No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., STATE HEALTH OFFICER, 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* REPRODUCTIVE JUSTICE SCHOLARS SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The issue in this case is whether all pre-viability prohibitions on nontherapeutic abortions are unconstitutional. This case concerns a Mississippi law prohibiting nearly all abortions after 15 weeks of pregnancy. *Amici* are law professors who are scholars in the field of reproductive rights and justice. They have a shared interest in challenging laws that undermine the constitutional right to an abortion, recognizing that the abortion right is essential to a woman's ability to control the course that her life will take. Notably, as reproductive *justice* scholars, *Amici* appreciate that abortion access is a key element of racial justice, and they recognize that the denial of abortion access is a form of racial subordination. This brief sets forth *Amici*'s considered understanding of the constitutional guarantee of a right to an abortion, as established by the decisions of this Court, as well as *Amici*'s understanding of the relationship between the right to an abortion and racial justice.

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[1] Pursuant to Supreme Court Rule 37.3(a), Petitioner and Respondent have provided blanket consent to the filing of *amicus curiae* briefs. *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

This case considers the constitutionality of Mississippi's Gestational Age Act (codified at Miss. Code Ann. § 41-41-191), which prohibits nearly all abortions after 15 weeks of pregnancy ("the Ban").[2] This Court's rulings, beginning with *Roe v. Wade*, 410 U.S. 113 (1973), have "established (and affirmed, and re-affirmed)" a woman's[3] right to choose an abortion before viability. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019). Before viability, "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992). Here, it is undisputed that the Ban prohibits essentially all pre-viability abortions after 15 weeks—

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[2] The Ban carves out two narrow exceptions for "medical emergenc[ies]" or "in the case of a severe fetal abnormality." *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 538 (S.D. Miss. 2018).

[3] In keeping with this Court's jurisprudence, this brief uses the words "woman" and "women" to refer to those who can become pregnant and may require abortion care. However, it is important to note that there are other categories of people with the capacity for pregnancy. Transgender or gender non-conforming people also may have uteruses and can become pregnant. *See Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021) ("[N]ot all persons who may become pregnant identify as female."). Abortion restrictions impact them as well. *Amici* hope that, in the near future, the nation's laws, policies, and jurisprudence will reflect this reality.

and Petitioners have baldly called for the overturn of *Roe* and *Casey*.

Over nearly five decades, with "unbroken commitment" in an "unbroken line" of cases, this Court has continuously re-affirmed the principles articulated in *Roe* and *Casey*. *Casey*, 505 U.S. at 870; *Dobbs*, 945 F.3d at 269. Overturning decades of precedent—precedent on which women have relied and around which women have planned their lives—would have catastrophic effects on all women, but most acutely on women of color. Black women in Mississippi disproportionately live under circumstances of extreme disadvantage. They experience poverty at significantly higher rates than white women. They experience intimate partner violence and reproductive coercion at higher rates than women of other races. They have high rates of un-insurance, and many do not receive, or are denied by law from receiving, information about sexual and reproductive health in their schools. These circumstances make access to and use of reliable contraception difficult, if not at times impossible. Women living in Mississippi, including black women, experience unanticipated pregnancies at higher rates than women in other parts of the country. These experiences are the legacy and continuation of a history in which black women have been subject to all manner of subjugation and reproductive control, including forced sterilization, forced pregnancy, and forced separation from their children.

This past remains deeply present in Mississippi.[4] And the Ban is yet another constraint on black women's ability to set the course of their reproductive futures. If upheld, the Ban will serve as an unconstitutional impediment to black women seeking to exercise their fundamental right to bodily autonomy and reproductive agency.

Advocates for racial justice have long understood the devastation caused by impediments to abortion care like the Ban, and they have recognized the critical importance of abortion access to black women and their communities. The ability to access abortion is a means of ensuring black women's agency and autonomy; it is a means of steering one's own life amidst a past and present rife with threats to one's health and well-being. This is, in part, why black women created the reproductive justice framework, which seeks to protect and further the ability and rights of women to have or not have children, and to parent their children with dignity. The effectuation of these rights is fundamental to ensuring that black women can control their own lives—and essential to obtaining racial justice. Reproductive justice is racial justice.

The Ban operates directly contrary to the aims of reproductive justice by unnecessarily and dangerously prohibiting nearly all abortions past 15 weeks. In doing so, the Ban coerces black women into pregnancy

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[4] "[L]egislation like [the Ban] is closer to the old Mississippi—the Mississippi bent on controlling women and minorities." *Currier*, 349 F. Supp. 3d at 540 n.22.

and parenthood. It also subjects black women to a host of health risks associated with pregnancy and childbirth—risks that are among the highest in Mississippi compared to other states in this country and higher for black women than for their white counterparts. The Fifth Circuit's decision invalidating the Ban as facially unconstitutional should be affirmed.

ARGUMENT

I. THIS COURT'S UNBROKEN LINE OF ABORTION PRECEDENT UNEQUIVOCALLY ESTABLISHES A WOMAN'S RIGHT TO MAKE THE ULTIMATE DECISION WHETHER TO CONTINUE A PREGNANCY BEFORE VIABILITY.

For decades, this Court has upheld the central holding of *Roe v. Wade*: a woman has a right "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Casey*, 505 U.S. at 846. The Court in *Casey* made clear that a "woman's right to terminate her pregnancy before viability is the most central principle of *Roe*. It is a rule of law and a component of liberty we cannot renounce." *Id.* at 871. On its face, the Ban's prohibition on abortions after 15 weeks violates this central principle of *Roe*, making the Ban unconstitutional.

