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 REASON FOR LIFE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JONATHAN BERRY
MICHAEL BUSCHBACHER
JORDAN SMITH
BOYDEN GRAY & ASSOCIATES
801 17th Street NW, Suite 350
Washington, DC 20006
(202) 955-0620
berry@boydengrayassociates.com

SAMUEL D. GREEN
Counsel of Record
REASON FOR LIFE
P.O. Box 500040
Palmdale, CA 93550
(661) 524-5770
sgreen@reasonforlife.org

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Reason for Life is a not-for-profit, Christian ministry that exists to advance the right to life for unborn children and cultivate a culture that recognizes those children as precious gifts from God who deserve protection.

SUMMARY OF THE ARGUMENT

When *Roe v. Wade*, 410 U.S. 113 (1973), created a right to abortion, it inflicted grave harm without constitutional grounding. That provides ample reason to reject *Roe*. There are, however, additional reasons to overrule *Roe* and the decisions embracing its creation of a right to abortion.

I. Since *Roe,* legal and factual developments have reduced the strength of asserted justifications for abortion. First, the advent of safe-haven laws, which allow mothers to relinquish their infants quickly and anonymously, invalidates the view that abortion is needed to avoid burdens associated with childrearing. Second, today's widespread acceptance of out-of-wedlock pregnancy removes *Roe*'s concern about helping single mothers avoid social stigma. Finally, pregnancy no longer impedes workplace participation to the extent that it did when *Roe* issued. Given the erosion of interests used to justify the construction of an abortion right, this Court should extinguish that judicially created right.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, all parties consented to this brief's filing.

II. In seeking to balance competing interests, *Roe* evaluated the state's interest in *potential* life. Yet established science shows that abortion ends actual—not potential—human life. Because it misapprehended the state's true concern, the Court failed to balance the competing interests properly. That critical error provides an independent ground to overrule *Roe* because protecting actual human life is a compelling reason to prohibit abortion.

III. The viability standard, which this Court has modified since *Roe*, is unworkable and arbitrary. Under this Court's jurisprudence, whether a state has constitutional authority to protect an unborn child—and whether that child will live or die—will vary from one abortion provider to another given differing views about the viability standard's vague meaning. That is unworkable. And the viability standard's arbitrary nature is illuminated by its troubling results. The unborn children Mississippi seeks to protect in this case have developed to the point where, like "viable" children, they are almost certain to survive through birth if not aborted first. It is irrational to deny protection to the former and grant it to the latter, especially when both are similarly situated in terms of their probability of living outside the womb *eventually*.

Thus, *Roe* and its progeny "can and should be overruled consistently with [this Court's] traditional approach to *stare decisis* in constitutional cases." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

ARGUMENT

Because it acted apart from the Constitution, the *Roe* majority had to create "judicial legislation" by engaging in "conscious weighing of competing factors." *Roe v. Wade*, 410 U.S. 113, 173-74 (1973) (Rehnquist, J., dissenting). While this departure from the Constitution warrants correction, even *Roe*'s efforts to weigh competing factors fall short. Legal and factual developments have undercut the strength of factors used to support abortion. And *Roe* failed to recognize the state's interest in protecting actual human life. Thus, a right to abortion—especially when determined by the unworkable and irrational viability standard—is not "consistent with the relative weights of the respective interests involved." *Id.* at 165 (opinion of the Court).

I. *Roe* created an abortion right to insulate women from burdens that are greatly diminished or even nonexistent today.

In inventing a right to abortion, *Roe* considered "the demands of the profound problems of the *present day*." *Roe*, 410 U.S. at 165 (emphasis added). It concluded that the burdens then-associated with pregnancy and childrearing required an alternative: abortion. *See id.* at 153. But "the Court decided [*Roe*] against a very different legal and economic backdrop" than we have today. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2483 (2018).

In the nearly fifty years since *Roe*, changes in law and societal norms have significantly reduced—and, in some cases, entirely removed—many burdens that *Roe* sought to address. *See Roe*, 410 U.S. at 153.

These "factual and legal" developments have "'eroded' the decision's 'underpinnings.'" *Janus*, 138 S. Ct. at 2482 (citation omitted).

