No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H.,
STATE HEALTH OFFICER OF THE
MISSISSIPPI DEPARTMENT OF HEALTH, ET AL.,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PROFESSOR RANDY BECK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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**Application for Admission Pending*

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Randy Beck teaches and writes in the area of constitutional law.[1] Professor Beck has published several articles concerning the Court's identification of viability as a controlling line in its abortion jurisprudence. *See Twenty-Week Abortion Statutes: Four Arguments*, 43 HASTINGS CONST. L.Q. 187 (2016); *State Interests and the Duration of Abortion Rights*, 44 MCGEORGE L. REV. 31 (2013); *Transtemporal Separation of Powers in the Law of Precedent*, 87 NOTRE DAME L. REV. 1405 (2012); *Self-Conscious* Dicta*: The Origins of* Roe v. Wade's *Trimester Framework*, 51 AM. J. LEGAL HIST. 505 (2011); Gonzales, Casey *and the Viability Rule*, 103 NW. UNIV. L. REV. 249 (2009). This brief aims to assist the Court by summarizing aspects of that research relevant to the question of whether all previability prohibitions on elective abortions should be deemed unconstitutional.

SUMMARY OF ARGUMENT

The rule forbidding state proscription of previability abortions fails to satisfy a principle embraced by the majority in *Planned Parenthood of SE Pa. v. Casey*: "[A] decision without principled justification [is] no judicial act at all." 505 U.S. 833, 865 (1992). *Casey*'s three-Justice plurality reiterated that principle in a manner particularly relevant to this litigation:

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[1] No party, counsel for a party or person other than *amicus* and counsel authored this brief or provided funds to support the brief's preparation and filing. Both parties have filed blanket consent to the submission of *amicus* briefs. Professor Beck has taught at the University of Georgia School of Law since 1997 and has held the Justice Thomas O. Marshall Chair of Constitutional Law since 2011. The positions advanced in this brief represent Professor Beck's conclusions based on his research and do not express the views of the University of Georgia.

"[L]egislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw." *Id*. at 870.

The Court has never justified its extreme rule forbidding states from protecting the life of any fetus prior to viability. The rule was created by the Court *sua sponte* in a case where the parties had not briefed the issue of when in pregnancy a state could regulate to protect fetal life. Early drafts of the opinions in *Roe v. Wade* and *Doe v. Bolton* would have left the gestational limit of abortion rights unresolved or allowed states to protect fetal life after the first trimester. The *Roe* majority recognized that language in the opinion addressing the duration of abortion rights constituted *dictum* that was unnecessary to the Court's decision. Moreover, Justice Blackmun described the viability line as "arbitrary" in an internal memorandum to the other Justices.

Professor John Hart Ely, in his classic critique of the *Roe* opinion, was the first of many scholars to recognize that the *Roe* Court never made any argument in favor of drawing a controlling line at viability; "the Court's defense," he wrote, "seems to mistake a definition for a syllogism." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973). The portions of the *Casey* opinion joined by a majority of the Court likewise offered no argument for selecting viability as the tipping point at which the state interest in fetal life outweighs the interests of the woman. No Supreme Court majority has ever explained why the Constitution precludes a state from protecting the life of a fetus before it can live outside the womb.

The three-Justice *Casey* plurality did assert without explanation that viability marks "the independent existence" of a "second life" that "can in reason and all fairness be the object of state protection that now overrides the rights of the woman." 505 U.S. at 870. Justice Scalia accurately labeled this argument "conclusory." It is also inconsistent with the subsequent recognition in *Gonzales v. Carhart* that "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." 550 U.S. 124, 147 (2007). The *Casey* plurality did not tie its "independent existence" criterion for state protection to anything in the Constitution and did not explain why the hypothetical independence associated with a doctor's prediction of viability is the form of independence that matters for constitutional purposes, rather than genetic independence from the mother (at conception) or the capacity for independent movement (at quickening).

The other two arguments advanced by the *Casey* plurality similarly fail to justify the viability rule in constitutional terms. The plurality's assertion that viability is a "workable" line does not take into account "the uncertainty of the viability determination," emphasized by Justice Blackmun in *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). The fact that doctors may disagree on the ability of a particular fetus to survive outside the womb makes viability a difficult regulatory line to enforce, the antithesis of a "workable" legal standard. The plurality's contention that a pregnant woman can be deemed to consent to state regulation after viability also fails as a principled constitutional justification because it does not distinguish viability from earlier lines that could be drawn.

