No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., 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 *AMICUS CURIAE* YALE LAW SCHOOL INFORMATION SOCIETY PROJECT IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

Amicus is the Information Society Project (ISP) at Yale Law School,[2] an intellectual center exploring the implications of new technologies for law and society. The ISP focuses on a wide range of issues such as the intersections between the regulation and dissemination of information, health policy, and privacy concerns. ISP initiatives include the Program for the Study of Reproductive Justice (PSRJ) and the Reproductive Rights and Justice Project legal clinic. Many of the scholars associated with the ISP and PSRJ have special expertise in First, Fourth, and Fourteenth Amendment jurisprudence, including the impact of this jurisprudence on reproductive rights and justice. These scholars share an interest in ensuring that the constitutionality of abortion regulations is determined in accordance with settled Fourteenth Amendment principles.

SUMMARY OF ARGUMENT

No argument is necessary to establish that the Mississippi law banning previability abortions after fifteen weeks of pregnancy ("HB 1510" or "the Act") violates *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992). The law was designed as a

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[1] Blanket consents to Amicus briefs have been filed by the parties. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or *amic*us's counsel made a monetary contribution to the preparation or submission of this brief.

[2] The Information Society Project does not represent the institutional views of Yale Law School, if any.

direct attack on these fifty-year-old precedents and Respondents follow the script, now asking the Court to overturn *Roe, Casey,* and their progeny in order that the Mississippi law may stand. *See* Br. for Pet'rs 1–5, 14–31. The only question in this case is whether the Court will adhere to those precedents.

Amicus writes here to shine light on an aspect of the plurality decision in *Casey* that has not been given its due. The Court in *Casey* recognized that the right to abortion stems from and is fundamental to the liberty right, and that the right to liberty guaranteed to and experienced by men in this country must be guaranteed to and experienced by women on equal terms. Without the right to abortion protected by the equal right to liberty, women as a group will never achieve status in the United States equal to men. *Casey*, 505 U.S. at 856. Accordingly, any analysis of the constitutionality of the abortion ban under *Casey* can and should include consideration of the impact of the ban on the ability of women to achieve full equality.

In this case, examination of the ban's impact on women's equality, such as that conducted in the Amicus Brief submitted in support of Respondents by Equal Protection Constitutional Law Scholars, [3] establishes that the ban reflects and promotes stereotypes of women, both that their primary role should be to bear and raise children, and that they

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[3] *See* Brief of Equal Protection Constitutional Law Scholars as Amici Curiae Supporting Respondents at Section II, *Dobbs v. Jackson Women's Health Organization,* No. 19-1392 (U.S. Sept. 20, 2021 (hereinafter "Equality Scholars' Brief"). To reduce repetition of arguments, the Equality Scholars' analysis in Section II of their brief is incorporated herein.

should abandon their right to bodily integrity and decisional autonomy to do so, elevating the status of a previable fetus above their own, and relegating them to status as second-class citizens. This straitjacket in turn deprives women of their dignity, not to mention access to educational and professional opportunities equal to those of men. The Act is therefore also unconstitutional under *Casey* because it denies women their equal right to liberty. *See id.*

ARGUMENT

I. The Impact of HB 1510 on Women's Ability to Achieve Full Equality Can and Should be Considered in an Analysis of its Constitutionality Under *Casey* and *Roe*.

Kenneth Karst wrote in 1977 that *Roe* was a "woman's role" case that "involve[s] some of the most important aspects of a woman's independence, her control over her own destiny," and her own "social roles."[4] Focusing on the equality aspects of the right requires a different focus of review, moving away from a balancing of woman versus fetus towards an examination of abortion as "an issue going to women's position in society in relation to men."[5] Karst's view was shared and expanded upon by numerous scholars and eventually adopted by the Court.[6]

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[4] *See* Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 57–58 (1977).

[5] *Id.* at 58.