A. Childrearing responsibilities are now easily avoidable without abortion.

In explaining the perceived need for abortion, *Roe* focused largely on the burdens associated with childrearing after birth. Raising an unwanted child, the Court feared, could create "a distressful life and future" for a woman. *Roe*, 410 U.S. at 153. Her "[m]ental and physical health may be taxed by child care," and she may be "unable, psychologically and otherwise, to care for" her child. *Id.* These concerns persisted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Some thought women needed an abortion option to exercise "basic control over [their] li[ves]" given motherhood's "dramatic impact on a woman's educational prospects, employment opportunities, and self-determination." *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Indeed, for many abortion supporters, allowing a woman to reduce the duration of her pregnancy is not the "overriding" concern. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 383 (1985). Rather, the driving motivation is often to offer abortion as an antidote to childrearing responsibilities seen as threatening "a woman's autonomous charge of her full life's course." *See id.* at 382-83; *see also Doe v. Bolton*, 410 U.S. 179, 214 (1973) (Douglas, J., concurring) ("[C]hildbirth may deprive a woman of her preferred lifestyle and force

upon her a radically different and undesired future.").

The concern about post-birth responsibilities that fueled *Roe*'s outcome also motivates many abortion decisions. Indeed, the difficulties involved in caring for a child after birth—not the burdens of pregnancy itself—are foremost in the minds of the vast majority of women turning to abortion. In one study surveying why women abort their children, "the two most common reasons" women provided were (a) "having a baby would dramatically change my life" (74%) and (b) "I can't afford a baby now" (73%). Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, Persp. on Sexual & Reprod. Health, Sept. 2005, at 110, 112, https://bit.ly/2Wd2dPj. In another study, the reason "most often given for having an abortion" was "unreadiness to parent." *Id.* at 110.

Today, however, the post-birth burdens that many use to justify abortion can be eliminated quickly and easily *without* abortion. Specifically, under what many call "safe haven" or "baby Moses" laws, mothers can relinquish their children at certain safe locations shortly after birth. Children's Bureau, U.S. Dep't of Health and Human Servs., *Infant Safe Haven Laws* 1-3 (2016), https://bit.ly/370gcdC. The process is fast and free and allows anonymity. *See id.* It ensures the safety of infants. It gives loving couples a chance to realize their long-awaited dream of welcoming a baby into their hearts and homes.[2] And it provides mothers a way to put

[2] The opportunity to adopt infants is "so rare" that many "wait years and pay tens of thousands of dollars" to do so. Megan

childrearing responsibilities behind them almost instantaneously without investing time in the more complex, traditional adoption process.

When this Court decided *Roe* and *Casey*, safe-haven laws did not exist. It was not until 1999 that Texas became the first state to create a law establishing this life-saving plan. *Id.* at 1; Tex. Fam. Code Ann. § 262.301 *et seq*. Safe-haven laws proliferated, and now every state offers women this option. Children's Bureau, *supra*, at 2.

The specifics of safe-haven laws vary by state, but they uniformly provide mothers an opportunity to relinquish their unharmed, newborn infants at no cost and without revealing their names. *See* Thomson Reuters, *50 State Statutory Surveys: Safe Haven Laws*, 0080 SURVEYS 2 (May 2021) (providing citations to, and information about, each state's safe-haven law). Every state allows mothers to leave their infants with certain medical professionals, often at hospital emergency rooms. *Id.* Many states also provide a more expansive array of safe-haven locations, such as fire departments, police stations, and even churches. *Id.* In every state, a mother has at least seventy-two hours after birth to

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McArdle, *The Adoption Turnaround*, Bloomberg (June 13, 2014), https://bloom.bg/2WddS0z. There is "little expectation that relinquishment rates will rise to meet the current level of demand." Jo Jones, *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, Nat'l Ctr. for Health Statistics 2 (Aug. 2008), https://bit.ly/2Ve1sF6. Tragically, "countless lives" that adoptive families would have welcomed with joy "have been cut short in utero instead." Ross Douthat, *The Unborn Paradox*, N.Y. Times (Jan. 2, 2011), https://nyti.ms/3kSIgaR.