Petitioners now ask this Court to reject decades of precedent and overrule *Roe*. Petitioners claim—without any support—that the "march of progress has left *Roe* and *Casey* behind." Pet. Br. at 4. Petitioners claim that "[i]nnumerable women and mothers have reached the highest echelons of economic and social

life independent of the right endorsed in those cases," and "[s]weeping policy advances now promote women's full pursuit of both career and family." *Id.* at 5; *see also id.* at 34–35 (same). But these arguments miss the point: there is no policy change that could support denying women autonomy over their reproductive decisions. Even so, the "factual developments" Petitioners reference, *id.* at 4–5, are unsupported and ignore objective data indicating that the "march of progress" has left black women behind:

Economic and Professional Success of Women. As of 2014, 34.7% of black women in Mississippi live below the poverty line, compared to 23.1% of women of all races. Asha DuMonthier et al., Inst. for Women's Pol'y Rsch., *The Status of Black Women in the United States* 66 (2017). Median annual wages for black women in Mississippi are $28,752, which is the lowest in all states.[5] This is, in part, attributable to the fact that black women in Mississippi are paid only 57 cents for every dollar paid to white, non-Hispanic men, while white, non-Hispanic women are paid 75 cents for every dollar their male counterparts earn.[6] Further, as of 2014, only 18.5% of black women in Mississippi hold a Bachelor's degree or higher, revealing that precious

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[5] *Black Women and the Wage Gap*, Nat'l P'ship for Women & Families (Mar. 2021) at 3, https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/african-american-women-wage-gap.pdf.

[6] *Id.* at 1 & n.5; *see also Resource: The Wage Gap, State by State*, Nat'l Women's L. Ctr., https://nwlc.org/resources/wage-gap-state-state/ (last updated Mar. 16, 2021).

few black women have the means by which to attain economic security. DuMonthier, *supra*, at 84.

Childcare & Parental Leave. In 2014, the average annual cost of full-time childcare for one child in Mississippi was $4,833, which was 19.3% of a black woman's median annual income. *Id.* at 50. Moreover, Mississippi does not require private employers to provide any paid parental leave. And federal programs, such as FMLA, provide only *unpaid* leave and contain eligibility restrictions that require a woman to be employed for at least 12 months prior to leave.[7]

The Family Regulation System. Racial disparities are prominent in the family regulation system, also known as the "child welfare" system. Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulations*, The Imprint (June 16, 2020). Black families are more likely to be reported to the child abuse hotline and investigated for abuse and/or neglect than white families. Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, The Appeal (Mar. 26, 2018). And black parents are more likely to have their children placed in foster care and to have their parental rights terminated. *Id.*

Adoption is not "accessible" for black children. *Cf.* Pet. Br. at 4. As of 2017, of the over 400,000 children in foster care in the U.S. waiting to be adopted, more

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[7] *The Rights of Pregnant Employees*, Miss. Bar, https://www.msbar.org/for-the-public/consumer-information/the-rights-of-pregnant-employees (last visited Sept. 17, 2021).

than half (56%) were children of color and nearly a quarter (22%) were black children.[8] Of children adopted through public agencies, black children made up only 17% of adoptions. *Id.* Black children also spend more time in foster care: the average number of months spent in foster care before adoption is 39.4 months for black children, longer than any other race and almost double that for white children, who wait on average 23.5 months. *Id.* It is estimated that about one-third of the approximately 20,000 adolescents who age out of the foster care system each year are black, more than any other race. Patrick J. Fowler et al., *Homelessness and Aging Out of Foster Care: A National Comparison of Child Welfare-Involved Adolescents*, 77 Children & Youth Servs. Rev. 27, 30 (2017). Aging out of the system with no legal, permanent connection leads to increased rates of homelessness, young parenthood, low educational attainment, and high unemployment, all of which impact black youth disproportionally.[9]

Availability of Medical Care & Information. Access to contraception is premised upon access to information and medical care. *See* Tanya Funchess et al., *Racial Disparities in Reproductive Healthcare*

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[8] Ronald Hall, *The US Adoption System Discriminates Against Darker-Skinned Children*, PRI: The World (Feb. 21, 2019), https://www.pri.org/stories/2019-02-21/us-adoption-system-discriminates-against-darker-skinned-children.

[9] Rachel Rosenberg & Samuel Abbott, *Supporting Older Youth Beyond Age 18: Examining Data and Trends in Extended Foster Care*, Child Trends (June 3, 2019), https://www.childtrends.org/publications/supporting-older-youth-beyond-age-18-examining-data-and-trends-in-extended-foster-care.

Among Parous and Nulliparous Women in Mississippi, 8 J. Racial & Ethnic Health Disparities 304, 311 (2020) (noting that 60% of all counties in Mississippi do not have a single active OB-GYN). Notably, 24.7% of black women in Mississippi do not have health insurance. DuMonthier, *supra*, at 66. And Mississippi is one of only 12 states that has not expanded Medicaid coverage under the Affordable Care Act.[10] This disproportionately affects black citizens, who are almost twice as likely to be uninsured in non-expansion states, like Mississippi, compared to expansion states (and at rates higher than their white counterparts in either case).[11] Without health insurance, accessing effective contraception is much more difficult—thereby increasing the likelihood of unintended pregnancy and the consequent need to turn to abortion services. And black and Hispanic women are less likely than white women to have accurate information about prescription contraceptives. Theresa Y. Kim et al., *Racial/Ethnic Differences in Unintended Pregnancy: Evidence From a National Sample of U.S. Women*, 50 Am. J.