[6] *See, e.g.*, Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical at Section II, The Supreme Court Review (forthcoming 2021); Catharine A. MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade, *in Feminism Unmodified:*

By the mid-1980s, the Court began to make explicit what was implicit in *Roe* itself—the right to abortion was fundamental to achieving equality for women. In *Thornburgh v. American College of Obstetricians & Gynecologists,* Justice Blackmun wrote for the Court:

> A woman's right to make that choice [to have an abortion] freely is fundamental. Any other result, in our view, would protect inadequately a central *part of the sphere of liberty that our law guarantees equally to all.*

476 U.S. 747, 772 (1986) (emphasis added), *overruled in part on other grounds by Casey,* 505 U.S. at 870, 882–83 (overruling part of *Thornburgh* striking mandatory information requirements).[7] In *Casey*, the Court picked up this thread noting that the liberty right to abortion implicated equality guarantees and recognizing that the ability to control their own reproductive lives facilitated "[t]he ability of women to participate equally in the economic and social life of

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Discourses on Life and Law 93, 93–102 (1987); Sylvia A. Law, *Rethinking Sex and the Constitution,* 132 U. Pa. L. Rev. 955 (1984).

[7] A century ago, in *Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525, 554 (1923), *overruled in part by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court held that after adoption of the Nineteenth Amendment adult women had an equal liberty right to contract and were "legally as capable of contracting for themselves as men."). The *Adkins* Court held that "[i]n view of the great—not to say revolutionary—changes which have taken place since [*Muller v. Oregon*], in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these [sex] differences have now come almost, if not quite, to the vanishing point." *Id.* at 553.

the Nation." *Casey*, 505 U.S. at 856; *see also id.* at 898 (implicating gender equality by rejecting spousal notice requirement as embodying a "repugnant" and outmoded view of marriage). The Court thus recognized the relationship between regulation of reproduction and sex inequality, explaining that laws restricting abortion that are grounded in and further entrench stereotypes about women are unconstitutional. *Casey* famously celebrated that:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.

505 U.S. at 856.

Justice Blackmun stressed this aspect of the decision in his *Casey* concurrence, forcefully declaring that abortion regulations "implicate constitutional guarantees of gender equality." *Id.* at 928 (Blackmun, J., concurring in part and dissenting in part). Abortion restrictions "compel women to continue pregnancies," "conscript[]" their bodies into the service of the state, "forc[e]" them to "suffer the pains of childbirth, and in most instances, provide years of maternal care." *Id.* Justice Blackmun also highlighted the state's failure to compensate women for forced childbearing and caretaking as proof of the state's assumption that women "owe this duty as a matter of course." *Id.* He then connected the dots, tying these forms of state coercion and stereotyping to the Equal Protection cases, declaring "[t]his assumption—that women can

simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause." *Id.* (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–26 (1982); *Craig v. Boren,* 429 U.S. 190, 198–99 (1976)); *see also id.* at 928 n.4. Justice Blackmun highlighted the plurality opinion's commonalities with his analysis, underlining the plurality's recognition that "these assumptions about women's place in society 'are no longer consistent with our understanding of the family, the individual, or the Constitution.'" *Id.* at 928–29 (quoting *Casey*, 505 U.S. at 897).

More recently, Justice Ginsburg emphasized the importance of consideration of sex equality in any analysis of an abortion restriction. Joined by three Justices, Justice Ginsburg noted in *Gonzales v. Carhart* that what is "at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny.'" *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 869). Rather than citing to Equal Protection jurisprudence, Justice Ginsburg cited provisions in the due process liberty jurisprudence rejecting stereotyping, *id*. (citing *Casey* at 852, 896–97), and reaffirming women's right "to participate equally in the economic and social life of the Nation," *Casey*, 505 U.S. at 856, a right which is "intimately connected to 'their ability to control their reproductive lives.'" *Gonzalez*, 550 U.S. at 171 (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 856). She summarized:

> [L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather,

> they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.

Id. at 172 (citing *inter alia* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992)).

Reiterating this point, Justice Sotomayor observed that "[t]his country's laws have long singled out abortions for more onerous treatment than other medical procedures that carry similar or greater risks," imposing an "unnecessary, irrational, and unjustifiable undue burden on women seeking to exercise their right to choose." *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 585 (2021) (Sotomayor, J., dissenting) (citing *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting)); *see also id.* at 582 (noting that these burdens are often most severe for low-income women and women of color).