relinquish her child, but many states provide more time, such as a week or thirty days. *Id.*

Given the importance of safe-haven laws, some states have expanded the scope of their own laws as recently as this year. For instance, Arizona just extended the post-birth period during which a mother can relinquish her child from seventy-two hours to thirty days. 2021 Ariz. H.B. 2410 (effective Sept. 29, 2021). And Louisiana will now allow certain emergency facilities to install locking, alarmed devices in which mothers may leave their babies. 2021 La. H.B. 218 (effective Aug. 1, 2021).[3]

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As families nationwide attended high-school graduation ceremonies this summer, one Texan used her graduation speech to argue that abortion must be available for women to achieve their "hopes and aspirations and dreams." Bill Chappell, *High School Valedictorian Swaps Speech to Speak Out Against Texas' New Abortion Law*, NPR (June 3, 2021), https://n.pr/2Ty2trc. Not far from her location, another Texan graduated and reminded us that there is a better way than abortion. He did not remind us with a speech, but with his life. Because as an infant, that happy graduate was left at a fire station under Texas's safe-haven law. Sarah Bahari, *Abandoned at an Arlington Fire Station 18 Years Ago, a Young Man Graduates from High School*, Dallas Morning News (May 27, 2021), https://bit.ly/3BFkvZW. His biological mother presumably went

[3] Such devices have seen successful use in other states. *See, e.g.*, Holly V. Hays, *Safe Haven Baby Boxes: What to Know About Surrendering Infants in Indiana*, Indianapolis Star (June 17, 2021), https://bit.ly/3BCUMRI.

on to pursue her hopes and dreams. Critically, she did so without destroying her son's life and future—which the college-bound graduate hopes will include joining the White House press corps. *Id.*

The existence of safe-haven laws undermines much of *Roe*'s justification for abortion. Women now have another option. They can chart their own course, unencumbered by the burdens of raising a child or the trauma of killing one via abortion. With a significant piece of *Roe*'s already-shaky footing now missing—along with any reliance interest in the availability of abortion to avoid raising an unwanted child—*Roe* should be overruled.

B. Unwed pregnancy no longer causes devastating social stigma.

Today, it is easy to forget that sexual mores once made many consider out-of-wedlock pregnancy "a fate worse than death." Kristin Luker, *Dubious Conceptions: The Politics of Teenage Pregnancy* 95 (1996). That was a common view when this Court decided *Roe*.

In the mid-1960s, one journalist described unwed mothers as "perhaps the most despised minority." *Id.* at 96 (citations omitted). In 1970, only about one in ten Americans thought that having children outside of marriage should even be *legal*, much less socially acceptable. *Id.* at 95. Given that view, if an unwed student became pregnant, schools often thought it best to expel her to provide "an object lesson in the wages of sin" and keep her from "'contaminating' the rest of the girls." *Id.* at 96

(citation omitted).[4] Such ostracism occurred in other spheres of life as well. In a 1970 article, a woman shared a personal story illuminating some of the ways that unwed motherhood could harm one's social standing. *Id.* at 97. Because she was unwed and pregnant, her employer fired her for "gross personal misconduct." *Id.* (citation omitted). Her status even prompted a company to refuse to deliver diapers to her home, and no "legitimate newspaper" would print her desired ad to find unwed mothers interested in forming a support group. *Id.*

Because of these prevailing social conditions, the Court thought that women might need abortion to protect against "the additional difficulties and continuing stigma of unwed motherhood." *Roe*, 410 U.S. at 153; *see also Doe*, 410 U.S. at 214-15 (Douglas, J., concurring) (arguing that without abortion, some women will "bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships"). This concern, however, does not carry the same weight today.

Since *Roe*, views about unwed motherhood have undergone a "revolutionary" transformation. Luker, *supra*, at 95. Even the current millennium has seen significant increases in social acceptance of unmarried women delivering and raising children. In 2002, 69.5% of women and 58.9% of men found that acceptable. That acceptance grew to 78.3% of women and 69.2% of men in surveys conducted from 2011 to 2013. Jill Daugherty & Casey Copen, *Trends*

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[4] Title IX, which prohibits sex discrimination in certain educational programs, became law only the year before *Roe* issued. *See* 20 U.S.C. § 1681.

in Attitudes About Marriage, Childbearing, and Sexual Behavior: United States, 2002, 2006-2010, and 2011-2013, Nat'l Ctr. for Health Statistics 3 (Mar. 17, 2016), https://bit.ly/3eVFTAu.

