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 UNITED NATIONS MANDATE HOLDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

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[1] No counsel for any party authored this brief in whole or in part, and no person other than counsel for *amici* made a monetary contribution to fund its preparation or submission. Counsel for Petitioners and Respondents filed blanket consents to the filing of *amicus curiae* briefs.

under Article VI of the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15, to which the United States has been a party since 1970.

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SUMMARY OF ARGUMENT

Mississippi asks this Court to overrule *Roe v. Wade*, 410 U.S. 173 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), by arguing, in part and incorrectly, that federal constitutional protection for abortion in the United States is out of step with the rest of the world and that the "march of progress" has made abortion access unnecessary for women's autonomy and equality. Petrs. Br. 4. *Amici* seek to set the record straight and explain how international human rights law protects abortion access.

The overwhelming trend for the past half-century has been toward the liberalization of abortion laws worldwide, with countries often using international

human rights law as a basis. *See generally* Int'l and Comparative Legal Scholars Br. This is because safe and legal abortion access constitutes a critical part of human rights and, in particular, the right to the highest attainable standard of health (which includes reproductive rights) as well as other human rights including the rights to non-discrimination and equality, respect for private life, the right to life, and the right to freedom from torture and cruel, inhuman and degrading treatment. *See, e.g.,* U.N. Human Rights Committee ("HRC"), *General Comment No. 36: Article 6 of the ICCPR, on the right to life*, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) [hereinafter HRC General Comment No. 36]; Committee on Economic, Social and Cultural Rights ("CESCR Committee"), *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶¶ 5, 10, 13, 45, U.N. Doc. E/C.12/GC/22 (May 2, 2016) [hereinafter CESCR Committee General Comment No. 22]; Committee on the Elimination of Discrimination against Women ("CEDAW Committee"), *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, ¶¶ 11, 14, U.N. Doc. A/54/38/Rev.1, Chap. I (1999) [hereinafter CEDAW Committee General Recommendation No. 24].

The United States would contradict international human rights law by overturning its established constitutional protections for abortion access—both by failing to recognize abortion access as necessary for women's autonomy, equality and non-discrimination and by retrogressing on human rights contrary to international law.

The United States has ratified, and is bound by, a number of human rights treaties including the International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 ("ICCPR") since 1992, the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2, 660 U.N.T.S. 195, 212 ("CERD") since 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, 113 ("CAT") since 1994. It has signed others—namely the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICESCR") in 1977, the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 ("CEDAW") in 1980, the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 ("CRC") in 1995, and the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S 3 ("CRPD") in 2009—and must refrain from defeating their object and purpose. *See, e.g.,* Vienna Convention on the Law of Treaties ("VCLT"), Art. 18, May 23, 1969, 1155 U.N.T.S. 331.

Treaty bodies, created and empowered under these treaties, and the U.N. Charter-based Human Rights Council and the Special Procedures created by it, examine States' compliance with human rights obligations. These bodies have repeatedly recognized that protections for abortion access are necessary to fulfill the rights to equality and non-discrimination, life, privacy, health, and freedom from torture, cruel, inhuman and degrading treatment, as well as freedom from gender-based violence, among other rights.

"Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl" nor "jeopardize their lives, subject them to physical or mental pain or suffering[,]" "discriminate against them or arbitrarily interfere with their privacy." HRC General Comment No. 36, ¶ 8. "States parties must provide safe, legal and effective access to abortion" including "where the pregnancy is the result of rape or incest" and also "should not introduce new barriers" and "should remove existing barriers to effective access by women and girls to safe and legal abortion[.]" *Id.*

In May 2020, the U.N. Working Group on discrimination against women and girls ("WGDAW"), the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Special Rapporteur on violence against women, its causes and consequences jointly decried the "pattern of restrictions and retrogressions in legal access to abortion care across" the United States through COVID-19 emergency orders suspending procedures "purportedly not immediately medically necessary[.]" Letter from the WGDAW to the United States, AL USA 11/2020 (May 22, 2020), https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25279 (last visited Sept. 15, 2021) [hereinafter the Techane-Puras-Šimonović Letter]. The WGDAW emphasized that "[a]bortion care constitutes essential health care and must remain so and available during the COVID-19 crisis" and that restrictions to abortion access "constitute human rights violations and can cause irreversible harm, in particular to those women experiencing

multiple and intersecting forms of discrimination such as low-income women, women of color, immigrants, women with disabilities and LBTI people." *Id.*

In her 2021 report to the U.N. General Assembly, lead *amicus* Tlaleng Mofokeng underlined States' obligations to decriminalize abortion, to prevent unsafe abortion and to provide safe, legal and effective access to abortion, in a manner that does not result in the violation of women's rights to life and other human rights. *See Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng, Sexual and reproductive health rights: challenges and opportunities during the COVID-19 pandemic*, ¶¶ 22, 40-41, U.N. Doc. A/76/172 (July 16, 2021) [hereinafter Mofokeng 2021 Report].