Professor Laurence Tribe is one of the many scholars who recognize that "nothing in the Supreme Court's opinion [in *Roe*] provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1349 (2d ed. 1988). He offered his own attempt to explain the viability rule, arguing that viability means a woman can "transfer nurture of the fetus to other hands." *Id*. at 1357-58. This argument fails as a constitutional justification, however, because it attributes undue practical significance to a finding of viability. A doctor's prediction that a fetus could theoretically survive outside the womb does not mean the woman can simply schedule a premature delivery and transfer the fetus to a neonatal intensive care unit (NICU); standards of care in the medical profession and the costs of neonatal life support preclude elective deliveries near the viability threshold.

Viability is an arbitrary line in the context of abortion rights, as Justice Blackmun acknowledged privately and other Justices have stated publicly. The ability of a fetus to survive outside the womb using advanced medical technology says nothing about the value of the fetus from the perspective of the state or the burden of pregnancy on the mother—the two interests the viability rule purports to balance. As Justice White noted, importing a medical line into this legal context introduces "morally and constitutionally irrelevant" factors. Viability varies based on the sex of the fetus, and possibly race as well, creating disparate impacts that result from tying constitutional status to biological criteria. Viability is also influenced by irrelevant behavioral and environmental factors like the mother's altitude during gestation and whether she smokes during pregnancy, either of which can

impact the rate of fetal growth and thus the point at which a particular fetus becomes viable.

The Court's *stare decisis* case law does not require adherence to a rule established in *dictum* without briefing or argument, especially when the legal rationale for the rule has never been "squarely addressed," considered "in depth," or "fully explore[d]." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 760 (1984); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974). In a series of cases including *Casey* and *Gonzales*, the Court has gradually diminished the significance attributed to viability, making it appropriate to revisit whether the viability line should retain any continuing vitality.

The viability rule is a relic of a time when the Court recognized only two state interests warranting regulation of abortion: maternal health and protection of what the *Roe* Court inaccurately described as "potential" life.[2] The Court upheld a regulation of late-term abortions in *Gonzales* based on a broader array of government interests, including interests in drawing a clearer line between abortion and infanticide, preserving the ethics and integrity of the medical profession and protecting against the coarsening effect of a brutal method of abortion on societal views of innocent human life. The states' broader regulatory authority after *Gonzales* provides an additional reason to revisit a one-size-fits-all line created when the Court took a more restrictive view of the relevant state interests.

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[2] *Compare Gonzales*, 550 U.S. at 147 ("a fetus is a living organism while within the womb, whether or not it is viable").

ARGUMENT

The Supreme Court has never offered a principled explanation for why the Constitution bars a state from protecting the life of a fetus before it can survive outside the womb with medical assistance. The Court's failure to justify the viability rule arises from the rule's arbitrary character. While viability is an important line for medical purposes, incremental changes in respiratory capacity and advances in medical technology that influence survival have no moral or legal significance that would warrant making viability the critical dividing line for purposes of amenability to protection by the state. Given the Court's failure to justify the viability rule in constitutional terms, *stare decisis* provides an inadequate ground for continued adherence to this aspect of the Court's abortion jurisprudence.

I. The *Roe* Court Embraced the Viability Rule in *Dictum* Without the Assistance of Briefing

The Justices who decided *Roe* knew viability was an arbitrary line that constituted *dictum* in the context of the Court's opinion. The Texas statute in *Roe* and the Georgia statute in *Doe* imposed restrictions applicable from the outset of pregnancy. The Court therefore was not required to offer an opinion regarding the gestational limits of abortion rights. Randy Beck, *State Interests and the Duration of Abortion Rights*, 44 MCGEORGE L. REV. 31, 34 (2013); Randy Beck, *Self-Conscious* Dicta*: The Origins of* Roe v. Wade's *Trimester Framework*, 51 AM. J. LEGAL HIST. 505, 513-15 (2011). The parties did not brief the issue of whether there was some point after conception at which a state could regulate abortions. Beck, *Self-Conscious* Dicta, 51 AM. J. LEGAL HIST. at 511-12. Following the first oral argument in *Roe* and *Doe*, Justice Brennan sent a

memorandum to Justice Douglas indicating that he would leave open the question "whether there is some point in the term before birth at which the interest in the life of the fetus does become subordinating." *Id*. at 516-17 (quoting Justice William J. Brennan, Memorandum re: Abortion Cases (Dec. 30, 1971)). Justice Blackmun's first draft of an opinion in *Roe* would have resolved the Texas case on vagueness grounds, while the first draft of the *Doe* opinion would have recognized a right to abortion of unspecified duration. Beck, *Self-Conscious* Dicta, 51 AM. J. LEGAL HIST. at 517-18; DAVID J. GARROW, LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 547-48, 550-51 (1994).

