 U.S. at 222 (White, J., dis.), this Court "discovered" the "right" to an abortion without any grounding in the Constitution's text. *Id*. at 152-153 (citing the First, Fourth, Fifth, Ninth, and Fourteenth amendments). The power to regulate abortion, however, is reserved to the States, not to this Court. *See* U.S. Const. amend. X.

Apart from *Roe*'s atextual reading of the Constitution, the precedents it relied upon do not support its conclusion. While a generous reading of the "intimate relations" cases could amount the recognition of a zone of privacy, the Court has consistently subjected regulation of rights within that category to rational basis review. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). Moreover, it stretches credulity to read the "procreation" cases as providing substantial support for *Roe*, as the holdings in those cases were based on

categorically different facts than those at issue in *Roe*. *See Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965). And the "bodily integrity" cases cited by *Casey* not only present factual and legally distinct issues, but their logic undermines both *Roe*'s holding and *Casey*'s application of the "undue burden" analysis. *See Casey*, 505 U.S. at 849 (citing, *e.g.*, *Washington v. Harper*, 494 U.S. 210 (1990); *Winston v. Lee*, 470 U.S. 753 (1985)).[4]

Additionally, *Roe* and its progeny are at odds with modern law. In particular, modern regulation of the medical profession in areas as intimate as pregnancy has rendered *Roe*'s prohibition on pre-viability abortion regulation a legal anomaly. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997). Similarly, other areas of the law such as tort and contract have increasingly recognized the rights of preborn children. *See* Paul Benjamin Linton, *The Legal Status of the Child Under State Law*, 6 U. St. Thomas J.L. & Pub. Pol'y 141 (2011).

Roe is also wrong on the science. As articulated by *Casey*, "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*." 505 U.S. 833 at 871. The *Roe* Court then chose "viability" because the body of scientific knowledge then-known suggested "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Casey,* 505 U.S. at 860. Modern medicine, however, now

[4] Many of these cases rely on this Court's expansive twentieth century, atextual substantive due process jurisprudence. To the extent that *Roe* relied upon such cases, it built on a rotten foundation.

understands this to be inaccurate. See Brief for *Amicus Curiae* Illinois Right to Life in Support of Petitioners, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (U.S. Jul. 30, 2020).

In sum, *Roe*'s holding is unsupported by the Constitution's text and this Court's precedent. It has also been undermined by developments in law and in fact. *Roe* is thus egregiously wrong.

B. **Negative jurisprudential and real-world consequences compel this Court to overturn *Roe*.**

Nearly fifty years have passed since *Roe* "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Casey*, 505 U.S. at 867. Yet national division over the issue of abortion remains as implacable as ever. Pro-life advocates still vehemently defend their position, and abortion-advocates fervently resist abortion regulation. But such vigorous debate is not limited to the halls of state government. No—this debate consistently spills political vitriol upon this Court.

All told, fifty years of unworkability, high stakes litigation, and constitutional subversion imposes upon this Court to overturn *Roe* and return abortion's regulation to the legal arena where it belongs—in the state legislatures.

i. Roe *as interpreted by* Casey *has proven unworkable.*

The Court has "never felt constrained to follow precedent" that is unworkable. *Payne*, 501 U.S. at 827 (internal quotation marks omitted) (quoting *Smith v.*

Allwright, 321 U.S. 649, 655 (1944)); *see also Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). Fifty years have proven the unworkability of this Court's abortion jurisprudence.

Casey rejected *Roe*'s trimester framework in favor of the "undue burden" standard. In doing so, the *Casey* plurality deprived *Roe* of all "principled or coherent legal basis," *Casey*, 505 U.S. at 987 (Scalia, J., concurring in part and dissenting in part), condemning this Court's abortion jurisprudence to a state of chaos.

Out of the gate, the term "undue burden" is ambiguous. *Id.* (Scalia, J., concurring in part and dissenting in part). As the *Casey* plurality admitted, members of the Court had already utilized the undue burden test "in ways that could be considered inconsistent." *Id.* at 876. But the plurality's attempt to clarify "undue burden" just made matters worse, defining this ambiguous term with *another* ambiguous term: "substantial obstacle." *Id.* at 877. And this Court has since made precious little progress in clarifying the standard.