If *Roe* and *Casey* are overturned, many U.S. states will implement bans or near-bans on abortion access that will make individual state laws irreconcilable with international human rights law.[2] This would cause irreparable harm to women and girls in violation of the United States' obligations under the human rights treaties it has signed and ratified.

[2] U.S.-ratified treaties are binding on individual states and are the "supreme Law of the Land". U.S. CONST. art. VI, cl. 2. For example, the United States noted its understanding that the ICCPR shall be implemented "by the state and local governments; to the extent that [they] exercise jurisdiction over such matters."

ARGUMENT

I. INTERNATIONAL HUMAN RIGHTS LAW SHOULD GUIDE THE SUPREME COURT IN THIS CASE

Since the nation's founding, international law has infused the U.S. Constitution. *See* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 Yale L. & Pol'y Rev. 329, 330 (2004) ("In writing the Constitution, the Framers . . . understood that the new nation would be bound by 'the Law of Nations,' today called international law.").

The Supreme Court has followed this tradition by interpreting and applying human rights treaties that the United States has ratified and signed. *See Roper v. Simmons*, 543 U.S. 551, 576 (2005) (identifying prevailing legal norms regarding juvenile death penalty by looking at international agreements, including CRC and ICCPR); *Graham v. Florida*, 560 U.S. 48, 81-82 (2010) (considering CRC's prohibition of sentencing juveniles to life imprisonment without the possibility of parole in determining whether practice was "cruel and unusual" under U.S. law); *cf. Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J. and Breyer, J., concurring) (considering applicability of CERD to affirmative action policies at U.S. universities).

II. INTERNATIONAL HUMAN RIGHTS LAW PROTECTS ABORTION ACCESS

International human rights law is comprised of treaties that enshrine human rights including rights to equality and non-discrimination, life, privacy,

health, and freedom from torture, cruel, and inhuman and degrading treatment. States—including the United States—codified these fundamental human rights after the horrors of the Second World War.

In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights reflecting States' consensus that "[a]ll human beings are born free and equal in dignity and rights." G.A. Res. 217 (III) A, Article 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). These rights are "inherent from the moment of birth." U.N. GAOR 3rd Comm., 99th mtg., 110-124, U.N. Doc. A/PV/98-99 (1948). In the decades that followed, several core international treaties enshrined these fundamental rights. Under this treaty regime, States parties cannot invoke their own domestic law to justify non-compliance with their obligations. *See* VCLT art. 27.

Treaty bodies[3] are "mandated to monitor State parties' compliance with their treaty obligations" and also provide guidance on the fulfilment of rights. OHCHR, *Human Rights Bodies*, https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (last visited Sept. 15, 2021). *See also, e.g.*, HRC, *Draft General Comment No. 33 (2nd*

[3] These bodies include: the HRC monitoring the ICCPR, the Committee on the Elimination of Racial Discrimination ("CERD Committee") monitoring the CERD, the Committee against Torture ("CAT Committee") monitoring the CAT, the CESCR Committee monitoring the ICESCR, the CEDAW Committee monitoring CEDAW, the Committee on the Rights of the Child ("CRC Committee") monitoring the CRC, and the Committee on the Rights of Persons with Disabilities ("CRPD Committee") monitoring the CRPD.

version, 18 August 2008), ¶¶ 15-16, U.N. Doc. CCPR/C/GC/33/CRP.3 (Aug. 25, 2008) (reflecting HRC's view that it is the "authentic interpreter" of the ICCPR and that "[a] finding of a violation by the Committee engages the legal obligation of the State party to reconsider the matter"); CERD Art. 9 (empowering CERD Committee, *inter alia*, to "make suggestions and general recommendations based on the examination of the reports and information received from the States Parties"); CAT Art. 19 (empowering CAT Committee, *inter alia*, to make general comments on State Party reports submitted to it).

Over time, States and human rights bodies clarified that human rights treaty obligations encompass the reproductive rights of women and girls, including safe and legal abortion access. *See, e.g.,* HRC General Comment No. 36, ¶ 8; CESCR Committee General Comment No. 22, ¶¶ 10-11, 13-14, 45, 49; CESCR Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶¶ 34-35, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR Committee General Comment No. 14]; CRC Committee, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, ¶ 60, U.N. Doc. CRC/C/GC/20* (Dec. 6, 2016) [hereinafter CRC Committee General Comment No. 20]; *L.C. v. Peru*, CEDAW Committee, Commc'n No. 22/2009, ¶ 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011) [hereinafter *L.C. v. Peru*]; OHCHR, *Information Series on Sexual and Reproductive Health Rights: Abortion* (2020), https://www.ohchr.org/Documents/Is-

sues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf (last visited Sept. 15, 2021) [hereinafter OHCHR, *Information Series*].