With shifts in cultural values, what was once a "shameful condition" is now seen as a "personal choice." Luker, *supra*, at 97. And that choice is quite popular. In fact, 40% of the babies born in 2019 were welcomed into a single mother's embrace. Joyce A. Martin et al., *Births: Final Data for 2019*, Nat'l Ctr. for Health Statistics 6 (Mar. 23, 2021), https://bit.ly/3BDOpha. This change in views about unwed pregnancy and motherhood eliminates another component of *Roe's* foundation.

C. Pregnancy no longer bars employment.

In advocating for abortion, counsel in *Roe* argued that "a woman, because of her pregnancy, is often not a productive member of society. She cannot work, she cannot hold a job . . . ." Transcript of Oral Argument at 47, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), https://bit.ly/3kPxySB. While such notions are foreign to many people today, pregnancy had very different implications when *Roe* issued. *Cf. Doe*, 410 U.S. at 214-15 (Douglas, J., concurring) (arguing that when abortion is unavailable, women must "forgo the satisfaction of careers").

In the early 1970s, students were not the only ones kicked off school grounds for being pregnant. Teachers were as well. It was not until the year following *Roe* that this Court struck down a public-school policy requiring a pregnant teacher to take unpaid maternity leave "beginning *five months* before the expected birth of her child." *Cleveland Bd.*

of Educ. v. LaFleur, 414 U.S. 632, 634, 651 (1974) (emphasis added).

Impediments to pregnant women's workplace participation extended beyond schools. For instance, a "labor market analyst" with "desk work" duties at the Texas Employment Commission faced a policy requiring her to leave her job—with no guarantee of reinstatement—at least two months before her baby's due date. *Schattman v. Tex. Emp't Comm'n*, 459 F.2d 32, 33 (5th Cir. 1972). The Fifth Circuit upheld that requirement, which was actually more generous than those imposed by certain other Texas agencies. *Id.* at 40-41. Indeed, at least one Texas agency "terminate[d] its women employees at the end of the fifth month of pregnancy and others at the end of six months." *Id.* at 40.

With such draconian workplace policies, pregnancy in the early 1970s could devastate careers. But that was then. The workplace has become much friendlier to pregnant women over the past five decades. Laws like the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, and the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6, have helped eliminate barriers that once made pregnancy and employment incompatible.

Pregnant women in the workplace are now ubiquitous. Among women who had their first baby between 2006 and 2008, almost 66% worked while pregnant. Lynda Laughlin, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008*, U.S. Census Bureau 5 (Oct. 2011), https://bit.ly/2TBBNpG. About 88% of those pregnant workers remained on the job into the last three months of pregnancy and nearly 65% worked during

their last month of pregnancy. *Id.* at 5-6. Moreover, most women who return to their jobs after giving birth are able to excel. For instance, "about 9 of 10 women returning to their prebirth employer" between 2005 and 2007 "earned around the same pay; and 97 percent were at the same or higher job-skill level as before their birth." *Id.* at 19.

Present realities show that women need not resort to abortion to participate in the workplace.

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These developments go "to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child." *McCorvey v. Hill*, 385 F.3d 846, 850-51 (5th Cir. 2004) (Jones, J., concurring) (mentioning safe-haven laws and arguments about changes in "the sociological landscape surrounding unwed motherhood"). And when "facts change, the law cannot pretend nothing has happened." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2178 (2020) (Gorsuch, J., dissenting); *see also Casey*, 505 U.S. at 862 (opinion of the Court) ("The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, . . . [which] not only justified but required the new choice of constitutional principle . . . .").

II. *Roe* errantly evaluated a state's interest in "potential" life instead of "actual" life.

Many good reasons exist to prohibit abortion. Protecting life is chief among them. Yet in proclaiming a newfound abortion right, *Roe* failed to consider the state's interest in protecting human life.