For instance, the Court itself cannot agree on *how* the standard should be applied. In the last five years alone, only *one* majority opinion has garnered more than five votes. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (a five-to-three decision with one concurrence); *Nat. Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (a five-to-four decision with one concurrence); *Box v. Planned Parenthood of Ind. and Ky., Inc*, 139 S. Ct. 1780 (2019) (a per curiam opinion with one concurrence, one concurrence in part, and one

dissent); *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020) (a four-member plurality with one concurrence in judgment). And all these cases came over vigorous dissents. *See, e.g.*, *Hellerstedt*, 136 S. Ct. at 2230 (Alito, J., dis.) (joined by Roberts, C.J., and Thomas, J.) ("[D]etermined to strike down two provision of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases."); *June Medical*, 140 S. Ct. at 2153 (Alito, J., dis.) (joined by Gorsuch, J., and in part by Thomas, J., and Kavanaugh, J.) ("The divided majority cannot agree on what the abortion right requires, but it nevertheless strikes down a [law] that the legislature enacted for the asserted purpose of protecting women's health. To achieve this end, the majority misuses the doctrine of *stare decisis*, invokes an inapplicable standard of appellate review, and distorts the record.").

This Court's partial birth abortion ban jurisprudence demonstrates the difficulty of applying the undue burden standard. The statute at issue in *Stenberg v. Carhart*, 530 U.S. 914 (2000) prohibited partial birth abortions except when necessary to save the mother's life. In a five-to-four decision, this Court rejected the statute because (a) it lacked a health exception, *id.* at 937-938, and (b) its language covered not just the less common dilation and extraction procedure (D & X), but also the more common dilation and evacuation procedure (D & E), *id.* at 939. Just seven years later, this Court analyzed the federal Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*, 550 U.S. 124 (2007). That law, like the one at issue *Stenberg*, prohibited partial birth abortions, including D & E. *Id.* at 147. But because the law was deemed

"more specific" than that at issue in *Stenberg* and included a health exception, a simple five-to-four majority upheld the law. *Id.* at 132.

The State Legislators believe that both lower courts and legislatures can be excused if they view the practical differences between these cases negligible. After all, three district courts and three circuit courts could not distinguish the cases. *See Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005) (relying on *Stenberg* to strike down the federal law); *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006) (same); *Nat'l Abortion Federation v. Gonzales*, 437 F.3d 278 (2006) (same).

Disagreement also exists about *when* this standard applies. For instance, this Court in *Box* applied rational basis to a law regulating fetal remains. 139 S. Ct. at 1782. At least one justice, however, would have applied *Hellerstedt*'s undue burden standard. *See id.* at 1793 (Ginsburg, J., concurring in part) (suggesting that the Court should have applied *Hellerstedt*'s undue burden standard); *see also id.* at 1782 (noting that Justice Sotomayor would have denied certiorari, leaving in place the Seventh Circuit's holding that rejected the law under rational basis review).[5]

But what may be worse than this unpredictability in application is the fact that this Court cannot even

[5] The plaintiffs conceded that the disposal provision did not implicate fundamental rights and therefore should be reviewed under rational basis. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'ner of Ind. Dep't of Health*, 917 F.3d 532 (7th Cir. 2018) (Wood, Chief Judge, concurring in denial of rehearing en banc). Chief Judge Wood suggested that this litigation strategy was a mistake, *id.* at 534, one future plaintiffs will surely not make.

agree on *what* the standard is. In *Casey*, the plurality suggested that, when assessing laws under the undue burden standard, the Court should look to whether the regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877. But in *Hellerstedt,* the five-member majority applied a balancing test that weighed the law's "asserted benefits against the burdens." 136 U.S. at 2310. Four years later, in *June Medical*, a four-justice plurality repeated this standard, 140 S. Ct. at 2112, but five justices—one concurring in judgment and four dissenting—explicitly rejected this balancing. *See id.* at 2135-2136 (Roberts, C.J., concurring in judgement); *id.* at 2154 (Alito, J., dis.) (noting that *Hellerstedt* "should be overruled insofar as it changed the *Casey* test").

This ambiguity has a profound effect on lower courts and state legislatures. When faced with a piece of challenged legislation, they must wrestle with *Casey*'s (and now *Hellerstedt*'s and *June Medical*'s) hopelessly ambiguous terms, resulting in disparate conclusions among the circuits and constant appeals to this Court. *See June Medical*, 2179 (Gorsuch, J., concurring) ("Some judges have thrown up their hands at the task put to them by the Court in this area."). As Judge Easterbrook noted:

> The 'undue burden' approach announced in [*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, which depends on what the

> burden would be . . . and whether that burden is excessive. Only the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute. *Planned Parenthood of Ind. & Ky. v. Box*, 949 F.3d 997, 999 (7th Cir. 2018) (Eastbrook, J., concurring).