At the 1994 International Conference on Population and Development ("ICPD"), States, including the United States, collectively acknowledged that "reproductive rights embrace certain human rights" and that ensuring safe abortion access is critical to women's reproductive health. ICPD, CAIRO, EGYPT, SEPT. 5–13, 1994, REPORT OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, ¶¶ 7.3, 8.19, 8.20(a), 8.25, U.N. Doc. A/CONF.171/13/Rev.1 (1995).

In the 1995 Beijing Platform for Action (another consensus document), States recognized that "[r]eproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes[,]" including the "right to make decisions concerning reproduction free of discrimination, coercion and violence[.]" FOURTH WORLD CONFERENCE ON WOMEN, REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN, BEIJING 4-15 SEPT. 1995, ¶¶ 94-95, U.N. Doc. A/CONF.177/20, annex II (Oct. 17, 1995).

Human rights bodies also have articulated the effects of abortion restrictions and their incompatibility with rights to equality and non-discrimination, privacy, life, health, and freedom from torture, cruel, inhuman and degrading treatment. *See, e.g.*, HRC General Comment No. 36, ¶ 8; CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No.*

19, ¶ 18, U.N. Doc. CEDAW/C/GC/35 (July 14, 2017) [hereinafter CEDAW Committee General Recommendation No. 35]; CESCR Committee General Comment No. 22, ¶ 10.

Lead *amicus* Mofokeng has recognized that "[v]iolence against women and girls manifests in numerous forms," including through "denied abortions". Human Rights Council, *Strategic priorities of work: Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng*, ¶ 53, U.N. Doc. A/HRC/47/28 (Apr. 7, 2021).

A. Prohibitions on abortion access breach the right to equality and non-discrimination

Laws restricting abortion access discriminate against women and girls on the basis of sex and engage States' obligations under the ICCPR. *See* Techane-Puras-Šimonović Letter ("[T]he failure to provide adequate access" to abortion services "constitute[s] discrimination on the basis of sex, in contravention of ICCPR article 2.").[4]

For example, the HRC found that Irish laws criminalizing abortion can subject a woman "to a gender-based stereotype of the reproductive role of women primarily as mothers" in violation of the right to equal

[4] ICCPR Article 2 states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

protection of the law in ICCPR Article 26.[5] *Mellet v. Ireland*, HRC, Commc'n No. 2324/2013, ¶ 7.11, U.N. Doc. CCPR/C/116/D/2324/2013 (2016) [hereinafter *Mellet v. Ireland*]; *see also Whelan v. Ireland*, HRC, Commc'n No. 2425/2014, ¶ 7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (2017) [hereinafter *Whelan v. Ireland*].

Contrary to the arguments of Petitioners' *amici*, CEDAW requires the safeguarding of women's reproductive rights and health, including abortion access.[6] CEDAW Article 12 requires States to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." Consequently, the CEDAW Committee made clear that "[i]t is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women." CEDAW Committee General Recommendation No. 24, ¶ 11.

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[5] ICCPR Article 26 states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[6] CEDAW Article 1 states that "discrimination against women" means "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

In 2011, the CEDAW Committee found that Peru must amend its law because it was discriminatory to deny abortion access to a girl who "was a minor and a victim of sexual abuse" and that restricted abortion access deprived her of "her entitlement to the medical services that her physical and mental condition required." *See L.C. v. Peru*, ¶ 8.15. In 2018, the CEDAW Committee concluded that abortion restrictions in Northern Ireland constituted discrimination because they affect only women, "preventing them from exercising reproductive choice[.]" CEDAW Committee, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Report of the Committee*, ¶ 65, U.N. Doc. CEDAW/C/OP.8/GBR/1 (Mar. 6, 2018) [hereinafter CEDAW 2018 UK Report].

Girls are particularly vulnerable to discrimination through restrictive abortion access. Lack of access to reproductive health services "contributes to adolescent girls being the group most at risk of dying or suffering serious or lifelong injuries in pregnancy and childbirth." CRC Committee General Comment No. 20, ¶ 59. The CRC Committee advised that "[t]here should be no barriers to commodities, information and counselling on sexual and reproductive health and rights, such as requirements for third-party consent or authorization" and "urge[d] States to decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislation with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions." *Id*. ¶ 60.