Even though Justice Blackmun had a five-Justice majority for his initial draft opinions, he circulated a memorandum recommending that *Roe* and *Doe* be reargued with Justices Powell and Rehnquist on the bench. The memorandum raised the possibility of using *dictum* to issue more comprehensive opinions: "Should we spell out—although it would then necessarily be largely dictum—just what aspects are controllable by the State and to what extent?" Beck, *Self-Conscious* Dicta, 51 AM. J. LEGAL HIST. at 518 (quoting Justice Harry A. Blackmun, Memorandum to the Conference (May 31, 1972)); GARROW, LIBERTY & SEXUALITY, at 553.

Following the second oral argument in the abortion cases, Justice Blackmun circulated a new draft of the *Roe* opinion. The discussion of the right to abortion had been shifted from *Doe* to *Roe* and this second draft opinion would have recognized a compelling state interest in protecting fetal life following the first trimester of pregnancy. Beck, *Self-Conscious* Dicta, 51 AM. J. LEGAL HIST. at 520. Justice Blackmun's cover memorandum circulated with this draft acknowledged

that the opinion contained *dictum*, including an arbitrary line governing the duration of abortion rights:

> Herewith is a memorandum (1972 fall edition) on the Texas abortion case.
>
> This has proved for me to be both difficult and elusive. In its present form it contains dictum, but I suspect that in this area some dictum is indicated and not to be avoided.
>
> You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.

Id. (quoting Justice Harry A. Blackmun, Memorandum to the Conference (Nov. 21, 1972)); GARROW, LIBERTY & SEXUALITY, at 580.

Justice Powell responded with a private memorandum to Justice Blackmun wondering whether the first trimester cutoff was essential: "I have wondered whether drawing the line at 'viability'—if we conclude to designate a particular point of time—would not be more defensible in logic and biologically than perhaps any other single time. . . . Of course, it is not essential that we express an opinion as to such a date." Beck, *Self-Conscious* Dicta, 51 AM. J. LEGAL HIST. at 522 (quoting Justice Lewis F. Powell, Jr., Memorandum re: Abortion Cases (Nov. 29, 1972)).

Justice Powell's unexplained reference to logic and biology evidently caught Justice Blackmun's attention. He circulated a memorandum to the Justices requesting feedback on whether the first trimester or viability would be a better line: "What we are talking about, therefore, is the interval from approximately 12 weeks

to about 28 weeks." *Id*. at 523 (quoting Justice Harry A. Blackmun, Memorandum to the Conference Re: Abortion Cases (Dec. 11, 1972)). After explaining his initial focus on the first trimester, he wrote, "Viability, however, has its own strong points. It has logical and biological justifications." *Id*.; GARROW, LIBERTY & SEXUALITY, at 582-83. This cryptic reference to "logical and biological justifications" ultimately worked its way into the published *Roe* opinion. 410 U.S. 113, 163 (1973) ("State regulation protective of fetal life after viability thus has both logical and biological justifications.").

In response to Justice Blackmun's inquiry, Justice Douglas supported a first trimester cutoff, rather than viability. Beck, *Self-Conscious* Dicta, 51 AM. J. LEGAL HIST. at 524. Justice Stewart expressed unease that the *dictum* concerning the duration of abortion rights seemed too legislative:

> One of my concerns with your opinion as presently written is the specificity of its dictum—particularly in its fixing of the end of the first trimester as the critical point for valid state action. I appreciate the inevitability and indeed wisdom of dicta in the Court's opinion, but I wonder about the desirability of the dicta being quite so inflexibly "legislative."

Id. at 525 (quoting Justice Potter Stewart, Memorandum re: Abortion Cases (Dec. 14, 1972)); GARROW, LIBERTY & SEXUALITY, at 585. He preferred "to allow the States more latitude to make policy judgments between the alternatives mentioned in your memorandum, and perhaps others." GARROW, LIBERTY & SEXUALITY, at

585.[3] Notwithstanding the reticence of Justices Douglas and Stewart, however, comments from Justices Marshall and Brennan moved the majority in the direction of the trimester framework that appeared in Justice Blackmun's third draft. Beck, *Self-Conscious Dicta*, 51 AM. J. LEGAL HIST. at 524-25. The Court's published opinion allowed state health regulations after the first trimester and regulations after viability to protect what the majority inaccurately referred to as "potential" life. *Roe*, 410 U.S. at 162-64.