The recent Sixth Circuit case *EMW Women's Surgical Center v. Friedlander*, 978 F.3d 418 (6th Cir. 2020) demonstrates a similar struggle to ascertain and apply the test that this Court has created. *Id.* at 433 (suggesting that Chief Justice Robert's opinion in *June Medical* was controlling and therefore *Casey*'s standard applied); *id.* at 448 (Clay, circuit judge, dis.) (accusing the majority of "openly disregard[ing]" this Court's standard of review, "condon[ing] the evisceration of the constitutional right to abortion access in Kentucky").

Beyond the courts, the ambiguity and unworkability inherent in *Roe* as applied by *Casey* leaves legislatures, women, and abortion providers with uncertainty and doubt. When a legislature acts on its "important and legitimate interest" in protecting preborn life, it cannot be sure that the law will pass muster unless the statute falls well within the boundaries of this Court's precedent. *See Hellerstedt*, 136 U.S. at 2326 (Thomas, J., dis.) ("[T]he majority seriously burdens States, which must guess at how much more compelling their interests must be to pass muster and what 'commonsense inferences' of an undue burden this Court will identify next."). Moreover, women who seek an abortion and abortion providers cannot be certain whether courts will uphold new abortion regulations. Thus, women

contemplating an abortion are rushed to a decision whenever a state legislature prepares to pass abortion restrictions or a district court enjoins a newly minted law. And abortion providers cannot know whether they should alter their practice in conformance with new law or if they should wait and see what the courts do. For instance, this Court found the law at issue in *Hellerstedt*—one that the Court would ultimately strike down—led to the closure of *half* of Texas' abortion clinics.

The fact that this Court cannot consistently agree on *how* the standard applies, *when* the standard applies, or even *what* standard applies demonstrates the clear unworkability of *Roe* as applied by *Casey*. And, to put it frankly, if this Court cannot come to some sort of consensus, why should it expect lower courts, legislatures, abortion providers, and women to do the same? Justice Scalia's prediction in *Casey* came true—the undue burden standard is "inherently manipulable" and "hopelessly unworkable in practice." 505 U.S. at 986. This Court is not required to adhere to such an ineffectual precedent. *Payne*, 501 U.S. at 827 (1991); *see also Montejo*, 556 U.S.at 792.

ii. Roe *and its progeny have politicized this Court by forcing it to engage in high-stakes constitutional litigation.*

Year in and year out, the American people hold their collective breath as this Court decides upon the newest challenge to abortion legislation. In fact, since *Roe*, this Court has decided forty-one cases that involve abortion amounting to just under one per year. In deciding these cases, this Court has regularly placed itself in an adverse position to the States and,

by extension, to the People of those States. Moreover, debates over abortion have consistently dragged this Court into the morass of other sensitive areas of constitutional law. And the Court has become increasingly fractured over the issue. The result? This Court is becoming unnecessarily politicized. To stem the tide of this institutional damage, the Court should overturn *Roe*.

"[T]he judiciary is beyond comparison the weakest of the three departments of power." *Evans v. Gore*, 253 U.S. 245, 250 (1920). Judges are unelected, and they have "neither force nor will, but merely judgment." *Id.* Consequently, judicial review is a grave task. For when this Court strikes down a statute, it strikes down the will of the majority and effectively removes the issue from the democratic arena. Thus, while judicial review is unquestionably part of the American system of government, it can cause significant friction between the judiciary and legislative bodies. This is especially true when the Court reviews laws under its substantive due process jurisprudence. *See Casey*, 505 U.S. at 1000 (Scalia, J., concurring in part and dissenting in part) (suggesting that "what the [*Casey* majority] call[ed] 'reasoned judgement'" "turns out to be nothing but philosophical predilection and moral intuition").

By removing the issue of pre-viability abortion regulation from the democratic sphere, *Roe* has created unhelpful tension. Some state regulations have inadvertently run afoul of *Casey*'s "undue burden" standard. *See, e.g.*, *Hellerstedt*, 136 S. Ct. at 2292. Other States have attempted to push the bounds of *Roe*. *See, e.g.*, Arkansas Human Heartbeat Protection Act, Ark. Code Ann. §§ 20-16-1301 to 1307

(2013) (preventing abortions where the preborn child has a detectable heartbeat) (permanently enjoined by *Edwards v. Beck*, 786 F.3d 1113, 1115 (8th Cir. 2015)). Yet one thing remains consistent: States desire to regulate abortion. And States that do regulate abortion[6] are in constant conflict with the judiciary. In fact, of twenty-six cases that asked this Court to review state abortion regulations, half struck down all or part of the State legislation.