For the *Roe* Court, the fact that "a new human life is present from the moment of conception" was nothing but a "theory." *Roe*, 410 U.S. at 150. So rather than delve into a realm that it thought may implicate "theology" and "philosophy," it chose to consider a state's interest in "potential life" instead of *actual* life. *Id.* at 150, 159, 163.

Roe thought this approach was adequate because a state's interest in mere "potential life" qualifies as a "legitimate state interest." *Id.* at 150 ("[A] legitimate state interest . . . need not stand or fall on acceptance of the belief that life begins at conception . . . ."). However, a state's interest is stronger when *actual*—not simply *potential*—life is involved. By concluding that it "need not resolve the difficult question of when life begins" and only evaluating the state's interest in "potential life," *Roe* overlooked the true magnitude of the state's interest. *Id.* at 159, 163. That doomed *Roe*'s efforts to rule "consistent with the relative weights of the respective interests involved." *Id.* at 165; *see also* S. Subcomm. on Separation of Powers Rep. on the Human Life B., at 5 (97th Cong., 1st Sess.) [hereinafter S. Rep.], https://bit.ly/3iLQcIx ("Because it did not resolve whether unborn children are human beings, the Court could not make an informed decision . . . .").

Casey failed to correct *Roe*'s mistake. *Casey*, 505 U.S. at 871 (plurality) ("On the other side of the equation is the interest of the State in the protection of *potential* life." (emphasis added)). Instead, it embraced *Roe*'s view that the question of when human life begins is only a matter of theory and belief. *Id.* at 851 (opinion of the Court) (asserting that liberty entails "the right to define one's own

concept of existence . . . and of the mystery of human life"). Although *Casey* did at times refer to "life" instead of just "potential life" when discussing unborn children, it explained that the reference one accepts "depend[s] on one's beliefs." *Id.* at 852.

But determining when human life begins does not require theorizing. Science answers the question: "the life of a human being begins at conception, the time when the process of fertilization is complete." S. Rep., *supra*, at 7; *see also id.* at 9 (quoting a genetics professor and Mayo Clinic physician's testimony that "[t]heologians and philosophers may go on to debate the meaning of life or the purpose of life, but it is an established fact that all life, including human life, begins at the moment of conception" (citation omitted)). Because of this scientific understanding, even federal law recognizes the humanity of unborn children and punishes those who murder them outside the abortion context. *See* 18 U.S.C. § 1841 (noting circumstances in which one who "intentionally kills or attempts to kill [an] unborn child" shall be punished "for intentionally killing or attempting to kill a human being").

Lacking the window to the womb that science and technology now offer, *Roe* failed to appreciate the scientific reality that conception marks the start of a human life that develops with astonishing speed. *See generally* Brief for the American College of Pediatricians & the Ass'n of American Physicians & Surgeons as *Amici Curiae* in Support of Petitioners, *Dobbs v. Jackson Women's Health Org.* (No. 19-1392) (detailing human development before birth and explaining that knowledge of unborn life is far more advanced today than at the time of *Roe* or *Casey*).

This unfamiliarity with the significance of conception as the beginning of a new human life persisted. For instance, Justice Stevens, who joined the Court after *Roe*, argued that "a State has no greater secular interest in protecting the potential life of an embryo" than it has "in protecting the potential life of a sperm or an unfertilized ovum." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 569 (1989) (Stevens, J., concurring in part and dissenting in part). That is because he was "not aware of any secular basis for differentiating" between destroying an individual sperm cell before conception and a human zygote after conception. *See id.* at 566. Both were equally only "*potential* life" to him. *Id.* at 569 (emphasis added).

Justice Stevens correctly observed that individual sperm and egg cells represent only "potential life." *Id.* at 569. In contrast, however, "an individual human life begins at conception, when egg and sperm join to form the zygote." S. Rep., *supra*, at 10 (citation omitted). It is then, with "the necessary total of 46 chromosomes," that "a unique individual"—"unlike any that has been born before and unlike any that will ever be born again"—begins to exist. *Id.* at 7 (citation omitted); *see also* Jérôme Lejeune*, 21 Thoughts,* Jerome Lejeune Foundation, https://bit.ly/2Ve8VUY ("The genetic makeup of a human being is complete from the moment of fertilization . . . .).