As the Ninth Circuit echoed, rules against paternalism and sex-stereotyping "are evident in the *Casey* opinion, and should be considered by courts assessing the legitimacy of abortion regulation under the undue burden standard." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 549 (9th Cir. 2004).

II. Because the Act Denies Women Their Equal Right to Liberty, it is Unconstitutional under *Casey*.

The Legislature claimed that HB 1510 was enacted to improve women's health. Every reputable medical organization and relevant textbook exposes the

absurdity of that claim.[8] Perhaps in recognition that this is a bald-faced lie designed to mask an attack on abortion that puts women's health in grave danger, the Petitioners have backed away from this claim.

Instead, the Petitioners now double down on the claim that the law is designed to protect fetal life, not in a way sanctioned by this Court's precedents, but in a way that prevents previability abortions, values the fetus more than the woman's health—not to mention her control over her destiny—and forces the woman into a childbearing (and likely childrearing) role against her will. The law—like many before it restricting access to contraception and abortion—reflects a hostility to women who decide against motherhood at a particular time. This hostility is grounded in the premise that a woman's natural role is to be a mother; that motherhood takes precedence over a woman's participation in the workforce, her health, and even her life; that her sexual activity should be in service of motherhood alone,[9] and that a

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[8] *See, e.g.*, Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215 (2012) (citing numerous studies and concluding that the risk of death associated with childbirth is approximately 14 times higher than with abortion).

[9] Stephanie Kirchgaessner & Jessica Glenza, *Women Can Say No to Sex if* Roe *Falls, Says Architect of Texas Abortion Ban,* The Guardian (Sept. 17, 2021), https://www.theguardian.com/us-news/2021/sep/17/texas-abortion-ban-jonathan-mitchell-supreme-court-brief; Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century,* 47 Conn. L. Rev. 971, 977 (2015) (opposition to contraceptives and abortion "is revealed here as a pretext for promoting a familiar, if outmoded, moral view that sexual

woman's interests are less important than the interest of a fertilized egg, embryo or fetus. It reflects and entrenches unfounded stereotypes about women. *See Casey*, 505 U.S. at 856. Moreover, it is well-established that making abortions illegal and/or more difficult to access does not reduce the overall number of abortions and thus does not protect potential life; it drives abortion underground, resulting in an increase in illegal or clandestine abortions.[10]

The stereotyping has a more sinister twist in this case which reinforces the view that the State has little actual concern for the lives and health of women and healthy pregnancies.[11] Mississippi pushes women to remain pregnant under frightful conditions. Mississippi has one of the highest pregnancy-related maternal death rates in the United States: in 2010–2012, the maternal death rate was 39.7 deaths per

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intercourse is immoral if undertaken for pleasure alone, without the risk of pregnancy"); Helen M. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379, 380 (2013) (claiming that "contraception affects the 'marketplaces' for sex and marriage" by "lowering the 'price' of sex, by separating sexual intercourse from the understanding that sex makes children")

[10] Guttmacher Inst., *Unintended Pregnancy and Abortion Worldwide* (July 2020), https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide (discussing empirical studies from around the globe).

[11] Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—Why it Matters in Law and Politics*, 93 Ind. L.J. 207, 216 & n.35 (2018).

100,000 live births overall.[12] The statewide maternal death rate is almost three times the national average of 14 per 100,000, which itself is far higher than other industrialized nations.[13] But even more appalling is the maternal death rate for black women was a shocking 54.7 deaths per 100,000 live births,[14] similar to maternal death rates in Iraq, and twice as high as the rates in the Gaza Strip and West Bank.[15]

Mississippi also has the highest infant mortality rate in the country.[16] In fifteen Mississippi counties, the infant mortality rate is over 12.4 per 1,000 live births[17]—more than twice the national average. The state also has the highest rates for low birth weight and preterm birth and cesarean section.[18] Nearly one in seven infants in Mississippi is born preterm, and

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[12] Miss. State Dep't of Health, *Pregnancy-Related Maternal Mortality, Mississippi, 2011-2012* at 1, http://msdh.ms.gov/msdhsite/_static/resources/5631.pdf.

