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 *AMICUS CURIAE* FOR CONCERNED WOMEN FOR AMERICA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Concerned Women for America (CWA) is the largest public policy women's organization in the United States with members in all fifty states. Through its grassroots organization, CWA encourages policies that strengthen and protect women and families, and advocates for the traditional virtues that are central to America's cultural health and welfare. The protection and recognition of the sanctity of every human life is one of CWA's seven core issues. CWA represents many of the women who supported and help pass Mississippi's House Bill 1510, the "Gestational Age Act." Miss. Gen. Laws 2018, ch. 393 (codified at Miss. Code Ann. 41-41-191).

CWA believes abortion harms women, men, their families, and the nation and actively promotes legislation and public education to support women in crisis pregnancies and address the harms caused by pro-abortion policies. CWA members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful elite. CWA affirms that ordinary women are capable of extraordinary things when, inspired by

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[1] Pursuant to Supreme Court Rule 37, blanket consents have been filed with the Court by both Respondents (June 1, 2021) and Petitioners (June 9, 2021). No Party or Party's Counsel authored this Brief in whole or in part, or contributed money to fund its preparation or submission; and no person other than Amicus Curiae, its members or Counsel, contributed money to fund the preparation or submission of this Brief.

the love of God, our families, and our country, they work together. CWA believes it is false to suggest women need abortion to have equality. Moreover, CWA affirms women are not a monolithic group assenting to a homogeneous worldview on any policy issue so that this honorable Court benefits from hearing and giving value to a broad range of women voices in cases such as this one.

SUMMARY OF ARGUMENT

All pre-viability prohibitions on elective abortion should not be deemed unconstitutional. As Justice Anthony Kennedy explained in *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007), "*Casey* rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all pre-viability regulations of abortion unwarranted." The Court should reject any reading of its precedent that forces states to ignore scientific, medical, or sociological data in order to abide by an amorphous concept of viability that will only continue to promote uncertainty in the law.

This Court should not continually second guess a state's, such as Mississippi's, balancing efforts to protect and promote the welfare of its citizens when it comes to abortion. Failure to show restraint in this matter makes the Court's declarations that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning" hollow. *Planned Parenthood of*

Southeastern Pennsylvania v. Casey, 505 U.S. 833, 873 (1992). The Constitution, very intentionally, leaves these types of determinations to the states, as they are better positioned to act and react to new challenges and fast-developing scientific advances. The time has come for the Court to rectify the constitutional errors of its abortion jurisprudence.

The Court has failed to give proper weight to the physical, psychological, and emotional harms abortion can have on women and society at large. Worse, current jurisprudence forces states considering these matters to have to wait until their legislative determinations are invariably challenged in court and appealed all the way to the Supreme Court to check their value judgments against the Court's personal preferences at any given point in time. As evidenced by the lower court's profoundly hostile disregard for women's concerns in this case, the Court's confused viability standard fails women by making it impossible for states to take into account, or even present in court, the full range of evidence in play when considering a state policy on the termination of the life of an unborn child.

The Court should not arbitrarily give more weight to the views of some women who support abortion on demand. The district court here went so far as to link efforts to protect life and women's health with sexism and racism, while the reality is that millions of women support efforts like Mississippi's and indeed reject the Court-created right to abortion. Though not strictly necessary to resolve this case, we submit that the Court's fundamental problems in this area of law go

back to *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), and to fully vindicate the constitutional principles involved requires an honest reversal, so that power may be returned to the states and "we the people" where it belongs.

ARGUMENT

I. Mississippi Should Be Free To Make Reasonable Determinations About Abortion Policy That Place A Higher Value On The Life Of Mothers And Their Unborn Children Previability.

All pre-viability prohibitions on elective abortion should not be deemed unconstitutional. The viability standard as articulated by this Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), is as arbitrary as was the trimester scheme it had established under *Roe v. Wade*, 410 U.S. 113 (1973). Justice Anthony Kennedy explained in *Carhart* that "*Casey* rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all pre-viability regulations of abortion unwarranted." 550 at 146. Indeed the Court noted, "The abortions affected by the Act's regulations take place both previability and postviability," *id*. at 156. Still, it upheld the ban. Similarly, the Court should reject in this case any reading of its precedent that forces states to ignore scientific, medical, or sociological data in order to abide by an amorphous concept of viability that will only continue to promote uncertainty in the law.