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[10] *Status of State Medicaid Expansion Decisions: Interactive Map*, Kaiser Family Found., https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ (last visited Sept. 17, 2021).

[11] *Health Coverage by Race and Ethnicity, 2010-2019*, Kaiser Family Found., https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-coverage-by-race-and-ethnicity/ (last visited Sept. 17, 2021); *see also* Cindy Pearson, *Protecting and Expanding Medicaid Means Confronting Racism Baked into the Program*, Nat'l Women's Health Network (Apr. 3, 2019), https://nwhn.org/protecting-and-expanding-medicaid-means-confronting-racism-baked-into-the-program/.

Preventative Med. 427, 427 (2016). Significantly, as of this year, Mississippi has the second-highest teenage birth rate in the nation at 29.1 births per 1,000 women.[12] This is likely attributable to the limited reproductive education provided by Mississippi public schools. *See infra* II.B.2 at 17–19.

Simply, Petitioners' unsupported claim that "factual developments" require an overhaul of *Roe* and *Casey* ignores the reality of black women in this country and, critically, in Mississippi. As in *Casey*, it is clear that *Roe*'s factual premises have not "so far changed in the ensuing [ ] decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed." 505 U.S. at 855. *Stare decisis* compels this Court to uphold *Roe* and strike down the Ban. Petitioners have not met their burden in proving otherwise.

II. THE BAN IS UNCONSTITUTIONAL AND WILL IMPOSE SIGNIFICANT BURDENS ON A VULNERABLE GROUP OF MARGINALIZED WOMEN—BLACK WOMEN.

Petitioners ask this Court to overrule *Roe* and reject the viability standard, or, in the alternative, to find that the Ban is not an undue burden because Respondents do not provide abortions after 16 weeks, and therefore the Ban limits a woman's constitutional right to an abortion by only one week. Pet. Br. at 47–48. But Petitioners' focus in their undue burden

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[12] Teen Pregnancy Rates By State 2021, World Population Rev., https://worldpopulationreview.com/state-rankings/teen-pregnancy-rates-by-state (last visited Sept. 17, 2021).

analysis on the number of people who seek abortions after 15 weeks has no basis in the Court's precedent. If the Ban is upheld, some number of women will be outright prohibited from obtaining abortions before viability. That means the State is *coercing* these women into continuing pregnancies, a legislative act which cannot withstand constitutional scrutiny. Further, Petitioners' arguments ignore the real world impact of the Ban, obscuring the fact that the most marginalized women will be affected. This Court has made clear that such impacts matter for ensuring that the constitutional right to reproductive autonomy exists not just in theory, but in fact.

A. Precedent Requires the Court to Consider the Real World Impacts of Abortion Legislation in Evaluating the Constitutionality of Such Legislation.

"The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894; *see also City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (same; finding the proper focus was warrantless searches that the law at issue actually authorized); *Fields v. Smith*, 656 F.3d 550, 557 (7th Cir. 2011) (same; finding the proper focus was transgender inmates for whom the law at issue prohibited from receiving certain medical treatments). If legislation will function to prohibit access to abortion for a group of women and, in so doing, exacerbate the group's vulnerability, then the regulation runs afoul of the Constitution.

Because the Ban prohibits abortion even prior to viability, it is unconstitutional under *Roe* and *Casey*.

In practice, some women seeking to assert their reproductive autonomy may be able to surmount the hurdles of an unconstitutional abortion ban by traveling out of state. But the greatest harms will fall on women living in poverty. For these women, the Ban will increase the costs associated with accessing abortion care, which include not only direct travel expenses, but also the cost of childcare services when they are away from home, and wages they will have to forfeit when taking time off of work.[13]

Crucially, because there is a close relationship between socioeconomic status and race in Mississippi—with black people disproportionately living in poverty[14]—harm to *poor* women constitutes

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[13] Going all the way back to *Roe*, this Court has considered travel burdens to be significant. 410 U.S. at 120 (Roe "could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions."); *see also Dobbs*, 945 F.3d at 272 ("the [Ban] would force these women to carry their pregnancies to term against their will or to leave the state for an abortion."); *FDA v. Am. Coll. Obstetricians & Gynecologists*, 141 S. Ct. 578, 582 & n.8 (2021) (Sotomayor, J., dissenting) ("Mississippi has just one abortion clinic, and 91% of women of childbearing age live in a county without any clinic" forcing patients to "travel, sometimes for several hours each way, to clinics often located far from their homes.").

[14] While as of 2019, black people made up 37.6% of the population of Mississippi, they constituted more than 58% of those living in poverty. *Population Distribution by Race/Ethnicity*, Kaiser Family Found., https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/ (last visited Sept. 17, 2021); *Poverty Rate by Race/Ethnicity*, Kaiser Family Found., https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/ (last visited Sept. 17, 2021) (of the 560,700 people in

harm to *black* women. *See* Melissa Murray*, Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 Harv. L. Rev. 2025, 2093 (2021) ("[B]ecause race and socioeconomic status are often related—particularly in those regions of the country where abortion restrictions are more extensive—the burden on poor women will also result in a burden on women of color, rendering abortion inaccessible to these groups."). The result will be women coerced to continue pregnancies and have children against their will, to seek unsafe methods of abortion, or to risk exposure to criminal prosecution for attempting to self-manage abortion. Far from continuing the "march of progress," Petitioners ask this Court to revert to a racist past of reproductive control over women, particularly marginalized women.