But the discomforting pressure on this Court caused by *Roe* and its progeny does not end at the review of abortion regulations. Instead, abortion has forced this Court into other sensitive constitutional areas such as freedom of speech, equal protection, and federal-state relations. For instance, because "the public spaces outside of [abortion-providing] facilities . . . ha[ve] become, by necessity and by virtue of this Court's decisions, a forum of last resort" for pro-life advocates, *Hill v. Colorado*, 530 U.S. 703, 763 (2000) (Scalia, J., dis.), states have implemented laws restricting speech near such facilities, requiring this Court to adjudicate the constitutionality of such laws under the first amendment. Compare *Hill*, 530 U.S. 703 (2000) with *McCullen v. Coakley*, 573 U.S. 464 (2014); *see also Nat'l Inst. of Family and Life Advocates v. Becerra,* 138 S. Ct. 2361 (2018). Even this term, the Court had a pending First Amendment case involving abortion. *American Med. Ass'n v. Cochran*, 141 S. Ct. 1368 (2021) (granting cert.)

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[6] *See* Kaia Hubbard, *A Guide to Abortion Laws by State*, U.S. News (Apr. 29, 2021), https://www.usnews.com/news/best-states/articles/a-guide-to-abortion-laws-by-state.

Roe's recognition of a right to abortion has also spawned equal protection challenges to various state and federal laws. The plaintiffs in *Poelker v. Doe*, 432 U.S. 519 (1977), for example, contended that a city's refusal to provide nontherapeutic abortions while providing services for childbirth violated the Fourteenth Amendment's Equal Protection Clause. *Id.* at 520. The Court rejected this challenge. *Id.* at 521-522; *see also Maher v. Roe*, 432 U.S. 464 (1977) (rejecting an equal protection challenge to a state law prohibiting funding for nontherapeutic abortions while providing funding for pregnancies); *Box*, 139 S. Ct. at 1782 (denying review of the Seventh Circuit's rejection of a state law prohibiting abortions based on the sex, race, or disability of the preborn child). And congressional abortion legislation—navigating among *Roe*, federalism, and the Bill of Rights—has brought cases to this Court that implicate complex federal-and-state relations. *See, e.g.*, *Beal v. Doe*, 432 U.S. 438, 440 (1977) (holding that Title XIX of the Social Security Act did not require participating States to fund nontherapeutic abortions); *see also Williams v. Zbaraz*, 448 U.S. 358 (1980).

Because *Roe* has forced this Court to essentially sit as a "super-legislature to weigh the wisdom" of abortion legislation, *see Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 423 (1952), this Court has become increasingly politicized. No longer can citizens resort to their elected representatives. Instead, they must turn solely to this Court through marches, mail, and protests "aimed at inducing [this Court] to change [its] opinions." *Casey*, 505 U.S. at 999 (Scalia, J., concurring in part and dissenting in part). Lawyers speculate as to how the Court will handle the next

abortion case. The media declares certain Justices to be "Republican" or "Democrat" and questions whether judicial nominees will pass or fail the abortion litmus test. Presidential candidates campaign on appointing justices who will overturn or uphold *Roe*. Politicians even argue that the Court should be packed. And every abortion case decided increases the hostilities between the pro-life and pro-choice camps.[7]

In short, "[n]ot only did *Roe* not . . . resolve the deeply divisive issue of abortion; it did more than anything else to nourish it." *Casey*, 505 U.S. at 995 (Scalia, J., concurring in part and dissenting in part). This Court should overturn *Roe* and return the debate back to the People and their legislators.