As Justice Sandra Day O'Connor predicted in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), medical advances continue to open a window into the womb, giving us a better understanding of the interest at play in the abortion decision and making us "better able to provide for the separate existence of the fetus," *id*. at 458 (O'Connor, J., dissenting). Still, according to the lower courts' interpretation of Supreme Court precedent in this case, a state's only hope of getting such scientific evidence before the courts in order to defend its statutory enactments is to plead its case to the U.S. Supreme Court, as Mississippi has done here. Does the Court want states to continually appeal to it for an update to its articulation of viability, which it has already admitted in its precedent can change—first set at 28 weeks in *Roe*, then around 23 weeks in *Casey*, and which facts suggest today it should perhaps be set even earlier?[2] This would leave the Court no better situated than under the *Roe* trimester framework, which was found "left this Court to serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States" (internal quotation marks omitted). 550 U.S. at 164 (quoting *Webster v. Reproductive Health Services*, 492 U.S. 490, 518–519 (1989)).

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[2] Gemma Mullin, Born Survivor: Docs told me my baby 'wasn't viable' when he was born at 20 weeks—now he's thriving, *THE SUN* (Nov. 1, 2019), available at https://www.thesun.co.uk/news/10260209/baby-not-viable-born-20-weeks-thriving/.

This uncertainty is sure to continue because, as the Court has acknowledged since *Roe*, there are "vigorous opposing views" on abortion, "even among physicians." 410 U.S. at 116. Justice Clarence Thomas articulated it well in *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2321 (2016), the Court's decisions in this area "deliver neither predictability nor the promise of a judiciary bound by the rule of law." *Amicus* prays the Court finds a pathway to remedy this unfortunate state of the law that has affected millions of women since 1973, resulting in the loss of over 62 million babies to abortion.[3]

Advances in science and our understanding of the process and interests involved in the abortion decision today should push the Court not only to reconsider the definition and timing of viability but the factual underpinnings from *Roe* that it left standing in *Casey*. The time has come for the Court to rectify the constitutional error of *Roe*'s quasi-legislative analysis. States should never be prevented from presenting the evidence which undergirds their legislative reasoning as they fight to withstand constitutional challenges to its laws in areas where the Constitution envisions them having ample freedom to engage based on well-established federalism principles.

This Court should never exclude additional evidence of the state's interests beyond viability. Limiting

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[3] Randall O'Bannon Ph.D., 62,502,904 Babies Have Been Killed in Abortions Since Roe v. Wade in 1973 in LIFE NEWS (Jan. 18, 2021), available at https://www.lifenews.com/2021/01/18/62502904-babies-have-been-killed-in-abortions-since-roe-v-wade-in-1973/.

the complex and challenging scientific and moral issues linked to abortion to a simple consideration of the physical development of the unborn baby and the technology available at any given time to preserve the child's life is a tragic outcome that the Court should never promote. As a women's organization, *amicus* considers the omission of the evidence for the state's interest in mothers' health from consideration at the previability stage, for example, a grave misuse of the Court's jurisprudence that the Constitution in no way prescribes. Beyond that, all evidence of the state's interests, including the state's interest in protecting the unborn child's life and the safeguarding and regulating of the medical profession, should not be ignored to abide by the artificial and unreliable line of viability.

The Court should abandon the viability standard entirely and return the power to make value determinations to balance state interests in the public policy of abortion to the states and the people where it constitutionally belongs. When the Court engages in the type of analysis that is required in the abortion debate, it participates in the sort of judgment that is "far more appropriate to a legislative judgment than to a judicial one." 410 U.S. at 173. This is why the Court should not merely try to come up with new and more effective terminology to restrict states in an effort to improve on the current system. To continue these attempts at "judicial legislation" is sure to result in the "impossible feat of leaving this area of the law more confused" than before, *id.* at 173, 174.

II. The Court Has Undervalued The State's Interest In Women's Health By Failing To Give Proper Weight to The Physical, Psychological, And Emotional Harms Abortion Can Have On Women's Lives.