B. Black Women Disproportionately Utilize Abortion Services in Mississippi Because They Are Extremely Disadvantaged.

For a host of reasons, black women make up a disproportionate number of women who obtain abortions in Mississippi. In 2018, 3,005 legal abortions were performed in the state.[15] Although black people constitute less than 40% of Mississippi's population,[16]

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poverty in Mississippi in 2019, 329,100 of them—or 58.7%—were black).

[15] *Number of Reported Legal Abortions by State of Occurrence*, Kaiser Family Found., https://www.kff.org/womens-health-policy/state-indicator/number-of-abortions (last visited Sept. 17, 2021).

[16] *See* World Population Rev., *supra* n.12.

black women comprised 72% of abortion patients in 2018.[17] Any law that makes it difficult for *women* to access abortion in Mississippi makes it difficult for *black women* to access abortion in Mississippi.

1. Black Women Are Overrepresented Among Mississippi's Poor.

Black women disproportionately bear the burdens of poverty in Mississippi. As noted above, 34.7% of black women in Mississippi live at or below the poverty level, and their median annual wages are the lowest in the country. *See supra* at 8–9. While women obtain abortions for numerous and often interrelated reasons, one reason women frequently cite for terminating a pregnancy is that they cannot afford to raise a child or to expand the size of their existing family. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Persp. on Sexual & Reprod. Health 110, 112, 115 (2005); *see also FDA*, 141 S. Ct. at 582 (Sotomayor, J., dissenting) ("[T]hree-quarters of abortion patients have low incomes."). Thus, it is reasonable to conclude that black women in Mississippi turn to abortion care more frequently than women of other racial groups because the disproportionate indigence they bear makes them incapable of bearing the cost of having and raising a child.

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[17] *Reported Legal Abortions by Race of Women Who Obtained Abortion by the State of Occurrence*, Kaiser Family Found., https://www.kff.org/womens-health-policy/state-indicator/abortions-by-race/ (last visited Sept. 17, 2021).

2. Black Women Are More Likely Than Other Racial Groups to Encounter Difficulties Accessing Safe and Effective Contraception.

Most women who have abortions generally do so to terminate an unintended pregnancy. Finer, *supra*, at 110. Notably, researchers have documented that black women experience unintended pregnancies at a higher rate than white women. Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 Guttmacher Pol'y Rev. 2, 3 (2008). Black women's higher rate of unintended pregnancy is due, in significant part, to barriers to their obtaining safe, effective contraception. *Id.* at 2–4. These barriers include the scarcity of geographically accessible reproductive healthcare, the financial inaccessibility of more reliable but "usually more expensive" prescription contraceptives, and a basic unavailability of general medical care. *Id.* at 4–5. Significantly, almost 24.7% of black women in Mississippi do not have health insurance, placing Mississippi in the "worst third" of states. *See supra* at 10–12. Without health insurance, accessing effective contraception is much more difficult, thereby increasing the likelihood of an unintended pregnancy and the consequent need for abortion care.

Black women's higher rate of unintended pregnancy may also be attributed to inadequate information regarding birth control and pregnancy

prevention. *See supra* at 10–12.[18] A study of reproductive health disparities among women in Mississippi found that black women were less likely than white women to use the most effective contraceptives, such as implants and intrauterine devices, and more likely than white women to use moderately effective contraceptives, such as oral contraceptives and hormonal injections. Funchess, *supra*, at 305, 309, 312 (also finding that black women were more likely than white women to be misinformed or lack information concerning the most effective contraceptives). These findings may be partly attributed to Mississippi public schools' failure to provide comprehensive reproductive health education. Mississippi public schools are required to adopt an "abstinence-only" or "abstinence-plus" education, with abstinence-only education remaining "the state standard." Miss. Code Ann. § 37-13-171(1)-(2) (1972). Both curricula focus on the "negative psychological and physical effects" and "harmful consequences" of not abstaining, and both prohibit demonstrations of condom application (with the abstinence-only

[18] This is not to suggest that negative views of contraception are unfounded. Rather, given the racist history of birth control in the U.S., these views reflect a reasonable mistrust of the medical establishment. Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 56 (2d ed. 2017) ("[The spread of contraceptives to American women hinged partly on its appeal to eugenicists bent on curtailing the birthrates of the 'unfit,' including Negroes. For several decades, peaking in the 1970s, government-sponsored family-planning programs not only encouraged Black women to use birth control but coerced them into being sterilized."). The racist history of contraceptive policies in the U.S. evidences another way in which black women's reproductive autonomy has been violated.

instruction further prohibiting demonstrations of any "other contraceptive" as well). *Id.* § 37-13-171(2)-(3).[19] Neither curricula is required to be medically accurate or unbiased.[20] Further, Mississippi is one of only five states where parents must proactively consent to their children receiving sex education. SIECUS, *supra* n.19. At best, black women who are educated in public schools in Mississippi are more likely than not to receive *insufficient* information about contraception and pregnancy prevention, and, at worse, likely to be given *misleading* information on the subject.

3. Black Women Are Less Likely Than Other Groups of Women to Be Able to Control the Conditions Under Which They Have Sex.