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[7] The rhetoric from some federal courts has increased this politicization. Without evidence, the District Court Judge below suggested that Mississippi was "bent on controlling women and minorities" and accused the State of "pure gaslighting." *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 fn.22 (S.D. Miss. 2018). Such blatant bias and "disrespect for the millions of Americans who believe that babies deserve legal protection during pregnancy as well as after birth" reflects poorly upon the entire judiciary and should be condemned by this Court. *Jackson Whole Women's Health Org. v. Dobbs*, 945 F.3d 265, 278 (5th Cir. 2019) (Ho, J., concurring); *Arizonans for Official English v. Arizona,* 520 U.S. 43, 75 (1997) ("When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question.").

iii. Roe *and its progeny have undermined the Constitution's structure.*

This Court's abortion jurisprudence has also subverted the structure of the American Constitution. The Founders formed a constitutional republic. Specifically, while the People remain sovereign, they divided power both vertically and horizontally. The Constitution thus splits our government into one federal government and many state governments. *The Federalist No. 51*, 320 (James Madison). Both levels of government are divided into three separate departments, and all departments at each level are subject to restraints contained in the federal Constitution; the state departments are also subject to restraints included within their respective state constitutions. The federal government then received certain enumerated powers, *see, e.g.,* U.S. Const. Art. I, § 8; *M'Culloch v. Maryland* 17 U.S. 316, 405 (1819); *see also The Federalist No. 14* (James Madison) (noting that the jurisdiction of the federal government extends to those matters that "concern all the members of the republic, but which are not to be attained by the separate provisions of any"), while the States retained plenary authority, *see U.S.* Const. Amend. X; *The Federalist No. 14*, at 97 (James Madison) (noting that state power extends "to all those other objects which can be separately provided for").

Because of their much broader authority, the Founders intended the States to serve as laboratories of democracy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). In fact, Alexander Hamilton in *Federalist No. 11* lists this as an advantage of the Constitution: Relegation of the most sensitive

subjects to the States diffuses tensions at the national level and allows States to resolve such issues in unique ways. *See The Federalist No. 11*, at 79 (Alexander Hamilton).

States embraced this power for one hundred and fifty years, regulating abortion to varying degrees and making different value judgments regarding the health of mothers and the lives of preborn children. *See supra*. Then the Court decided *Roe*.

Roe elevated abortion from a state-based debate "to the national level where it is infinitely more difficult to resolve." *Casey*, 505 U.S. at 995 (Scalia, J., concurring in part and dissenting in part). If only the Court stopped there. Instead, *Roe* made this Court the sole arbiter of abortion regulation, "destroy[ing] compromises of the past, render[ing] compromise impossible for the future, and requir[ing] the entire issue to be resolved uniformly." *Id.*

Late Justice Antonin Scalia described the situation best:

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

Casey, 505 U.S. at 1002 (Scalia, J., concurring in part and dissenting in part). To restore our constitutional order, this Court must overturn *Roe*.

A half-century has passed since this Court decided that individuals have a fundamental right to an abortion before the point of viability. And for a half-century, Supreme Court Justices, lower court judges, legislatures, and citizens have registered their disagreement with this precedent. *See, e.g., Casey*, 505 U.S. 833, 944 (Rehnquist, J., concurring in part) (joined by White, J., Scalia, J., Thomas, J.) ("We believe that *Roe* was wrongly decided); *June Medical*, 140 S. Ct. 2103, 2149 (Thomas, J., dis.) ("[T]he putative right to abortion is a creation that should be undone."); *id.* at 2154 (Alito, J., dis.) (joined by Gorsuch, J., and in part by Thomas, J., and Kavanaugh, J.) ("Unless *Casey* is reexamined . . . the test it adopted should remain the governing standard."). *Roe* has proven unworkable, but, perhaps more importantly, it has politicized and delegitimized this Court while simultaneously undermining the foundations of our Republic. Such negative jurisprudential and real-world consequences counsel this court to overturn *Roe*.

C. **Overturning *Roe* will not inordinately upset reliance interests.**

Finally, reliance interests cannot sustain *Roe* and its progeny, as the precedents' unworkability has systematically undermined reliance interests of both public and private actors. State legislatures cannot rely on *Roe* as interpreted by *Casey* when developing abortion regulations, as the undue burden standard puts even sensible regulations for the health and

safety of the mother on tenuous ground. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. at 2292 (striking down a law requiring physicians performing abortions to have admitting privileges at a hospital located no more than thirty miles away from where the abortion is performed). Women who seek an abortion are forced to make hasty decisions as courts enjoin and overrule one another. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (reversing injunctions established by the Eighth and Ninth Circuits). And abortion providers must decide whether to implement new regulations or wait for the courts. Consequently, reliance interests are few.

To summarize, all three *stare decisis* factors compel this Court to overturn *Roe* and its progeny. *Roe* is egregiously wrong, as its reasoning is inadequate and it has been undermined by modern law and new facts. Moreover, *Roe* has caused negative jurisprudential and real-world consequences: The precedent is unworkable, has politicized this court, and has undermined our Nation's constitutional structure. Lastly, reliance interests are minimal. This Court should overturn *Roe* and its progeny.