II. The *Roe* Court Offered No Reason for the Viability Rule

The Court in *Planned Parenthood of SE Pa. v. Casey* stressed principled and transparent decision making as foundational requirements for judicial legitimacy. "[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." 505 U.S. 833, 866 (1992). A decision that lacked principled justification "would be no judicial act at all." *Id*. at 865. The three-Justice *Casey* plurality revisited the theme of principled decision making in explaining the retention of fetal viability as the controlling line for abortion rights. "[L]egislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw." *Id*. at 870. Conceding that "[a]ny judicial act of line-drawing may seem somewhat arbitrary," the plurality nevertheless described *Roe* as "a reasoned statement, elaborated with great care." *Ibid*.

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[3] This sentence is accurately quoted in Garrow. The version of this sentence in *Self-Conscious* Dicta inadvertently included an extra word.

The *Casey* plurality's description of *Roe* as "a reasoned statement, elaborated with great care" overlooks a point widely recognized in the academic literature: the *Roe* Court *did not offer any reason* for embracing viability as the controlling line for abortion regulations. The *Roe* Court recognized two "important and legitimate" state interests that could justify regulation of abortion: "preserving and protecting the health of the pregnant woman" and "protecting the potentiality of human life." *Roe*, 410 U.S. at 162. "Each [interest] grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'" *Id*. at 162-63. The viability rule was embraced in a passage addressing the second of these state interests:

> With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id. at 163-64. This passage represents the totality of *Roe*'s attempt to justify the viability line in constitutional terms.

Before the year was out, articles in both the *Yale Law Journal* and the *Harvard Law Review* had highlighted *Roe*'s failure to justify the viability rule. Noted constitutional scholar John Hart Ely questioned the Court's selection of viability as the point at which the state could protect fetal life: "Exactly why that is the

magic moment is not made clear . . . . [T]he Court's defense seems to mistake a definition for a syllogism." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973).[4] Shortly thereafter, Laurence Tribe echoed Ely's criticism, writing that the Court's discussion of viability "offers no reason at all for what the Court has held." Laurence H. Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 4 (1973).

Other scholars have concurred with Ely's assessment. John Robertson notes that "[m]uch more needs to be said" to demonstrate that the viability rule "is constitutionally justified." John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 359-60 (2011). Christopher Eisgruber observes that the *Roe* Court offered "a blatantly circular justification for making viability the point at which the state acquired an interest in fetal life." Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 96 (1995). Many others could be cited for the same proposition. *See* Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 HASTINGS CONST. L.Q. 187, 203-04 & n.97 (2016) (citing articles).

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[4] Unpacking Ely's comment, the *Roe* "syllogism" was missing its major premise, a "constitutional principle connecting state regulatory power and the value of developing fetal life that—when combined with the Court's definition of viability—would entail the conclusion that the state can only prohibit abortion of a viable fetus." Randy Beck, Gonzales, Casey *and the Viability Rule*, 103 NW. UNIV. L. REV. 249, 270 (2009).

III. The *Casey* Court Failed to Justify the Viability Rule

The Court in *Casey* retained a diminished version of *Roe*'s viability line, but failed to supply the constitutional justification missing from the *Roe* opinion. Apart from invocation of *stare decisis*, the sections of the *Casey* opinion joined by a majority of the Court offered no justification for the viability rule. 505 U.S. at 860-61. The three-Justice plurality articulated what it called a "second reason," apart from *stare decisis*, for adhering to the viability line:

> The second reason is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has

> consented to the State's intervention on behalf of the developing child.

Id. at 870 (citations omitted). The plurality's discussion of viability fails to satisfy the *Casey* majority's standards for legitimate judicial decision making. Nothing in this discussion demonstrates "the warrant for" the viability rule in the Constitution or offers a constitutional analysis "sufficiently plausible to be accepted by the Nation." *Id*. at 865-66.

A. The Plurality's "Independent Existence" Criterion for State Protection is Conclusory and Unsupported

The *Casey* plurality asserted without explanation that viability marks "the independent existence of [a] second life" with interests the state could deem overriding. *Id*. at 870. On behalf of the four dissenters, Justice Scalia argued that the plurality's inability to offer more than this "conclusory" justification underscores "[t]he arbitrariness of the viability line." *Id*. at 989 n.5 (Scalia, J., concurring in the judgment in part and dissenting in part). David Smolin suggests that, as in *Roe*, the plurality here merely "restate[d] the definition of viability." David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 137 n.82 (1995).

Consider the critical elements missing from the plurality's defense of the viability line. The plurality pointed to nothing in the Constitution that supports requiring independence as a necessary requisite for legal protection by the state. In contexts such as the rights of prisoners, children and comatose patients, the fact of dependence is thought to create legal rights rather than eliminating them. *See* Randy Beck, *The Essential Holding of* Casey*: Rethinking Viability*, 75

UMKC L. REV. 713, 728-29 (2007). Even if one can envision a requirement of independence from the mother as a necessary condition for state protection, the *Casey* plurality gave no reason why viability is the particular form of independence that matters. Viability is not a bright line description of an existing state of affairs, but rather a medical prediction about what might happen if one radically changed the location of the fetus. The plurality did not explain why this hypothetical form of independence is what matters under the Constitution, rather than other more objective forms of independence, such as genetic independence at conception or the ability to move independently at quickening. Beck, Gonzales, Casey *and the Viability Rule*, 103 NW. U.L. REV. at 275-76.