Women's interests should never be irrelevant in the abortion context at every stage of pregnancy, including at the pre-viability stage. Any interpretation of viability that forces courts to exclude the consideration of women's health, not only before choosing to have an abortion but also after that choice, as the lower court decreed here, should not be upheld. "*Casey* overruled the holdings in two cases because they undervalued the State's interest in potential life." 550 U.S. at 146. In this case, *amicus* contends the district court did the same and, even more egregiously, displayed actual disdain for the states' interests in the health of mothers, specifically.

The district court's callous dismissal of Mississippi's stated interest in women's health as "pure gaslighting," *Jackson Women's Health Organization v. Currier*, 349 F.Supp.3d 536, n.22 (2016), is demeaning to the women *amicus* represents. After all, the legislators who enacted H.B. 1510 did not act *sua sponte* but in response to the deep concerns expressed by many CWA women, among millions of other pro-life Americans, who implored the Mississippi legislature to act to prioritize women's health and wellbeing as they did with the Gestational Age Act. Equating our deep concerns for mothers and their unborn children to sexism by attributing it to the legislators representing women

is a grave injustice that this Court should not let stand. Judge James C. Ho of the Fifth Circuit concurring on appeal noted it saying he was:

> [D]eeply troubled by how the district court handled this case. The opinion issued by the district court displays an alarming disrespect for the millions of Americans who believe that babies deserve legal protection during pregnancy as well as after birth, and that abortion is the immoral, tragic, and violent taking of innocent human life. *Jackson Women's Health Organization v. Dobbs*, 945 F.3d 265, 278.

It is worth pondering whether the Court's inconsistent precedent has empowered such a one-sided approach to this issue among lower courts. The Court has acknowledged that "Whether to have an abortion requires a difficult and painful moral decision," 505 U.S. at 852–853; that it is "a decision [] fraught with emotional consequences," 550 U.S. at 159; that pregnancy may "force upon the woman a distressful life and future," and that "Psychological harm may be imminent." 410 U.S. 153. But the focus is most often driven by the "distress, for all concerned, associated with the unwanted child." *Ibid*. The Court should also emphasize that the effects of that painful moral decision will not disappear after an abortion. Mississippi rightfully recognizes that the state's interest in the health of mothers and women's wellbeing must continue long after an abortion, just as intently as before.

Thirty-four years after *Roe*, this Court recognized in *Carhart* the deep trauma that can follow an abortion:

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child." 127 S.Ct. at 159–160.

The acknowledgment was a welcomed, if rare, moment of candor and realism in an area of law that has been often characterized by a politically correct, one-sided view of the abortion debate that has required many exceptions to the legal norms ordinarily followed by the Court. As Justice Kennedy acknowledged in *Carhart*:

> It is true this longstanding maxim of statutory interpretation has, in the past, fallen by the wayside when the Court confronted a statute regulating abortion. The Court at times employed an antagonistic " 'canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.' " 550 U.S. 124, 153–154 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 943–944 (2000), some internal quotation marks omitted).

Could the Court's one-sided, specialized approach to abortion have something to do with what we saw from the district court?

Amicus represents mothers, daughters, sisters, grandmothers, aunts, and friends who have seen the devastation that abortion can have on women's emotional, psychological, and spiritual lives. There are serious concerns about women's health after an abortion, especially after one at the late stages of pregnancy. One study found "Women who had undergone an abortion experienced an 81% increased risk of mental health problems, and nearly 10% of the incidence of mental health problems was shown to be attributable to abortion."[4] It found post-abortive women were 34% more likely to develop an anxiety disorder, 37% more likely to experience depression, 110% more likely to abuse alcohol, and 155% more likely to commit suicide, *id*. A long thirteen-year longitudinal study also found women sometimes struggle for years after an abortion:

> After extensive adjustment for confounding, other pregnancy outcomes, and sociodemographic differences, abortion was consistently associated with increased risk of mental health disorder. Overall risk was elevated 45% (risk ratio, 1.45; 95% confidence interval, 1.30–1.62; $p < 0.0001$). Risk of mental health disorder with pregnancy loss was mixed, but

[4] Priscilla K. Coleman, Abortion and mental health: quantitative synthesis and analysis of research published 1995-2009, 199 BRITISH JOURNAL OF PSYCHIATRY 180–186 (2011), DOI: https://doi.org/10.1192/bjp.bp.110.077230.