Had Justice Stevens understood that truth and its implications, he would have realized that there is a "secular basis for differentiating" between a sperm cell and a newly formed, distinct human being existing in his or her earliest stage of development as a zygote. *Webster*, 492 U.S. at 566. And had *Roe*

understood the scientific fact that life begins at conception, it would have considered the state's interest in protecting *actual*, not just *potential*, human life.

By failing to evaluate a key state interest—the interest in actual life—*Roe* failed to recognize states' legitimate power to protect human life in the womb at all stages of development. *Casey* perpetuated the error. This Court should correct it, especially in light of the scientific and technological advances showing the undeniable existence, beauty, and complexity of human life in the womb.

III. The viability standard, which has changed since *Roe*, is unworkable and arbitrary.

This Court should reject the unfounded notion—rooted in the failure to recognize that human life begins at conception—that the Constitution creates a timeframe during which the powerful may kill the vulnerable via abortion. At the very least, it should overrule *Roe* and *Casey*'s view that the timeframe extends until a child is "viable" outside the womb. *See Casey*, 505 U.S. at 879 (plurality) ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

A. *Casey*'s revised viability standard is unworkable, allowing doctors to abort children who are already sufficiently developed to live outside the womb.

Ever-changing standards are a common theme in this Court's abortion jurisprudence. The viability standard is no exception. *Casey* purported to retain

Roe's viability standard while jettisoning its trimester framework. *Casey*, 505 U.S. at 878-79 (plurality). But *Casey*'s viability standard is different from *Roe*'s—and even more unworkable.

Under *Roe*, a "viable" child in utero was one who was "*potentially* able to live outside the mother's womb, albeit with artificial aid." *Roe*, 410 U.S. at 160 (emphasis added). Six years later, this Court said that an unborn baby was "viable" if he or she had a "reasonable likelihood" of "sustained survival outside the womb, with or without artificial support." *Colautti v. Franklin*, 439 U.S. 379, 388 (1979). Now, under *Casey*, an unborn baby is "viable" at "the time at which there is a *realistic possibility* of maintaining and nourishing a life outside the womb . . . ." *Casey*, 505 U.S. at 870 (plurality) (emphasis added). So to be eligible for protection from death by abortion, a child's requisite probability of survival outside the womb changed from a mere possibility ("potentially") to a "reasonable likelihood" to a "realistic possibility."[5]

With these changes to the viability standard, states may now have less authority to protect unborn children than they did under *Roe*. And greater uncertainty and subjectivity is involved when viability depends on a *realistic possibility* of survival (*Casey*) rather than just the *possibility* of survival (*Roe*). Moreover, "*Casey*'s viability standard [is] more difficult" to apply today given "medical and

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[5] To Justice White, *Colautti* "tacitly disown[ed] . . . the 'potential ability' component of viability as that concept was described in *Roe*." *Colautti*, 439 U.S. at 406-07 (White, J., dissenting). "Potential ability," he explained, "is ability '[e]xisting in possibility, not in actuality.'" *Id.* at 402 (alteration in original) (citation omitted).

technological advances" and "increasing knowledge of prenatal life since the Court decided [*Roe*] and *Casey*." *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (per curiam).

A recent news story helps illustrate the problem. Richard Hutchinson was born "at a gestational age of 21 weeks[,] 2 days," weighing just under twelve ounces. Adam Millward, *World's Most Premature Baby, Given 0% Odds of Survival, Celebrates First Birthday*, Guinness World Records (June 11, 2021), https://bit.ly/3y88w54. At Children's Minnesota, the Neonatal Intensive Care Unit (NICU) team gave Richard "a 0% chance of survival." *Id.* Fortunately, Richard defied the odds. He celebrated his first birthday this year, and Guinness World Records recognized him as "the most premature baby to survive." *Id.*

Things would have been very different if Richard had parents who wanted to abort him instead of protect him. No state could have saved him from a brutal death via abortion on June 5, 2020—his actual *birth* day. *Id.* After all, if doctors specializing in preserving life had no hope for Richard, neither would a doctor who specializes in ending lives. Under this Court's jurisprudence, Richard's inspiring story could have instead been one of being "t[orn] apart . . . piece by piece." *Gonzales v. Carhart*, 550 U.S. 124, 135-36 (2007).