II. Upon overturning *Roe* and its progeny, this Court should assess state laws regulating abortion under the rational basis standard.

Upon reversing *Roe*, this Court must decide the appropriate constitutional standard to review abortion legislation going forward. The State Legislators urge that rational basis review best conforms with both the Constitution and this Court's precedents.

The Founders created a constitution that is neither wholly national nor wholly federal, but a composition of both. *The Federalist No.* 39, 242 (James Madison). Under this design, the Founders reserved to the states a power that "extend[s] to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." *The Federalist No. 45,* 289 (James Madison); *see also The Federalist No. 39,* 242 (Madison). The Nation then enshrined this principle in the Tenth Amendment. *See* Joseph Story, 3 *Commentaries on the Constitution* §§ 1900-01.

The Fourteenth Amendment did not upend this arrangement. Instead, it secured to all Americans the equal protection of the law and extended federal protection to rights "deeply rooted in this Nation's history and tradition, or implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997). So long as a State does not run afoul of its state constitution or the federal Constitution, it may still exercise its police power over a wide range of subjects touching upon the public's health and welfare. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *see also Crowley v. Christensen*, 137 U.S. 86, 89 (1890).

In consequence, this Court has upheld regulations as mundane as the prohibition of oleomargarine, *Powell v. Pennsylvania*, 127 U.S. 678 (1888), and a ban on ice cream without specific proportions of butter fat, *Hutchinson Ice Cream Co. v. Iowa*, 242 U.S. 153 (1916). This power, however, equally extends to much weightier objects such as the regulation of drugs, *see,*

e.g., *Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41 (1921), the regulation of the medical profession, *see, e.g.*, *Gonzales*, 550 U.S. at 157; *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975), and the regulation of medical procedures, *see, e.g.*, *Glucksberg*, 521 U.S. at 735 (1997), *see also Gibbons v. Ogden*, 22 U.S. 1, 78 (1824).

From the early days of the Republic, this Court has applied a "rational basis" standard of review to such regulations. *See Ogden v. Saunders*, 25 U.S. 213, 270 (1827) ("It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the [C]onstitution is proved beyond all reasonable doubt."). Since then, the test traditionally applied in the area of social and economic legislation is whether or not a law has a rational relation to a valid state objective. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595-596 (1962).

The power to regulate abortion falls squarely into States' police powers. In fact, the power to regulate abortion *did* fall squarely into this design for one hundred and fifty years leading up to *Roe*. At its core, abortion is a medical procedure that involves the death of a preborn child and potential harm to the mother. The Constitution has delegated the task of balancing such "considerations of marginal safety," *Gonzales*, 550 at 166, and competing interests, *see Harris v. McRae*, 448 U.S. 297, 325-326 (1980);

Glucksberg, 521 U.S. at 735, to the States, not to the federal judiciary.[8]

The application of rational basis review would once again afford States their proper constitutional role in protecting the health and welfare of their citizens, empowering democratically elected state legislatures to make considered policy decisions carefully crafted to protect the life and health of both the mother and child. If citizens in turn disagree with these decisions, they "must resort to the polls, not to the courts." *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

CONCLUSION

The State Legislators are duty bound to protect life within their respective states. That duty compelled the citizens of Mississippi, through their elected representatives, to enact a fifteen-week abortion ban. Preventing the enforcement of that duly enacted legislation is the now demonstratively erroneous *Roe*. *Roe* should not be overturned for political reasons; it should be overturned because all three prongs of the *stare decisis* analysis support overturning the precedent. First, advancements in science now demonstrate the core premise of *Roe*, that preborn humans are mere potential life, is egregiously wrong. Second, *Roe* has caused often dramatic negative jurisprudential and real-world consequences. Third, the overturning of *Roe* will not necessarily upset reliance interests. Once this Court overturns *Roe*, it should apply rational basis to state laws regulating

[8] As Chief Justice Rehnquist noted in his *Roe* dissent, the rational basis test would still require legislation to contain a "life of the mother" exception. *Roe*, 410 U.S. at 173.

abortion, as rational basis review conforms to this Court's precedent and the Constitution's structure.

This Court now has the chance to right a constitutional, precedential, and historical wrong. The ability of the State Legislators to perform their duty depends on it. For this reason, this Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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