> also elevated 24% (risk ratio, 1.24; 95% confidence interval, 1.13–1.37; $p < 0.0001$) overall. Birth was weakly associated with reduced mental disorders. One-eleventh (8.7%; 95% confidence interval, 6.0–11.3) of the prevalence of mental disorders examined over the period were attributable to abortion.[5]

It concludes:

> Evidence from the United States confirms previous findings from Norway and New Zealand that, unlike other pregnancy outcomes, abortion is consistently associated with a moderate increase in risk of mental health disorders during late adolescence and early adulthood. *Ibid*.

It is therefore entirely reasonable for Mississippi to conclude in its H.B. 1510 legislative findings that:

> Abortion carries significant physical and psychological risks to the maternal patient, and these physical and psychological risks increase with gestational age. Specifically, in abortions performed after eight (8) weeks' gestation, the relative physical and psychological risks escalate exponentially as gestational age increases. L. Bartlett et al., Risk factors for legal induced abortion mortality in the United States, OBSTETRICS AND

[5] Sullins D. P. Abortion, Substance Abuse and Mental Health in Early Adulthood: Thirteen-Year Longitudinal Evidence From the United States. SAGE OPEN MEDICINE (2016), https://doi.org/10.1177/2050312116665997.

> GYNECOLOGY 103(4):729 (2004). Miss. Code Ann. § 41-41-45.

The state presented compelling evidence that "Importantly, as the second trimester progresses, in the vast majority of uncomplicated pregnancies, the maternal health risks of undergoing an abortion are greater than the risks of carrying a pregnancy to term." *Ibid.* The Court must leave no doubt that states should be able to present the evidence that compels them to enact abortion policies as they face constitutional challenges in court.

Mississippi was addressing severe matters of concern to millions of women with this law. Another finding stated that:

> Medical complications from dilation and evacuation abortions include, but are not limited to: pelvic infection; incomplete abortions (retained tissue); blood clots; heavy bleeding or hemorrhage; laceration, tear, or other injury to the cervix; puncture, laceration, tear, or other injury to the uterus; injury to the bowel or bladder; depression; anxiety; substance abuse; and other emotional or psychological problems. Further, in abortions performed after fifteen (15) weeks' gestation, there is a higher risk of requiring a hysterectomy, other reparative surgery, or blood transfusion. *Ibid.*

Amicus is aware that there are emotional health issues associated with the carrying of an unwanted pregnancy also. Still, the legal principle to stress here

is that courts should not take sides on the abortion debate as it has done since *Roe*, nor should it second-guess states in their assessment of the evidence and prioritization of values, when there is compelling but competing evidence on both sides.

III. The Court Should Give Proper Weight To The Views Of A Wide Range Of Women's Voices, Including Those Who Support Mississippi's Law And Reject the Court's One-Sided Abortion Jurisprudence.

The Gestational Age Act (H.B. 1510) was enacted as a response to women's concerns. Mississippi women want this law. The accusations of sexism by the district court saying that "H.B. 1510 is closer to the old Mississippi—the Mississippi bent on controlling women and minorities" is, to use the district court's terminology, pure gaslighting, not to mention sexist in its own way. 349 F.Supp.3d 536, n.22. It takes it upon itself to present one side of the debate. As Judge Ho noted on his concurrence on appeal, "The district court no doubt believes that its opinion faithfully reflects one side of the debate—the side that believes that abortion is a necessary component of a woman's personal autonomy." 945 F.3d at 278. But it is much worse. The district court assumes the pro-abortion side of this discussion speaks for all women. But it does not. In fact, it does not speak even for the majority of women.