Finally, regardless of the justification for the *Casey* plurality's independent existence criterion, a majority of the Court took a different view in *Gonzales*. The *Gonzales* Court approved a previability ban on a particularly brutal method of abortion because of the fetus' independence from the mother prior to viability: "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." 550 U.S. at 147. Post-*Gonzales*, "if the Court wishes to justify the viability rule in a manner consistent with its precedents, it will need an even more subtle and discriminating constitutional analysis, capable of explaining why the state may ascribe sufficient value to a previable fetus to protect it against death by one means, but may not value it sufficiently to protect it against death by other means." Beck, Gonzales, Casey *and the Viability Rule*, 103 NW. U.L. REV. at 279. The *Casey* plurality's unexplained reference to the "independent existence" of a viable fetus *in utero* did not

satisfy the Court's obligation to "justify the lines we draw."

B. The "Uncertainty of the Viability Determination" Makes It an Unworkable Regulatory Standard

The *Casey* plurality believed it important to establish "a line that is clear" to secure abortion rights. 505 U.S. at 869. The plurality's second argument for the viability rule, apart from *stare decisis*, was that no other line would be "more workable." 505 U.S. at 870. This pragmatic point, even if true, would not amount to a principled constitutional justification for preventing state protection of a previable fetus.

The *Casey* plurality's optimistic view of viability as a clear and workable legal standard fails to take account of how viability determinations are actually made. Writing for the Court in *Colautti v. Franklin*, 439 U.S. 379, 395 (1979), Justice Blackmun acknowledged "the uncertainty of the viability determination":

> As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement

> may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability.

Id. at 395-96.

The *Colautti* Court's description of the uncertain process of determining fetal viability is reinforced by clinical guidance developed jointly by the American College of Obstetricians & Gynecologists (ACOG) and the Society for Maternal-Fetal Medicine (SMFM). *See Obstetric Care Consensus No. 6: Periviable Birth*, 130 OBSTETRICS & GYNECOLOGY e187 (Oct. 2017). The guidance notes that delivery "near the limit of viability" presents "complex and ethically challenging decisions." *Ibid*. It embraces a definition of "periviable birth" as delivery "occurring from 20 0/7 weeks to 25 6/7 weeks of gestation," *id*. at e188, noting that "[m]ultiple factors have been found to be associated with short-term and long-term outcomes of periviable births in addition to gestational age," *id*. at e189-90.

> These include, but are not limited to, non-modifiable factors (eg, fetal sex, weight, plurality), potentially modifiable antepartum and intrapartum factors (eg, location of delivery, intent to intervene by cesarean delivery or induction of labor, administration of antenatal corticosteroids and magnesium sulfate), and life-sustaining interventions and postnatal management (eg, starting or withholding and

> continuing or withdrawing intensive care after birth).

Id. at e190. The guidance recognizes that gestational age "may not be known accurately in all cases." *Id*. at e191. Moreover, "[t]he inherent inaccuracy of ultrasound-estimated fetal weight introduces a degree of uncertainty to the prediction of newborn outcomes." *Id*.

One can get a sense for the complexity of viability determinations from the Extremely Preterm Birth Outcomes Tool maintained by the Eunice Kennedy Shriver National Institute of Child Health and Human Development (NICHD). *See* https://www.nichd.nih.gov/research/supported/EPBO (visited July 2, 2021). The tool offers access to a database of outcomes in a set of preterm births between 2006 and 2012 at hospitals participating in the Neonatal Research Network. If one submits, for example, a query concerning the survival prospects of a singleton male fetus at 23 weeks' gestation with an estimated birth weight of 600 grams and use of antenatal steroids, the database reports hospital survival rates ranging from 27% to 55% if the infant received active treatment, with an average survival rate of 40%.[5] The same characteristics for a female fetus resulted in hospital survival rates ranging from 39% to 68%, with an average survival rate of 54%. The database warns users to "keep in mind that every infant is an individual, and that factors beyond those described on this website influence infant survival and development." *Ibid*.

Whether one thinks a judicially crafted line "workable" depends on what work one expects the line to do.

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[5] The website notes that "'Hospital range' in the tool results represent outcomes for 80% of hospitals included in this study (10th to 90th percentiles)." *Id*.