Because black women disproportionately live in poverty, they experience intimate partner violence at higher rates than women of other races.[21] DuMonthier, *supra*, at xix. Specifically, more than

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[19] For further discussion of the curricula and the disproportionate effect they have on black youth, *see* Sex Ed for Social Change (SIECUS), *Mississippi's Sex Ed Snapshot* (2021), https://siecus.org/wp-content/uploads/2020/01/Mississippi.pdf (addressing, for example, how "[s]tudents have reported instruction to be shame-based and stigmatizing").

[20] *Sex and HIV Education*, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education# (last updated Sept. 1, 2021).

[21] When controlling for income levels, "racial differences in rates of partner abuse frequently disappear, or become less pronounced." Carolyn M. West, *Black Women and Intimate Partner Violence: New Directions for Research*, 19 J. Interpersonal Violence 1487, 1487 (2004).

40% of black women experience physical violence by an intimate partner, compared with 31.5% of all women. *Id.* at 119. Further, black women are more likely than women of other races to be victims of rape during their lifetimes. *Id.* at 120–21. Black women also experience reproductive coercion—where "partners actively try to impregnate their partner against their wishes, interfere with contraceptive use," pressure their partner not to use contraception, or interfere with condom use—at higher rates than white women. Charvonne N. Holliday et al., *Racial Differences in Pregnancy Intention, Reproductive Coercion, and Partner Violence Among Family Planning Clients: A Qualitative Exploration*, 28 Women's Health Issues 205, 206 (2018). The higher rate of intimate partner violence, sexual assault, and reproductive coercion among black women—coupled with their lack of safe and effective contraception—contributes to higher rates of unintended pregnancies, and therefore higher rates of abortion, among black women.

III. BLACK WOMEN IN MISSISSIPPI DISPROPORTIONATELY TURN TO ABORTION BECAUSE THEY ARE TRYING TO EXACT A MODICUM OF CONTROL OVER THEIR BODIES AND LIVES.

Black women in Mississippi are living within breathtakingly constrained social conditions. They are poor. They are uninsured. They have little to no access to contraception or even accurate information about contraception. They face violence in a multiplicity of forms. For black women in Mississippi, then, abortion is a tool that helps them navigate poverty, violence, and vulnerability. *See, e.g.*, Murray, *supra*, at 2090–91 ("As reproductive justice advocates make clear, for

many people of color, the decision to terminate a pregnancy is shot through with concerns about economic and financial insecurity, limited employment options, diminution of educational opportunities and lack of access to health care and affordable quality childcare.").

Despite recent suggestions, *see, e.g.*, *Box v. Planned Parenthood of Indiana & Kentucky*, 139 S. Ct. 1780, 1790 (2019) (Thomas, J., concurring), the abortion rate among black women is *not* a measure of the success that eugenicists have had among Mississippi's black population. Rather, the abortion rate among black women reflects the power of the forces that foist unintended pregnancy upon them. And, importantly, the abortion rate reflects black women's defiance of those forces. It is a measure of black women's insistence upon carrying a pregnancy to term *only* when they believe that they are ready for their lives to take that course. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures … center on a woman's autonomy to determine her life course ….").

To suggest that abortion in Mississippi today is in any way reminiscent of the eugenic practices of yesteryear is to disregard the concept of agency. Eugenics was about coercion; abortion in Mississippi in 2021 is about autonomy. Black women are autonomously choosing a form of healthcare that helps them negotiate the profound constraints that limit the fullness of their lives. That autonomy should be respected.

Indeed, *denying* abortion access to black women in Mississippi is reminiscent of past eugenic practices. Mississippi has a long and storied history of using reproductive coercion. For example, lawmakers in Mississippi passed legislation as recently as 1964 designed to curtail black people from having children by threat of prison or sterilization, based on harmful and unquestionably racist stereotypes. Julius Paul, *The Return of Punitive Sterilization Proposals: Current Attacks on Illegitimacy and the AFDC Program*, 3 L. & Soc'y Rev. 77, 88–92 (1968); Associated Press, *Illegal Sex is Fought in House*, Enter. J. (McComb, Miss.) (Mar. 12, 1964), at 1. During this time, Mississippi physicians routinely subjected black people to involuntary sterilization. For example, the pattern of women who entered the hospital to give birth or have abdominal surgery but left having undergone nonconsensual tubal ligation or hysterectomy was common enough to be termed a "Mississippi appendectomy." Rebecca M. Kluchin, *Fit to be Tied: Sterilization and Reproductive Rights in America, 1950-1980* 93–94 (2009).

The Ban perpetuates this racist legal legacy. Abortion restrictions and eugenic sterilization "both seek to control reproductive decision making for repressive political ends."[22] Like the eugenicists who

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[22] Dorothy Roberts, *Dorothy Roberts argues that Justice Clarence Thomas's* Box v. Planned Parenthood *concurrence distorts history*, U. Pa. Law (June 6, 2019), https://www.law.upenn.edu/live/news/9138-dorothy-roberts-argues-that-justice-clarence; *see also* Murray, *supra*, at 2041–45 (discussing the evolution of black nationalist groups' treatment of black women's reproductive rights).

sought to dictate the direction of women's reproductive capacities, proponents of abortion restrictions like the Ban seek to do the same. We will have moved away from our eugenic past when women *themselves* can determine what their bodies will and will not do. We will have triumphed over our eugenic history when black women *themselves* are the ones deciding whether or not they will bring a child into this world. *Cf. Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("[I]t is no secret that people of color are disproportionate victims of this type of scrutiny … [that] says that your body is subject to invasion while courts excuse the violation of your rights."). The Ban allows governments and policymakers (83.3% of whom are men in Mississippi[23]) to determine women's reproductive futures. *See Currier*, 349 F. Supp. 3d at 545 (acknowledging the "sad irony" that "men … are determining how women may choose to manage their reproductive health"). Like the horrific eugenic practices of the early twentieth century, these restrictions stand in the way of women's self-determination.