Given Richard's example of strength and resilience, we must consider the ability of states to protect similarly situated children. Under *Roe*'s viability standard, a state could presumably protect an unborn child with Richard's birth age, weight, and other developmental indicators, because we now know that such children are "potentially" able to

survive outside the womb. *Roe*, 410 U.S. at 160. But would an abortion provider say that the child has a "realistic possibility" of surviving, such that he or she is protectable under *Casey*'s viability standard? *Casey*, 505 U.S. at 870 (plurality). Unlikely.

In many instances, the "probability" of an unborn child's survival outside the womb "can be determined only with difficulty." *Colautti*, 439 U.S. at 396. To start, simply determining the child's age can be challenging. During the stages of development when viability is often disputed, ultrasound dating can be off by two weeks. Am. Coll. of Obstetricians & Gynecologists' Comm. on Obstetric Practice, *Committee Opinion No. 700*, at 3 (May 2017), https://bit.ly/3zvqwGK ("Between 22 0/7 weeks and 27 6/7 weeks of gestation, ultrasonography dating has an accuracy of ± 10-14 days." (citation omitted)). Thus, which children live and which children die may turn on a testing error.

Even if a doctor accurately determines the child's age, "different physicians equate viability with different probabilities of survival." *Colautti*, 439 U.S. at 396. Some physicians even "refuse to equate viability with any numerical probability at all." *Id.* Thus, "it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability." *Id.*

Put differently, we can expect a state's ability to protect unborn children—and the scope of the current abortion right—to vary depending on the subjective views of the doctor consulted for an abortion. *See id.* at 388-89, 396-97 (explaining that the viability determination rests on the "judgment of the attending physician" and that states may not set a viability line using "weeks of gestation or fetal

weight or any other single factor"). Exacerbating this disparity is the reality that some abortion providers will not be current on advances in neonatal treatment to make an informed judgment. *See id.* at 391-92 (acknowledging that an assessment of viability based on the "judgment, skill, and training of the attending physician" may differ from "the perspective of . . . a panel of experts," and a typical doctor "may not have the skills and technology that are readily available at a . . . large medical center").

The "line between" the viable and unviable—the protectable and the helplessly vulnerable—is "impossible to draw with precision." *See Janus*, 138 S. Ct. at 2481. Because the viability standard is amorphous, some unborn children who are in fact ready to live outside the womb will still suffer death by abortion. For decisions about who lives and who dies, this Court should not maintain such a nebulous, subjective, unworkable standard. *See id.* (listing the "workability of the precedent" as a "relevant consideration in the *stare decisis* calculus").

B. The viability standard is arbitrary and denies protection to certain second-trimester children who, like "viable" unborn babies, will almost certainly live outside the womb eventually.

It is arbitrary to conclude that, for purposes of constitutional analysis, something "magical" occurs once a child may be able to live outside his or her mother's womb. *Casey*, 505 U.S. at 989 n.5 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also* Randy Beck, *The Essential Holding of* Casey*: Rethinking Viability*, 75 UMKC L. Rev.

713, 723-24 (2007) (quoting Justice Blackmun's memorandum accompanying a draft of *Roe*, where he wrote that making the critical point the end of the first trimester "is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary" (citation omitted)). After all, an unborn child is a living human "while within the womb, whether or not [he or she] is viable outside the womb." *See Gonzales*, 550 U.S. at 147. Moreover, *Roe* and *Casey* failed to provide any good reason to think that a child's worth varies with the environment he or she needs to survive. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting) (explaining that an unborn child's character "does not change at the point of viability"); *see also Casey*, 505 U.S. at 989 n.5 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond [a] conclusory assertion . . . .").