In this context, at least one function of the viability rule is to provide a legal standard that allows states to defend their compelling interest in protecting the lives of fetuses at advanced stages of gestation. Given the nature of the viability determination, however, it will be very difficult in a wide range of cases for a state to demonstrate in a legal or administrative proceeding that a doctor performed an abortion on a fetus that should have been considered viable. The problem is compounded by the Court's case law requiring some unspecified level of deference to the doctor's professional judgment. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 64 (1976) ("[T]he determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."); *Colautti*, 439 U.S. at 396 (expressing concern about "chilling effect" if doctors could face liability for "erroneous" viability determinations); Randy Beck, *Overcoming Barriers to the Protection of Viable Fetuses*, 71 WASH. & LEE L. REV. 1263, 1276 (2014) (deference to abortion provider's judgment "virtually guarantees that some fetuses will be aborted in cases near the margin even though they could in fact survive outside the womb"). Viability is not a workable line for regulating medical practice because doctors cannot agree on what the standard means in the abstract, much less when the line has been crossed in particular cases.

C. Earlier Lines Provide Adequate Time to Decide

The *Casey* plurality's third argument was that "it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." 505 U.S. at 870. This does not suffice as a principled constitutional justifica-

tion because nothing in the argument distinguishes viability from earlier lines that could be drawn. A similar implied consent argument could be made with respect to a law restricting abortion after 15 weeks, well beyond the average point of awareness of pregnancy. Amy M. Branum & Katherine A. Ahrens, *Trends in Timing of Pregnancy Awareness Among US Women*, 21 MATERN. CHILD HEALTH J. 715, 722 (2017) (average gestational age at time of pregnancy awareness: 5.5 weeks).

IV. Professor Tribe's Justification Falls Short Because a Pregnant Woman Cannot Transfer a Viable Fetus to Other Caretakers

As noted above, Professor Laurence Tribe quickly recognized the *Roe* Court's failure to justify the viability rule. *See Foreward: Toward a Model of Roles*, 87 HARV. L. REV. at 4. He returned to this point in his constitutional law treatise: "[N]othing in the Supreme Court's opinion provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability." *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1349 (2d ed. 1988).

In light of the *Roe* Court's inadequate explanation, Professor Tribe offered his own justification for the viability rule, premised on the circumstance that only the pregnant woman can meet the needs of a previable fetus:

> This unique characteristic of fetal life justifies the line that the Supreme Court has drawn between a woman's freedom to abort and the state's authority to protect a fetus. Until the fetus is viable, *only* the pregnant woman can respond to and support her fetus' "right" to life; during this period, the state cannot abridge

> the woman's autonomy. But once the fetus "has the capability of meaningful life outside the mother's womb"—that is, once the responsibility for the nurture that is essential to life can be assumed by others with the aid of medical technology—the state may limit abortions so long as it poses no danger to the woman's life or health.

Id. at 1357. Professor Tribe was unconcerned that the point of viability changes as a result of advances in technology. "That is precisely the point: as technology enhances the ability to relieve the pregnant woman of the burden of her pregnancy and transfer nurture of the fetus to other hands, the state's power to protect fetal life expands—*as it should*." *Id*. at 1357-58.

Professor Tribe's theory does not provide a sound justification for the viability rule because it attributes undue practical significance to a finding of viability. The fact that a fetus has crossed the viability threshold does not mean the mother can "transfer nurture of the fetus to other hands." *Ibid*. The American College of Obstetricians and Gynecologists takes the position that "[a]lthough there are specific [medical] indications for delivery before 39 weeks of gestation, a nonmedically indicated early-term delivery should be avoided." *See Avoidance of Nonmedically Indicated Early-Term Deliveries and Associated Neonatal Morbidities*, ACOG Committee Opinion No. 765, 133 OBSTETRICS & GYNECOLOGY e156, e160 (Feb. 2019). For reasons of medical ethics and the high cost of neonatal intensive care, a typical NICU would not consent to the purely elective delivery of a recently viable fetus at 24 weeks' gestation. As Nancy Rhoden has recognized, "it would be irresponsible and even cruel to advocate simply allowing viable fetuses to be removed, especially since

the removal process itself can harm the fragile, premature fetus." Nancy K. Rhoden, *Trimesters & Technology: Revamping* Roe v. Wade, 95 YALE L.J. 639, 664-65 (1986).