It is also worth noting that the claim that abortion among black women is part of a genocidal plot against black people has reared its head—and been rejected—

[23] *Women in State Legislatures for 2021*, Nat'l Conf. of State Legislatures, https://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2021.aspx (last visited Sept. 17, 2021) (reporting that 16.7% of representatives in the Mississippi legislature are women).

time and again.[24] Despite these historically inaccurate and misleading claims, black scholars and activists devoted to racial justice have been unwavering in their support for abortion rights and access. Their support is due to their recognition that when commentators call upon black people to reproduce in order to liberate the black race, it is black women who shoulder the burdens of this sexist path to black empowerment.[25]

Indeed, black feminists have always rejected the claim that abortion access should be limited in order to promote black liberation because they know that making abortion unavailable, for any reason, would inevitably result in black women resorting to dangerous measures, like unsafe abortion practices, in order to regain some control over their fertility. Bev Cole, *Black Women and the Motherhood Myth*, *in* Linda Greenhouse & Reva B. Siegel, *Before Roe v.*

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[24] Kathryn Joyce, *Abortion as "Black Genocide": An Old Scare Tactic Re-Emerges*, Pol. Rsch. Assocs. (Apr. 29, 2010), https://www.politicalresearch.org/2010/04/29/ abortion-as-black-genocide-an-old-scare-tactic-re-emerges; *see also Memphis Ctr. for Reprod. Health v. Slatery*, No. 20-5969, 2021 WL 4127691, at *18 & n.18 (6th Cir. Sept. 10, 2021) (finding the "assumption that women of color are committing genocide against their own community" "baseless," because, "[w]hile Black women and women of color do have higher abortion rates, the host of structural racial burdens to which they are subjected create the conditions for this disparity") (internal citations omitted).

[25] *See Our History*, SisterSong, Trust Black Women, https://trustblackwomen.org/our-roots (denying that "the oppression of black people should relegate black women to breeding machines with no right to make personal choices about family creation") (last visited Sept. 17, 2021); Murray, *supra*, at 2055–56.

Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling 53 (2010). In the eyes of many black people devoted to racial justice, the claim that abortion is black genocide is unconvincing, as the "prospect of genocide lay on both sides of the equation. If the availability of abortion is genocidal because black fetuses will be killed, the unavailability of abortion also threatens genocide because of the lengths to which desperate black women will go to terminate an unwanted pregnancy." Khiara M. Bridges, *Elision and Erasure: Race, Class, and Gender in* Harris v. McRae, *in* Reproductive Rights and Justice Stories 118, 132 (Melissa Murray et al. eds., 2019); *see also* Cole, *supra*, at 53 (the "argument against legal, safe abortion is, in itself, genocidal, killing off Black women in the name of the fetus").

In response to the recent revival of the claim that abortion is black genocide, black feminists have been compelled to remind the world, yet again, that the assertion is simply a "misogynistic attack to shame-and-blame black women who choose abortion." SisterSong, *supra* n.25; Murray, *supra*, at 2090. These black feminists deny that black women have a "racial obligation to have more babies." SisterSong, *supra* n.25. They insist that black women should have children only when their "individual circumstances" counsel that childbearing is appropriate. *Id.* Indeed, they remind us that we should trust black women to do what is best for themselves, their families, and their communities. *See id.*

Feminists of color have long recognized the importance of black women being able to decide whether or not they will become mothers. They have understood that there are forces that would compel

black women into motherhood—like the forces that assert that abortion is black genocide. *See id.* They have also understood that there are forces that would deny black women motherhood—like the forces that subjected tens of thousands of black women to forced sterilizations from the 1950s to the 1980s. Khiara M. Bridges, *White Privilege and White Disadvantage,* 105 Va. L. Rev. 449, 470–72 (2019). Because feminists of color have realized that controlling black women's reproduction has been a tool of racial oppression, they have identified black women's ability to control their *own* reproduction as a tool for racial justice. Because the ability to terminate a pregnancy enables black women to control their reproduction, feminists of color consider abortion access to be essential to racial justice.

IV. THE REPRODUCTIVE JUSTICE FRAMEWORK CONTEMPLATES THE CENTRALITY OF ABORTION ACCESS TO RACIAL JUSTICE.

In the 1990s, feminists of color created the reproductive justice framework as a response to the almost exclusive attention that the largest and most powerful reproductive rights organizations had given to abortion rights.[26] The black women who were the

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[26] Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 Ann. Rev. L. & Soc. Sci. 327, 328 (2013); *A New Vision for Advancing Our Movement for Reproductive Health, Reproductive Rights and Reproductive Justice*, Asian Cmtys. for Reprod. Just. 5 (2005), https://forwardtogether.org/wp-content/ uploads/2017/12/ACRJ-A-New-Vision.pdf; *see generally* Loretta J. Ross & Rickie Solinger, *Reproductive Justice: An Introduction* (2017).

architects of the reproductive justice framework recognized that abortion rights were essential to racial justice and reproductive freedom. Nevertheless, they felt that affluent white activists' narrow focus on abortion rights led reproductive rights organizations to ignore or deprioritize *other* issues that impacted women's reproductive lives and health. Luna & Luker, *supra* n.26, at 333, 335. Moreover, the issues that fell under the radar at these organizations tended to be the issues that did not affect affluent white women but rather affected women of color—especially poor women of color. *See generally* Jael Silliman et al., *Undivided Rights: Women of Color Organize for Reproductive Justice* (2004). While the creators of the reproductive justice framework recognized that abortion rights were crucial, they also recognized that the legal right to abortion did not represent the full universe of concerns that women faced with respect to their reproductive lives and health.