[13] *See* Cent. Intel. Agency, *Maternal Mortality Rate*, The World Factbook (2015), https://www.cia.gov/the-world-factbook/field/maternal-mortality-rate.

[14] *Id.*

[15] *Id.*

[16] *See* Ctrs. for Disease Control & Prevention, *Infant Mortality Rates by State* (Mar. 12, 2021), https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant_mortality.htm; *see also* Ctrs. for Disease Control & Prevention, *Stats of the State of Mississippi* (Apr. 11, 2018), https://www.cdc.gov/nchs/pressroom/states/mississippi/mississippi.htm.

[17] *See* Miss. State Dep't of Health, Off. of Health Data & Rsch., *Infant Mortality Report 2017* at 2 (2017), https://msdh.ms.gov/msdhsite/_static/resources/7501.pdf.

[18] *See* Ctrs. for Disease Control & Prevention, *supra* note 15.

this number has been increasing.[19] Mississippi was one of only six states that scored an "F" on the 2019 report card on preterm births released by March of Dimes, a national organization dedicated to improving health outcomes of mothers and babies.[20] Preterm birth or low birth weight is associated with increased risks to health, including breathing problems, such as respiratory distress syndrome, bleeding in the brain, patent ductus arteriosus (a failure of the proper closing of an opening between two major blood vessels leading from the heart), retinopathy, and necrotizing enterocolitis (a dangerous condition of the intestinal tract).[21]

Despite these dismal maternal and infant health outcomes, the state has nonetheless declined to take steps that could improve maternal and infant health. For example, Mississippi has declined to expand Medicaid, which would provide increased access to healthcare to many low-income mothers and children in a state with the sixth highest percentage of uninsured residents out of all fifty states, despite a federal reimbursement rate of at least ninety percent.[22] Mississippi also declined to implement a

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[19] *See Infant Mortality Report 2017*, *supra* note 16.

[20] *See* March of Dimes, *2019 March of Dimes Report Card* 63 (2019), https://www.marchofdimes.org/materials/MOD2019_REPORT_CARD_and_POLICY_ACTIONS_BOOKLETv72.pdf.

[21] March of Dimes, Low Birthweight (June 2021), https://www.marchofdimes.org/complications/low-birthweight.aspx.

[22] Ctrs. for Disease Control & Prevention, *Uninsured at the Time of Interview for All Ages by State* (June 14, 2016), https://www.cdc.gov/nchs/pressroom/sosmap/nhis_insured/nhisunins

provisions of the American Rescue Plan that allowed states to receive federal funding to expand Medicaid coverage from sixty days post-partum to one year.[23] Adopting this expansion would have significant benefits for women in Mississippi, sixty-one percent of whom give birth on Medicaid.[24] The maternal mortality rate for post-partum complications also far exceeds the national average. Nationwide, approximately one-third of maternal deaths occur from post-partum complications. In Mississippi, post-

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ured.htm; Kaiser Fam. Found., *Status of State Medicaid Expansion Decisions: Interactive Map* (Sept. 8, 2021), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/.

[23] Usha Ranhi, Ivette Gomez & Alina Salganicoff, *Expanding Postpartum Medicaid Coverage*, Kaiser Fam. Found. (Mar. 9, 2021), https://www.kff.org/womens-health-policy/issue-brief/expanding-postpartum-medicaid-coverage/. *See also* Michael Ollove, *States Push to Extend Postpartum Medicaid Benefits to Save Lives*, PEW (May 5, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/05/05/states-push-to-extend-postpartum-medicaid-benefits-to-save-lives; Associated Press, *Mississippi: No Extension of Postpartum Medicaid Coverage*, U.S. News (Mar. 30, 2021, 9:05 PM), https://www.usnews.com/news/best-states/mississippi/articles/2021-03-30/mississippi-no-extension-of-postpartum-medicaid-coverage.