Moreover, international human rights treaties require States to take positive measures to achieve substantive equality and address inequalities faced by women and girls that a formal, gender-neutral or gender-blind approach to equality does not rectify, including by dismantling the discriminatory, racist, and xenophobic institutional structure and laws surrounding health and abortion services. *See, e.g.,* CEDAW Committee, *General Recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, (30th Sess., 2004),* in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶¶ 8-12, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004); CESCR Committee, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, ¶ 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶¶ 9-10, U.N. Doc. E/C.12/ GC/20 (July 2, 2009); HRC, *CCPR General Comment No. 28: Article 3 (The equality of rights between men and women),* ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter HRC General Comment No. 28].

States must recognize that, pursued alone, formal equality disadvantages individuals who face intersectional discrimination on multiple grounds: "groups such as, but not limited to, poor women, persons with disabilities, migrants, indigenous or other ethnic minorities, adolescents, lesbian, gay, bisexual, transgender and intersex persons, and people living with HIV/AIDS are more likely to experience multiple discrimination" and "may be disproportionately affected by intersectional discrimination in the context

of sexual and reproductive health." CESCR Committee General Comment No. 22, ¶ 30. *See also, e.g.* CRC Committee, *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, ¶¶ 8-11, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013) [hereinafter CRC Committee General Comment No. 15]; CRPD Committee, *General comment No. 3 (2016) on women and girls with disabilities*, ¶ 2, U.N. Doc. CRPD/C/GC/3 (Nov. 25, 2016) [hereinafter CRPD General Comment No. 3] (noting barriers which "create situations of multiple and intersecting forms of discrimination against women and girls with disabilities"); HRC General Comment No. 28, ¶ 30; *K.L. v. Peru*, HRC, Commc'n No. 1153/2003, ¶¶ 6.3-6.5, U.N. Doc. CCPR/C/85/D/1153/2003 (2005) [hereinafter *K.L. v. Peru*]; *Mellet v. Ireland*, ¶ 7.11 (finding differential treatment where Ireland "failed to adequately take into account [woman's] medical needs and socioeconomic circumstances"); *Whelan v. Ireland*, ¶ 7.12 (same).

Restrictive abortion laws such as the Mississippi Act exemplify the intersectional discrimination that targets marginalized communities, as noted by the District Court below. *See Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 n. 22 (S.D. Miss. 2018), *aff'd sub nom. Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019).

In its report to the Human Rights Council on its visit to the United States, the WGDAW cautioned that:

> The United States, which is a leading State in terms of formulating international human rights

> standards, is allowing its women to lag behind in the respect for these standards. While all women are victims of these "missing" rights, women who are poor; Native American, African-American, Hispanic and Asian women; women who are members of ethnic minorities; migrant women; lesbian, bisexual, transgender or intersex persons; women with disabilities; and older women are in a situation of heightened vulnerability.

Human Rights Council, *Report of the Working Group on the issue of discrimination against women in law and in practice on its mission to the United States of America*, ¶ 87, U.N. Doc. A/HRC/32/44/Add.2 (Aug. 4, 2016).

African-American women and girls have historically been subjected to racism, and restrictive abortion laws subject them to intersectional discrimination that imperils their reproductive health. "The United States has the highest maternal mortality ratio among wealthy countries, and [B]lack women are three to four times more likely to die than White women[.]" Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America*, ¶ 57, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018) [hereinafter Human Rights Council, Extreme Poverty and Human Rights SR Report on United States].

Noting "the persistence of racial disparities in the field of sexual and reproductive health, particularly with regard to the high maternal and infant mortality rates among African American communities," the CERD Committee called on the United States to "[e]liminate racial disparities in the field of sexual and

reproductive health and standardize the data collection system on maternal and infant deaths in all states to effectively identify and address the causes of disparities in maternal and infant mortality rates[.]" CERD Committee, *Concluding Observations on the combined seventh to ninth periodic reports of the United States of America*, ¶ 15, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014) [hereinafter CERD Committee 2014 U.S. Observations].

Women living in poverty are vulnerable to abortion restrictions. The WGDAW observed that "in countries where induced termination of pregnancy is restricted by law and/or otherwise unavailable, safe termination of pregnancy is a privilege of the rich, while women with limited resources have little choice but to resort to unsafe providers and practices." OHCHR, *Information Series*. *See also Mellet v. Ireland*, ¶ 7.10; *Whelan v. Ireland*, ¶ 7.11.

In the United States, legal and practical limitations on abortion access result in intersectional discrimination compounded by poverty:

> Low-income women who would like to exercise their constitutional, privacy-derived right to access abortion services face legal and practical obstacles, such as mandatory waiting periods and long driving distances to clinics. This lack of access to abortion services traps many women in cycles of poverty.

Human Rights Council, Extreme Poverty and Human Rights SR Report on United States, ¶ 56.