Importantly, the feminists of color who generated the reproductive justice framework understood that the state's punitive regulation of black women's reproduction—through laws and policies that prevent them from having children, coerce them into having children, or deny them the ability to raise the children that they have—was both a cause and an effect of racial subordination. *See generally* Roberts, *Killing the Black Body*, *supra* n.18. Thus, the founders of the reproductive justice framework recognized the inextricable relationship between racial oppression and reproductive oppression.

A. The Three Prongs of Reproductive Justice.

The reproductive justice framework has three prongs. Luna & Luker, *supra* n.26, at 328. Importantly, all three prongs of the framework are equally central to reproductive justice.

The first prong consists of the right *not* to have a child. *Id*. This right includes the right to prevent pregnancy through contraception as well as the right to access an abortion if one becomes pregnant. This, of course, is a right that the Court has long recognized. *See Casey*, 505 U.S. at 877 (stating that the woman herself has the "right to make the ultimate decision" of whether or not to have a child).

The second prong consists of the right *to* have a child. Luna & Luker, *supra* n.26, at 338. This right includes, *inter alia*, the ability to avoid forced sterilizations and the ability to be treated for medical conditions that may compromise the ability to conceive, maintain a pregnancy, or survive childbirth and the postpartum period. This also is a right that the Court has long recognized. *See Casey*, 505 U.S. at 851 ("Matters[] involving the most intimate and personal choices a person may make in a lifetime [are] choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment.").

The third prong consists of the right to parent a child with dignity. Luna & Luker, *supra* n.26, at 340. This right includes, *inter alia*, the ability of imprisoned people to give birth without being shackled and the ability of all people to provide their children safe, lead-

free drinking water. The Court has long recognized that the Constitution protects individuals' dignity in matters involving the family and parent-child relationships. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("[C]hoices about marriage, family life, and the upbringing of children are […] rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."); *see also Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (the "fundamental liberties protected by [the Due Process] Clause … extend to certain personal choices central to individual dignity and autonomy").

Reproductive justice centers all three prongs simultaneously. This is to say: the right *not* to have a child is as important to reproductive justice as the right *to* have a child and the right to parent one's child with dignity. Thus, the right to an abortion, a vital component of the right *not* to have a child, is an essential element of reproductive justice.

Also, as described herein, feminists of color—black women—were the architects of the reproductive justice framework. Thus, black women who were committed to racial justice recognized the centrality of abortion rights to their lives and the lives of women like them. Eugenicists and other plotters of genocide have not thrust abortion rights on unwitting black women. *See* Murray, *supra*, at 2028 (characterizing Justice Thomas' concurrence in *Box* as "a misleading and incomplete history in which he associated abortion with eugenics"). Quite the contrary, black women have demanded abortion rights for themselves. They have made these demands because they understand that freedom—for themselves, for their families, for their

communities, for their race—is impossible without the ability to control their reproductive capacities.

B. The Reproductive Justice Framework Teaches That the Appropriate Way to Reduce Abortion Rates Among Black Women Is Not to Coerce Them Into Motherhood, But to Transform the Social Conditions Within Which They Live.

If society is interested in reducing abortion rates among black women, the reproductive justice framework sets forth ways to accomplish that goal that also respect black women's right to make meaningful choices about their reproductive futures. Thus, it is a form of reproductive *injustice* to endeavor to lower abortion rates by banning abortion, as that tactic disregards women's agency and autonomy, with disproportionately negative impacts on black women.

If abortion rates among black women are high because they are mired in poverty, have little to no access to safe and effective contraception, and confront violence in their intimate lives, then efforts to reduce or eliminate poverty, increase the availability of contraception and reproductive healthcare generally, and protect women from interpersonal violence can effectively lower abortion rates among black women.

C. The Reproductive Justice Framework Recognizes That Coercing Black Women into Motherhood Is Particularly Cruel Given the U.S.'s High Rates of Black Maternal Death and Morbidity.

Maternal mortality is a growing crisis in this country. The likelihood that a woman will not survive pregnancy and childbirth is much greater in the U.S. than in the countries that the U.S. tends to consider its peers. Indeed, the 2018 maternal mortality ratio ("MMR") in the U.S.—17.4 deaths per 100,000 live births—is more than double that of most other high-income countries and as much as *nine* times higher than some (such as New Zealand and Norway).[27] And this number was even higher (20.1) in 2019.[28]

The national MMR obscures the fact that not all women in the U.S. are similarly situated when it comes to the likelihood that they will not survive pregnancy, childbirth, or the postpartum period. To be precise, the path to motherhood is significantly deadlier for nonwhite women, specifically black women, than it is for white women.

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[27] Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, Commonwealth Fund (Nov. 18, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries.