States should be empowered to protect human life from conception. Yet even if one operates from the troubling premise that human life is uniquely valuable once outside the womb, it remains irrational to permit states to protect only those who have a "realistic possibility" of surviving if birthed at *that moment*. *Casey*, 505 U.S. at 870 (plurality). Instead, it is more sensible to allow states to protect at least those who may live outside the womb *eventually*. *See Thornburgh*, 476 U.S. at 795 (White, J., dissenting) ("The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb.").

Detection of a baby's normal heartbeat during the first trimester of pregnancy indicates that the child is very likely to survive through birth—if not aborted first. *See* Charlotte Lozier Institute, *Fact Sheet: Fetal Survival and Risk of Pregnancy Loss* 2-3 (July 2021), https://bit.ly/3kSv99H (summarizing results of various studies, including one showing that "a heartbeat at 6-8 weeks' gestation correlated with a live birth rate of 98% in normal pregnancies without intervention"). Babies who survive to the second trimester of pregnancy are almost certain to survive through birth. *See id.* at 5. Notably, even babies with an abnormally slow heart rate at or before seven weeks' gestation—which is associated with a significant probability of first-trimester death—have about a 98% chance of surviving through birth if they reach the second trimester. Peter M. Doubilet et al., *Long-Term Prognosis of Pregnancies Complicated by Slow Embryonic Heart Rates in the Early First Trimester*, 18 J. Ultrasound Med. 537, 539 (1999).

In this case, the unborn children Mississippi seeks to protect have survived into the second trimester and do not have a "life-threatening physical condition that . . . is incompatible with life outside the womb." Miss. Code Ann. § 41-41-191(3)(h), (4)(b) (Pet. App. 69a-70a). If protected from abortion, they are almost certain to survive through birth. *See* Charlotte Lozier Institute, *supra*, at 5; Doubilet, *supra*, at 539. Thus, Mississippi acted to protect children who are similarly situated to *Casey*'s "viable" children with respect to their probability of living outside the womb eventually. It is untenable to bar Mississippi from providing that protection.

The viability standard is irrational in its theory, unworkable in its application, and cruel in its impact. This Court should reject it. And rejecting that "central holding of *Roe*," *Casey*, 505 U.S. at 879 (plurality), provides another reason to abolish *Roe*'s judicially created right to kill children in the womb. States must be able to protect human life from its inception—the moment of conception.

* * *

Although lacking support "in the language or history of the Constitution," this Court fashioned and declared a right to abortion in "an exercise of raw judicial power." *Doe*, 410 U.S. at 221-22 (White, J., dissenting). In doing so, it interpreted the document revered for safeguarding life and liberty as actually banning state protection for the most innocent and vulnerable.

In its extraconstitutional action, the Court sought to balance various interests. But it overlooked the government's interest in protecting *actual* human life and gave significant weight to certain concerns that are much less significant—or entirely absent—today. It also created an arbitrary, unworkable division between those in the womb whom the state may protect from death and those it may not.

Nearly fifty years after *Roe*, abortion's domestic death toll is staggering. It is estimated to exceed the number of lives we would lose if everyone in these states died tomorrow: Arizona, Arkansas, Colorado, Idaho, Iowa, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota,

Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming.[6]

It is past time to end the destruction of human life and the distortion of our constitutional order. This Court should overrule *Roe* and its successor cases so that states can perform their duty to protect human life at all stages, beginning at conception.

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[6] In 2019, an estimated 62,175,662 people were residents of the eighteen states listed. U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019* (Dec. 2019), https://bit.ly/3zzv7Yk. An estimated 62,502,904 children died via abortion in the United States between 1973 and 2020. Nat'l Right to Life Educ. Found., *Abortion Statistics: United States Data and Trends*, https://bit.ly/2V8HFXY.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

SAMUEL D. GREEN
Counsel of Record
REASON FOR LIFE
P.O. Box 500040
Palmdale, CA 93550
(661) 524-5770
sgreen@reasonforlife.org

JONATHAN BERRY
MICHAEL BUSCHBACHER
JORDAN SMITH
BOYDEN GRAY & ASSOCIATES
801 17th Street NW, Suite 350
Washington, DC 20006
(202) 955-0620
berry@boydengrayassociates.com

Counsel for Amicus Curiae

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