Moreover, "rural women are more likely to resort to unsafe abortion than their urban counterparts, a situation that puts their lives at risk and compromises

their health." CEDAW Committee, *General recommendation No. 34 (2016) on the rights of rural women*, ¶ 38, U.N. Doc. CEDAW/C/GC/34 (Mar. 7, 2016). *See also* OHCHR, *Information Series*. The CESCR Committee clarified that States are required "to eradicate practical barriers" including "disproportionate costs and lack of physical or geographical access to sexual and reproductive health care." CESCR Committee General Comment No. 22, ¶ 46.

Abortion access is a prerequisite for equal protection of the law for women with disabilities. "[L]ike all women, women with disabilities have the right to choose the number and spacing of their children, as well as the right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence." CRPD Committee General Comment No. 3, ¶ 38; *see also* CRPD Committee, *Concluding Observations on the initial report of Poland*, ¶ 44(e), U.N. Doc. CRPD/C/POL/CO/1 (Oct. 29, 2018).

B. Prohibitions on abortion access breach the right to privacy

"The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, involving intimate matters of physical and psychological integrity, and is a precondition for the enjoyment of other rights." Working Group on the issue of discrimination against women in law and in practice (today WGDAW), ¶ 35, U.N. Doc. A/HRC/38/46 (May 14, 2018).

Special Rapporteur Mofokeng noted recently that "[w]omen, adolescents, girls and all persons capable of becoming pregnant have a right to make informed, free and responsible decisions concerning their reproduction, their body and sexual and reproductive health, free of discrimination, coercion and violence." Mofokeng 2021 Report, ¶ 40.

The CEDAW Committee recommends that States "[r]equire all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice[.]" CEDAW Committee General Recommendation No. 24, ¶ 31(e); *see also* CEDAW 2018 UK Report, ¶ 65 (noting that restrictive abortion law in Northern Ireland "affronts women's freedom of choice and autonomy and their right to self-determination").

The right to privacy under ICCPR Article 17 encompasses women's reproductive autonomy. *See* HRC General Comment No. 36, ¶ 8 (referencing right to privacy).[7] The HRC has found violations of the right to privacy in every case before it when the State interferes with reproductive decision-making or abortion access. This was reflected first in *K.L. v. Peru* in 2005 and recently in *Whelan v. Ireland* in 2016 and *Mellet v. Ireland* in 2017, where the HRC held that the decision to seek an abortion falls within the scope of the right to privacy under the ICCPR. *See K.L. v. Peru*, ¶ 6.4; *L.M.R. v. Argentina*, HRC, Commc'n No.

[7] ICCPR Article 17 states: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

1608/2007, ¶ 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (2007); *Mellet v. Ireland*, ¶ 7.8; *Whelan v. Ireland*, ¶ 7.9. In *Mellet* and *Whelan*, the HRC held that forcing a woman to choose between continuing an unwanted pregnancy or traveling to another jurisdiction to receive a safe legal abortion at her personal expense was an intrusive interference contrary to the ICCPR. *See Mellet v. Ireland*, ¶ 7.8; *Whelan v. Ireland*, ¶ 7.9.

The CRC mandates that "no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or correspondence." CRC Art. 16. In *K.L. v. Peru*, ¶ 6.4, the HRC recognized that denying an adolescent girl access to abortion for a fatal fetal impairment was a violation of her right to privacy under the ICCPR.

C. Prohibitions on abortion access breach the right to life

The HRC's authoritative interpretation of ICCPR Article 6 clarifies longstanding standards developed over decades that abortion restrictions cannot imperil the right to life, among other rights, and force women and girls to undertake unsafe abortions:

> Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily

> interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable. . . . States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly. . . . States parties should remove existing barriers to effective access by women and girls to safe and legal abortion . . . and should not introduce new barriers[.]

HRC General Comment No. 36, ¶ 8.

Contrary to the assertions of several of Petitioners' *amici*, the right to life emanating from human rights treaties does not apply prenatally. *See, e.g.*, CEDAW 2018 UK Report, ¶ 68 ("[A]nalyses of major international human rights treaties on the right to life confirm that it does not extend to fetuses."); Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Following His Visit to Ireland from 22 to 25 November 2016, ¶ 93, CommDH (2017) 8 (Mar. 29, 2017) ("[T]he Eighth Amendment of the Irish Constitution, protecting the right to life of the unborn on an equal basis with the right to life of the pregnant woman, departs from the position consistently held by human rights bodies that the right to life, as enshrined in relevant international treaties, does not apply to prenatal life."); Council of Europe

Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe*, at 51 (Dec. 2017), https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead (last visited Sept. 16, 2021) ("[T]he right to life as enshrined in core international human rights treaties does not apply prior to birth and international human rights law does not recognise a prenatal right to life"; "the drafters of these treaties rejected claims that the right to life enshrined in those instruments should apply prenatally.").