Moreover, Professor Tribe's theory assumes a more sweeping constitutional right than the one described in the Court's prior abortion opinions. From the very beginning, the Court has said that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand." *Doe v. Bolton*, 410 U.S. 179, 189 (1973). It has more recently referred to "a woman's right to terminate her pregnancy in its early stages." *Casey*, 505 U.S. at 844. By contrast, Professor Tribe's theory implicitly assumes that the Constitution protects a much broader right irreconcilable with the Court's opinions: "a right not to be pregnant at any given stage of gestational development." Beck, *Twenty-Week Abortion Statutes*, 43 HASTINGS CONST. L.Q. at 208.

V. Viability Is an Arbitrary Line for Measuring Abortion Rights

Justice Blackmun's reference to viability as an "arbitrary" line in his November 21, 1972 memorandum to the Court has been echoed, either expressly or in substance, in opinions joined by at least six other Justices. *Casey*, 505 U.S. at 993 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ.) ("I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains."); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519 (1989) (Rehnquist, C.J., joined by White & Kennedy, JJ.) ("[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of

viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., joined by Rehnquist, J.) ("The substantiality of [the govermental] interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant."); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 461 (1983) (O'Connor, J., joined by White & Rehnquist, JJ.) ("The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward."); *see also* Beck, *Twenty-Week Abortion Statutes*, 43 HASTINGS CONST. L.Q. at 192 & n.30.

The *Roe* Court identified viability as the tipping point at which the state interest in fetal life suddenly came to outweigh the woman's interest in relief from the burdens of pregnancy. However, the ability of a fetus to survive outside the womb with advanced medical technology does not tell us anything significant about either interest the Court was attempting to balance. The slight enhancement in respiratory capacity that makes it possible for a premature infant to survive in a NICU does not suddenly make the life of the fetus more valuable from the perspective of the state. And the hypothetical possibility that the fetus could be sustained on life support equipment does not make pregnancy less burdensome for a woman who continues to carry the unborn infant. Viability is a significant line to doctors required to make treatment decisions for mothers and their periviable fetuses. It is

not a significant line for purposes of determining constitutional status or amenability to protection by the state. Beck, *Twenty-Week Abortion Statutes*, 43 HASTINGS CONST. L.Q. at 221-22.

Justice White critiqued the viability rule on the ground that fetal survival depends on "the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant." *Thornburgh*, 476 U.S. at 795. There are many other ways in which the viability rule introduces "morally and constitutionally irrelevant" factors into the determination of constitutional status. For instance, the viability rule has a disparate impact based on sex. Female fetuses become viable earlier than male fetuses, with some studies finding a survival advantage as high as 20 percent. *See* Samuel B. Morse et al., *Racial and Gender Differences in the Viability of Extremely Low Birth Weight Infants: A Population-Based Study*, 117 PEDIATRICS e106, e111 (2006). This is why clinicians using NICHD's Extremely Preterm Birth Outcomes Tool are asked to enter the sex of the fetus. *See supra* Section III.B.

ACOG and SMFM also list "[r]ace and ethnicity" among nonmodifiable "Factors Potentially Affecting Clinical Outcomes." *Periviable Birth*, 130 OBSTETRICS & GYNECOLOGY at e190 (Table 1). Some studies have found a survival advantage for African-American infants delivered at extremely low birth weights, while other studies have not found significant differences. *See* Hamisu M. Salihu *et al.*, *Survival of Pre-Viable Preterm Infants in the United States: A Systematic Review and Meta-Analysis*, 37 SEMINARS IN PERINATOLOGY 389, 398 (2013) (citing three studies on either side of question); Morse *et al.*, *Racial and Gender Differences in the Viability of Extremely Low Birth Weight Infants*, 117

PEDIATRICS at e111 ("Some studies show a distinct advantage, whereas other studies found no significant difference. We found that black race conferred a significant survival advantage at 1 year of age across all gestational ages among ELBW infants."). While researchers continue to study whether race affects viability, the existence of the debate tends to underscore the downsides of uncritically importing a medical line into questions of constitutional status.

Another key variable affecting viability is fetal weight. *See Periviable Birth*, 130 OBSTETRICS & GYNECOLOGY at e190. Environmental and behavioral factors can have significant impacts on fetal growth and therefore can be expected to influence the point at which particular fetuses become viable. Evidence suggests "a causal relationship between maternal active smoking and fetal growth restriction and low birth weight." *The Health Consequences of Smoking: A Report of the Surgeon General* 601 (2004). Likewise, fetal growth tends to be slower if the mother lives at a high altitude during pregnancy. *See* Beth A. Bailey *et al.*, *High Altitude Continues to Reduce Birth Weights in Colorado*, 23 MATERN. CHILD HEALTH J. 11 (2019).