Judge Ho again:

> [*M*]*ore* women than men describe themselves as "pro-life." *Abortion Trends by Gender*, GALLUP, https://news.gallup.com/poll/245618/abortion-trends-gender.aspx (last visited Dec. 2, 2019) (noting that, in 2019, 51% of women and 46% of men in the United States self-identify as "pro-life"). Likewise, many feminists, both past and present, view "abortion [as] part and parcel of women's oppression." MARY KRANE DERR & LINDA NARANJO-HUEBL, PRO-LIFE FEMINISM: YESTERDAY & TODAY 12 (Rachel MacNair ed. 1995). *See also*, *e.g.*, *id.* at 5 ("[T]here is a motif in feminism which began long ago and has endured to the present day. This is the theme of abortion as an injustice against fetal life which originates with injustice against female life."); Brief Amici Curiae of Feminists for Life of America; Massachusetts Citizens for Life, Inc.; Pro-Life Legal Defense Fund, Inc.; and University Faculty for Life in Support of Petitioners, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 207161, at *1 ("[Feminists for Life] is dedicated to securing basic human rights for all people, especially women and children, from conception until the natural end of life. Among its members are women who oppose [partial-birth abortion] as a threat to the lives of women and children."); Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 890 (2011) ("[A] growing segment of women instead echoes the

> views of the early American feminists, who believed that abortion was not only an egregious offense against the most vulnerable human beings, but that it was also an offense against women and women's equality."). *Jackson Women's Health Organization v. Dobbs*, 945 F. 3d at 284.

Moreover, a new AP-NORC poll found that "most Americans say abortions should generally be illegal during the second and third trimester."[6] One would never guess this by looking at the Court's abortion precedent. Citing the Court's precedent, the district court demands Mississippi ignore the concerns of the majority of the women they represent and pay attention to "a group of over 110 women, all members of the legal community. The women noted that the right to choose represents more than just the ability to make a medical decision; it is about 'dignity and autonomy which are central to the liberty protected by the Fourteenth Amendment.'" *Jackson Women's Health Organization v. Currier*, 349 F.Supp.3d at 544. But the Court could have just as easily looked at briefs from women on the other side of the debate. It simply chose not to do so, choosing instead to become an advocate instead of an umpire.

The rhetoric the court endorsed is undoubtedly popular among a particularly influential group of

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[6] David Crary and Hannah Fingerhut, AP-NORC poll: Most Say Restrict Abortion After 1st Trimester, AP (June 25, 2021), https://apnews.com/article/only-on-ap-us-supreme-court-abortion-religion-health-2c569aa7934233af8e00bef4520a8fa8.

women, but the reality is that it does not represent the views of most women in America. The hundreds of thousands of women *amicus* represent want to stress that women do not need abortion as a measure of equality. Women have intrinsic dignity and value, regardless of abortion public policy. The fact that men do not give birth is not something they see as a flaw but a feature of the beautiful way women are created—the *imago Dei*. Being mothers is not to women's detriment, despite its many challenges. Women celebrate the diversity of our Creator and therefore affirm our dignity, aside from abortion. *Amicus* affirms the dignity of every woman, including unborn women. Mississippi should consequently be commended here for trying to strike a proper balance given the state's interests at play while reflecting the stated values of its citizens and paying particular attention to women's concerns, given the nature of the abortion decision.

Americans in every state should be free to pursue the abortion policies they deemed most advantageous for society as a whole at any point of pregnancy, based on the available information they have. The Court should affirm their efforts instead of inserting itself in the state legislative deliberation effort to impose its specific views on the subject on the entire nation.

CONCLUSION

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Const. Amendment X. This is the fundamental principle that should guard the Court in this and every other abortion-related case. The states should have broad discretion in addressing the interests at play in the abortion context. Neither viability nor any other framework should constrain the state's ability to address the ever-changing concerns associated with abortion.

To the extent that the Court's precedent prohibits states from "mak[ing] a value judgment favoring childbirth over abortion," *Maher v. Roe*, 432 U.S. 464, 474 (1979), or from considering new scientific evidence, or from hearing the growing concerns of women from all walks of life, its precedent should be reconsidered. Though not strictly necessary to resolve this case, the Court's fundamental problems in this area of law go all the way back to *Roe* and *Doe*. To fully vindicate the constitutional principles involved requires reversal.

In Justice Thomas' words, "The Constitution does not constrain the States' ability to regulate or even prohibit abortion. This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the 'legal fiction' of substantive due process, *McDonald v. Chicago*, 561 U.S. 742, 811, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in

judgment). As the origins of this jurisprudence readily demonstrate, the putative right to abortion is a creation that should be undone." *June Medical Services L.L.C. v. Russo*, 140 S.Ct. 2103, 2149 (2020) (Thomas, J., dissenting). *Amicus* agrees.

Respectfully submitted,

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