During the drafting of ICCPR Article 6, delegations voted against adding text to the provision stating that "[t]he right to life is inherent in the human person . . . [f]rom the moment of conception[.]" U.N. GAOR, *Agenda Item 33, Report of the Third Committee*, ¶¶ 97, 113, 120(e), U.N. Doc. A/3764 (1957). The HRC has found in several cases that the right to life does not apply from conception, emphasizing women's right to life by protecting abortion access. The CEDAW and CRC Committees have focused on the violation of women's and girls' right to life through restrictions and punishments relating to abortion. *See, e.g., L.C. v. Peru*, ¶ 8.15; CRC Committee General Comment No. 15, ¶ 70.

While the CRC's preamble refers to "legal protection before as well as after birth", this was never intended to trump women's and girls' right to life in the context of abortion access. Supporters of this language expressly stated that "the purpose of the amendment was not to preclude the possibility of abortion[.]" U.N. Commission on Human Rights, *Question of a Convention on the Rights of the Child: Rep. of the Working Group*, 36th Sess., ¶ 6, U.N. Doc. E/CN.4/L.1542 (Mar.

10, 1980). This understanding is reflected by the CRC Committee, which has consistently criticized States' restrictive abortion laws and never recommended that a liberal abortion law be narrowed. *See* CRC Committee General Comment No. 20, ¶ 60.

The HRC has emphasized that States must reduce legal restrictions on family planning, which give rise to high rates of pregnancy, and illegal abortions—one of the principal causes of maternal mortality interfering with the right to life. *See* HRC, *Concluding observations on the fourth periodic report of the Philippines,* ¶ 13, U.N. Doc. CCPR/C/PHL/CO/4 (Nov. 13, 2012). *See also* CEDAW Committee, *Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, ¶ 47, U.N. Doc. CEDAW/C/OP.8/PHL/1 (Apr. 22, 2015) ("tak[ing] note of the potentially life-threatening consequences of resorting to unsafe abortion as a method of contraception and recall[ing] that there is a direct link between high maternal mortality rates resulting from unsafe abortion and lack of access to modern methods of contraception"); HRC General Comment No. 36, ¶ 8 ("States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions.").

In a joint statement, the CEDAW and CRPD Committees found that "access to safe and legal abortion, as well as related services and information are essential aspects of women's reproductive health and a prerequisite for safeguarding their human rights to life, health, equality before the law and equal protection of the law, non-discrimination, information, privacy,

bodily integrity and freedom from torture and ill treatment." *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities, Joint statement by the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of All Forms of Discrimination against Women* (Aug. 29, 2018), https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_STA_8744_E.docx (last visited Sept. 16, 2021) [hereinafter CEDAW and CRPD 2018 Joint Statement].

D. Prohibitions on abortion access breach the right to health

Abortion access is part of women's and girls' comprehensive reproductive health. The right to health encompasses rights to physical health, mental health, and social well-being.

ICESCR Article 12(1) enshrines "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." "The freedoms [protected by Article 12] include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the Covenant." CESCR Committee General Comment No. 22, ¶ 5.

The right to health "is not to be understood as a right to be *healthy*. The right to health contains both

freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation." CESCR Committee General Comment No. 14, ¶ 8, 11.

The Report of the Special Rapporteur on Health to the Human Rights Council has recognized that target 3.7 of the Sustainable Development Goals, on ensuring universal access to sexual and reproductive healthcare services, must be fulfilled in part by States adopting "a comprehensive gender-sensitive and non-discriminatory sexual and reproductive health policy" that is consistent with human rights standards. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,* ¶¶ 89-92, U.N. Doc. A/HRC/32/32 (Apr. 4, 2016); Mofokeng 2021 Report, ¶¶ 40-43.

CRC Article 24 recognizes the right of the child to enjoy the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health and requires that States Parties "develop preventive health care, guidance for parents and family planning education and services."

The CRC Committee has stated that "[g]iven the high rates of pregnancy among adolescents globally and the additional risks of associated morbidity and mortality, States should ensure that health systems and services are able to meet the specific sexual and reproductive health needs of adolescents, including

family planning and safe abortion services." CRC Committee General Comment No. 15, ¶ 56.

The CEDAW Committee, jointly with the CRPD Committee, has framed abortion access as a component of the right to reproductive health, stating that "access to safe and legal abortion, as well as related services and information are essential aspects of women's reproductive health and a prerequisite for safeguarding their human rights to[…]health[...]" CEDAW and CRPD 2018 Joint Statement, 1.