[28] Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2019*, Ctrs. for Disease Control & Prevention (Mar. 21, 2021), https://www.cdc.gov/nchs/data/hestat/maternal-mortality-2021/maternal-mortality-2021.htm.

Black women are more than three times as likely to die from pregnancy-related causes than their white counterparts.[29] This racial disparity in maternal mortality has persisted across generations. Yale Glob. Health Just. P'ship, *When the State Fails: Maternal Mortality and Racial Disparity in Georgia* 16 (2018). Indeed, the gap has widened. Elizabeth Howell, *Reducing Disparities in Severe Maternal Morbidity and Mortality*, 61 Clinical Obstetrics & Gynecology 387, 387 (2018). Eighty years ago, black women were twice as likely as white women to die on the path to motherhood. Yale Glob. Health Just. P'ship, *supra*, at 16. Thirty years ago, black women were three times as likely as white women to die. *Id.* Decades later, those odds are unchanged. *See Pregnancy Mortality Surveillance System*, *supra* n.29. This fact alone could cause some black women to conclude that it would be a risk to their lives to carry a pregnancy to term.

Maternal morbidity is also a crisis in this nation. "Severe maternal morbidity" refers to cases in which a pregnant or recently postpartum woman faces a life-threatening diagnosis or must undergo a life-saving medical procedure—like a hysterectomy, blood transfusion, or mechanical ventilation—to avoid death. Howell, *supra*, at 387. For every maternal death in the country, there are close to 100 cases of severe maternal morbidity. *Id.* As with maternal mortality,

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[29] *See Pregnancy Mortality Surveillance System*, Ctrs. for Disease Control & Prevention (Nov. 25, 2020), https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm (for every 100,000 live births from 2014-2017, 13.4 non-Hispanic white women died of pregnancy-related causes compared to 41.7 non-Hispanic black women).

there are racial disparities in ratios of severe maternal morbidity. Presently, black women are twice as likely as their white counterparts to suffer severe maternal morbidity. Andreea A. Creanga et al., *Racial and Ethnic Disparities in Severe Maternal Morbidity: A Multistate Analysis, 2008-2010*, 210 Am. J. Obstetrics & Gynecology 435.e1, 435.e6 (2014).

High rates of maternal mortality are also reflected in Mississippi. Between 2013 and 2016, the MMR in Mississippi was 33.2 deaths for every 100,000 live births, 1.9 times higher than the national average.[30] Thus, while forcing gestation is always cruel, forcing gestation is particularly cruel in Mississippi, where women's chances of surviving pregnancy, childbirth, and the postpartum period are some of the worst in the country. Indeed, Mississippi's "leaders are proud to challenge *Roe* but choose not to lift a finger to address the tragedies lurking on the other side of the delivery room: our alarming infant and maternal mortality rates." *Currier,* 349 F. Supp. 3d at 540 n.22 (internal citations omitted).

Further, there is an additional cruelty involved in forcing *black* women to gestate a fetus in Mississippi: black women in the state are almost three times more likely to die than their white counterparts due to causes related to or aggravated by pregnancy or its management. Miss. State Dep't Health, *supra* n.30, at 5. In 2013–2016, the MMR for black women in

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[30] *Mississippi Maternal Mortality Report 2013-2016*, Miss. State Dep't Health 10 (2019), https://msdh.ms.gov/msdhsite/index.cfm/31,8127,299,pdf/Maternal_Mortality_2019_amended.pdf at 5.

Mississippi was 51.9 deaths per 100,000 live births, compared to 18.9 for white women. *Id.* In some areas of Mississippi, "the rate of maternal death for women of color exceeds that of Sub-Saharan Africa, while the number of White women who die in childbirth is too insignificant to report." Ctr. for Reprod. Rights et al., *Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care*, at 6 (2014). Thus, the Ban has the effect of forcing black women to continue a pregnancy in a state where women generally—and black women particularly—have very poor chances of surviving the event relative to their counterparts in other states.

It is important to note that most maternal deaths in the U.S. are preventable.[31] Indeed, Mississippi's own Maternal Mortality Report emphasizes the need to "eliminate future preventable maternal loss." Miss. State Dep't Health, *supra* n.30, at 25. Accordingly, most maternal deaths—and most cases of severe maternal morbidity—should not be understood as an unfortunate but unavoidable consequence of pregnancy and childbirth. Instead, they are the result of a societal failure to guard the health of women.

One group of researchers at Yale University emphasizes that, given the significant variation in MMR across states, the risk of dying or nearly dying from pregnancy-related causes "is not a 'natural' distribution," but rather the result of "state-by-state policies." Yale Glob. Health Just. P'ship, *supra*, at 21.

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[31] *Pregnancy-related Deaths*, Ctrs. for Disease Control & Prevention (May 7, 2019), https://www.cdc.gov/vitalsigns/maternal-deaths/index.html.

Thus, Mississippi's disastrously high maternal mortality ratio is a product of the state's failure to institute policies that will protect the lives of the women who reside there. Again, there is a callous brutality involved in the Mississippi legislature's passage of the Ban—which coerces women into childbearing—and the legislature's concomitant failure to ensure that women will survive the task that they have been coerced to perform.

CONCLUSION

In sum, Mississippi's pre-viability ban on abortion after 15 weeks of pregnancy is unconstitutional and, if permitted, will disproportionately harm already marginalized women, especially black women. *Stare decisis* compels this Court to uphold *Roe* and strike down the Ban. For the foregoing reasons, *Amici Curiae* respectfully submit that the decision below should be affirmed.

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