[24] Ctr. for Miss. Health Pol'y, *Postpartum Medicaid* 1 (2021), https://mshealthpolicy.com/wp-content/uploads/2021/02/Post-Partum-Medicaid-Feb-2021.pdf.

partum complications account for eighty-six percent of pregnancy-related deaths.[25]

Given the centrality of financial considerations in decisions about having children,[26] a state that truly wanted to protect potential life and reduce abortions would provide additional economic support to women who want to carry a pregnancy to term but lack the resources to care for a (or another) child. At the very least, the state could provide job protections to pregnant women, requiring employers to make reasonable accommodations that would allow pregnant workers to keep their jobs. But Mississippi, unlike the substantial majority of states, including Louisiana and Tennessee, has no law that either prohibits private employers from discriminating against pregnant women or requires private

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[25] Erica Hensley & Nick Judin, *Disrupted Care: Mississippi Legislature Kills Postpartum Medicaid Expansion, Affecting 25,000 Mothers Yearly*, Miss. Free Press (Apr. 2, 2021), https://www.mississippifreepress.org/10868/disrupted-care/; Miss. State Dep't of Health, *Mississippi Maternal Mortality Report 2013-2016* at 5 (2019), https://msdh.ms.gov/msdhsite/index.cfm/31,8127,299,pdf/MS_Maternal_Mortality_Report_2019_Final.pdf

[26] *See* M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC Women's Health 29 (2013) (employing data collected from 2008–2010); *cf.* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Persps. on Sexual & Reprod. Health 110 (2005) (describing a study that employed different questions and data from 2004 and found that 73% percent of women reported having an abortion because they could not afford having a baby).

employers to provide pregnancy accommodations.[27] In fact, Mississippi considered and declined to enact such a bill in 2019 and 2020.[28]

Nor does Mississippi take substantial steps to protect potential life by reducing the number of unplanned pregnancies and thus the need for abortions.[29] Unlike the majority of states, Mississippi does not require insurers to provide contraceptive coverage. [30] Mississippi also fails to adequately educate young people about how to avoid pregnancy, even though Mississippi has the third-highest teen birth rates in the United States—more than one and a half times the national average.[31] Instead of teaching

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[27] U.S. Dep't of Labor, *Employment Protections for Workers Who Are Pregnant or Nursing* (Oct. 2017), https://www.dol.gov/wb/maps/.

[28] *See* Miss. Legislature 2021 Regular Session, *Mississippi Legislature Measure Search*, http://www.legislature.ms.gov/legislation/measure-search/ (search "HB 809" in "Measure Number") (noting that HB 809, the Mississippi Pregnant Worker Fairness Act is "dead").

[29] Public health data demonstrates the relationship between improving contraceptive access and reducing abortions. Natalia E. Birgisson et al., *Preventing Unintended Pregnancy: The Contraceptive CHOICE Project in Review*, 24 J. Women's Health 349 (2015); Jeffrey F. Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 Obstetrics & Gynecology 1291 (2012).

[30] Kaiser Fam. Found., *State Requirements for Insurance Coverage of Contraceptives* (July 1, 2021), https://www.kff.org/other/state-indicator/state-requirements-for-insurance-coverage-of-contraceptives/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

[31] Ctrs. for Disease Control & Prevention, *supra* note 15.

adolescents how to use contraception, Mississippi explicitly bans educators from showing students how to use contraceptives.[32]

These policies, which Mississippi has shunned, would respect the autonomy of women. Instead, the State's failure to act reflects a devaluing of women and their families, exacerbates inequality, and further inhibits these women's ability to make significant progress towards equal citizenship. *See Casey*, 505 U.S. at 856; *United States v. Virginia*, 518 U.S. 515, 533–34 & n.12 (1996). Therefore, HB 1510 is unconstitutional for the additional reason that it denies women of their equal right to liberty contrary to *Casey* and *Roe*. *See Casey*, 505 U.S. at 856.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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[32] *See* Miss. Code. Ann. § 37-13-171(2)(d) ("In no case shall the instruction or program include any demonstration of how condoms or other contraceptives are applied.").