Special Rapporteur Mofokeng notes that "[a]ccess to family planning, contraception including emergency contraception, safe abortion services and post-abortion care is a component of the right to health and, in particular, the right to sexual and reproductive health." Mofokeng 2021 Report, ¶ 33. The Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health has stated that "[t]he right to sexual and reproductive health is a fundamental part of the right to health. States must therefore ensure that this aspect of the right to health is fully realized," and that "[s]ome criminal and other legal restrictions in each of those areas, which are often discriminatory in nature, violate the right to health by restricting access to quality goods, services and information" and "infringe human dignity by restricting the freedoms to which individuals are entitled under the right to health, particularly in respect of decision-making and bodily integrity." U.N. GAOR, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, at 2, U.N. Doc. A/66/254 (Aug. 3, 2011).

The CESCR Committee notes that "[h]ealth facilities, goods, information and services related to sexual and reproductive health care should be accessible to all individuals and groups without discrimination and free from barriers." CESCR Committee Comment No. 22, ¶ 15. The requirement of accessibility is made up of four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility (affordability), and information accessibility. CESCR Committee, General Comment No. 14, ¶ 12(b). Accordingly, the CESCR Committee recommends that to enable the realization of a woman's right to health, States Parties should remove "all barriers interfering with [a woman's] access to health services, education and information including in the area of sexual and reproductive health." *Id.* ¶ 21, Exhibit 40.

The Report of the Working Group on the issue of discrimination against women in law and practice to the Human Rights Council states that "[w]omen's non-discriminatory enjoyment of the right to health must be autonomous, effective and affordable" and makes clear that criminalizing behavior attributed only to women is discriminatory and risks their lives and health. Human Rights Council, *Report of the Working Group on the issue of discrimination against women in law and in practice,* at 1, U.N. Doc. A/HRC/32/44 (Apr. 8, 2016). *See also* World Health Organization, *Fact Sheet: Preventing unsafe abortion* (Sept. 25, 2020), https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion (last visited Sept. 16, 2021) (listing restrictive abortion laws as a barrier to safe abortion, with attendant risks to health and life of women).

The CERD Committee has addressed "the persistence of racial disparities in the field of sexual and reproductive health, particularly with regard to the high maternal and infant mortality rates among African-American communities[.]" CERD Committee 2014 U.S. Observations, ¶ 15.

The CRPD Committee has also emphasized that women and girls with disabilities face burdensome barriers "with regard to health care, including sexual and reproductive health services[.]" CRPD General Comment No. 3, ¶ 2.

E. Prohibitions on abortion access breach the right to be free from torture and cruel, inhuman or degrading treatment

CAT Article 1 defines "torture" as "any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person … for any reason based on discrimination of any kind" and the CAT Committee has consistently found that prohibitions on legal abortion can constitute a violation of the prohibition on torture. The CAT Committee has "expresse[d] concern at the severe physical and mental anguish and distress experienced by women and girls regarding termination of pregnancy" due to a State's policies. CAT Committee, *Concluding observations on the second periodic report of Ireland*, ¶ 31, U.N. Doc. CAT/C/IRL/CO/2 (Aug. 31, 2017). The CAT Committee found that Poland's restrictive 12-week gestation abortion laws combined with a lack of guidelines on abortion access "will result in physical and mental suffering so severe in pain and intensity as to amount to torture" and "engage the international responsibility

of the State party under the Convention." CAT Committee, *Concluding observations on the seventh periodic report of Poland*, ¶¶ 33-34, U.N. Doc. CAT/C/POL/CO/7 (Aug. 29, 2019).

The CAT Committee clarified that States parties must refrain "from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture[.]" CAT Committee, *General Comment No. 2: Implementation of article 2 by States parties*, ¶ 17, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). This obligation requires States to take effective legislative, administrative, judicial or other measures to prevent violations of reproductive rights amounting to torture or other cruel, inhuman or degrading treatment, including denial of abortion and post-abortion care. *See* Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, ¶ 46, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).

The Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment or punishment has highlighted that "the denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill treatment." Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 44, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016). "International human rights law increasingly recognizes that abuse and mistreatment of women seeking reproductive health services cause tremendous and lasting physical and emotional suffering"

which can constitute cruel and degrading treatment. *See id.* ¶ 42.

ICCPR Article 7[8] protects both the dignity and physical and mental integrity of the individual, and the HRC has made clear that mental suffering violates this article. HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, ¶ 5 (Mar. 10, 1992), https://www.refworld.org/docid/453883fb0.html (last visited Sept. 15, 2021). The HRC has viewed restrictions on abortion as a violation of the right to be free from torture, cruel, inhuman and degrading treatment since the first case on abortion decided in the U.N. system, *K.L. v. Peru*, ¶ 6.3. The HRC held in *Whelan* and *Mellet* that Irish laws restricting abortion access exacerbate physical and mental suffering and can constitute cruel, inhuman or degrading treatment in violation of ICCPR Article 7. *See Mellet v. Ireland*, ¶¶ 7.4-7.6; *Whelan v. Ireland*, ¶¶ 7.4-7.7. Upon the HRC's recommendations, in 2018 Ireland successfully voted on a referendum to remove from the Irish Constitution the article prohibiting abortion, enabling Ireland to comply with its international human rights obligations. *See generally* European Law Scholars Br.

The CEDAW Committee has identified a direct relationship between abortion access and the prohibition on torture and found that "[v]iolations of women's sexual and reproductive health and rights" such as "criminalization of abortion, denial or delay of safe

[8] ICCPR Article 7 states in relevant part: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

abortion and/or post-abortion care, [and] forced continuation of pregnancy . . . are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment." CEDAW Committee General Recommendation No. 35, ¶ 18. In the CEDAW 2018 UK Report, ¶ 65, the Committee found that the abortion restrictions in Northern Ireland "involve[d] mental or physical suffering constituting violence against women and potentially amounting to torture or cruel, inhuman and degrading treatment[.]"

III. THE COURT SHOULD UPHOLD EXISTING CONSITUTIONAL PROTECTIONS FOR ABORTION ACCESS AND REFUSE THE RETROGRESSION OF RIGHTS, CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS LAW

Overturning or curtailing constitutional protections to abortion access established in *Roe* and *Casey* constitutes retrogression in violation of human rights law. *See* HRC General Comment No. 36, ¶ 8 ("States parties should remove existing barriers to effective access by women and girls to safe and legal abortion . . . and should not introduce new barriers."). The United States should not regress and contravene human rights standards:

> Retrogressive measures should be avoided and, if such measures are applied, the State party has the burden of proving their necessity. This applies equally in the context of sexual and reproductive health. Examples of retrogressive measures include . . . imposition of barriers to information,

> goods and services relating to sexual and reproductive health[.]

CESCR Committee General Comment No. 22, ¶ 38. *See also* HRC, *Concluding observations on the sixth periodic report of Spain*, ¶ 13, U.N. Doc. CCPR/C/ESP/CO/6 (Aug. 14, 2015) (expressing concern over proposed legislation that "could increase the number of illegal abortions and put women's lives and health at risk in the State party").

During the Universal Periodic Review of the United States, several States recommended the United States to improve, protect, and ensure equitable access to comprehensive sexual and reproductive health, rights, services and information. *See* Human Rights Council, *Report of the Working Group on the Universal Periodic Review: United States*, at 21-22, U.N. Doc. A/HRC/46/15 (Dec. 15, 2020). In response, the United States supported these recommendations concerning reproductive rights and health services. *See U.S. Statement during the Adoption of the Third Universal Periodic Review (UPR) of the United States* (Mar. 17, 2021), https://geneva.usmission.gov/2021/03/17/us-upr-1/ (last visited Sept. 16, 2021).

Petitioners' *amici* invoke the 2020 Geneva Declaration, but this non-binding, ideologically-motivated political declaration only serves to show how few countries seek to increase restrictions on abortion access, with just 34 out of 193 States signing. *Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family* (October 2020). The United States withdrew its sponsorship and signature, and notified other countries of its withdrawal, in favor of a

policy "support[ing] women's and girls' sexual and reproductive health and rights in the United States, as well as globally." The White House, *Memorandum on Protecting Women's Health at Home and Abroad* (Jan. 28, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/ (last visited Sept. 16, 2021).

Dismantling the U.S. framework that has protected abortion access for nearly 50 years will lead to further violations of women's and girls' human rights. Many states have "trigger" abortion bans in place that would come into force if the Supreme Court overturns *Roe* and *Casey*. Resp'ts. Br. 43.

As a party and signatory to human rights treaties, the United States must ensure that individual states comply with treaty obligations, since a breach by any U.S. state engages the legal responsibility of the United States as a whole. *See* Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 4, U.N. Doc. A/56/10 (2001).

CONCLUSION

Upholding the Mississippi Act and thereby overturning nearly 50 years of constitutional protections for women's and girls' reproductive rights would contravene the United States' international human rights obligations.

Respectfully submitted,

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Counsel for Amici Curiae

September 20, 2021

APPENDIX

APPENDIX[9]
List of *Amici Curiae*

1. Dr. Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

2. Ms. E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

3. Mr. Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

4. Ms. Melissa Upreti, a member and current Chair of the U.N. Working Group on discrimination against women and girls

5. Ms. Dorothy Estrada-Tanck, Vice-Chair of the U.N. Working Group on discrimination against women and girls

6. Ms. Elizabeth Broderick, member of the U.N. Working Group on discrimination against women and girls

7. Ms. Ivana Radačić, member of the U.N. Working Group on discrimination against women and girls

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[9] U.N. affiliation listed for identification.

8. Ms. Meskerem Geset Techane, member of the U.N. Working Group on discrimination against women and girls