Troubling or unusual results are sometimes the unavoidable consequence of adhering to principled lines derived from the Constitution. Given the Court's failure to justify the viability rule, however, and the lack of any apparent grounding in constitutional principle, there is no reason to accept the random and problematic consequences the viability rule produces. *See* Beck, Gonzales, Casey *and the Viability Rule*, 103 Nw. U.L. Rev. at 261.

VI. *Stare Decisis* Should Not Preserve an Arbitrary Rule Without Constitutional Warrant

Discussions of *stare decisis* tend to focus on the power of a precedent-setting court to bind successors. Careful examination of the case law, though, shows that *stare decisis* doctrine also includes numerous tools that allow later judges to rein in overreaching and police poor decision-making practices by their predecessors. *See* Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 NOTRE DAME L. REV. 1405, 1408-09 (2012).

Several features of the Court's case law surrounding fetal viability undermine its value as binding precedent. First, the viability rule entered the Court's case law as *dictum*. *See supra* Section I. Reaffirmation of the viability rule in *Casey* also constituted *dictum*. The Pennsylvania restrictions reviewed in *Casey* applied from the outset of pregnancy and their validity did not turn on the gestational duration of abortion rights. Beck, *Transtemporal Separation of Powers*, 87 NOTRE DAME L. REV. at 1463; Beck, *Rethinking Viability*, 75 UMKC L. REV. at 716-17. Denying precedential effect to *dictum* serves a separation of powers function, preventing a precedent-setting court from ambitiously overreaching by resolving issues beyond the scope of the actual case or controversary presented by the parties. Beck, *Transtemporal Separation of Powers*, 87 NOTRE DAME L. REV. at 1429-30.

Second, the Court has "felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998); *Johnson v. United States*, 576 U.S. 591, 606 (2015); *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 202-03 (2014). The

issue of the duration of abortion rights was not briefed in *Roe*. Beck, *Self-Conscious Dicta*, 51 AM. J. LEGAL HIST. at 511-12. Likewise, arguments for or against the viability rule "played no more than a *de minimis* role in the parties' briefs" in *Casey*. Beck, *Rethinking Viability*, 75 UMKC L. REV. at 718. Courts are "passive instruments of government" that "normally decide only questions presented by the parties." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of rehearing en banc)). A decision reached by a court *sua sponte* inspires less confidence because the court deliberated without the benefit of adversarial testing. Beck, *Transtemporal Separation of Powers*, 87 NOTRE DAME L. REV. at 1434-39.

Third, the Court has accorded less precedential weight to decisions supported by inadequate or cursory reasoning. The Court has been willing to depart from prior rulings where an issue had never been "fully explore[d]." *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974). Even after repeatedly approving a doctrine, the Court has been willing to rethink the issue where no case had "considered the merits of the . . . doctrine in depth." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 760 (1984). The Court has felt "free to address [an] issue on the merits" when the answer was assumed in prior decisions, but never "squarely addressed." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). The Court has declined to afford broad precedential effect to "an uncontested and virtually unreasoned case" that interpreted the Constitution without thoroughly examining relevant interpretive materials. *District of Columbia v. Heller*, 554 U.S. 570, 623-24 & n.24 (2008). When prior decisions "are unworkable or are badly reasoned, 'this Court has

never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)); *Janus v. American Fed. of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2479 (2018) ("An important factor in determining whether a precedent should be overruled is the quality of its reasoning[.]"). The doctrine of *stare decisis* is not designed as a substitute for careful and principled decision making by the judiciary, and affords no protection to a rule that the Court has never justified in constitutional terms.

Fourth, *stare decisis* carries less weight when the "underpinnings" of a decision have been "eroded" by subsequent decisions of the Court. *United States v. Gaudin*, 515 U.S. 506, 521 (1995). "Erosion" provides a good visual image for what has happened to the viability rule over time. Early decisions following *Roe* were extremely strict, allowing no state regulations protective of fetal life prior to viability and no regulatory incursions on the doctor's professional judgment as to when viability had been reached. *See Colautti*, 439 U.S. at 388, 390-97 (striking down as vague statute imposing standard of care in situations where fetus "may be viable"). A divided Court permitted a bit more flexibility prior to viability in *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 513-21, 525-32 (1989), upholding a statute requiring certain tests after 20 weeks' gestation if they could assist in informing the viability determination. Soon thereafter, the *Casey* Court, while claiming that it was reaffirming the viability rule, significantly diminished the role played by viability in the Court's constitutional analysis. *Casey* for the first time permitted previability regulations designed to protect fetal life, so long as they did not create an "undue burden" or "substantial obstacle" to abortion. 505 U.S. at 871-79. The viability rule was

weakened further in *Gonzales*, where the Court upheld a previability ban on a particular method of abortion, over the dissent's objection that the majority opinion "blur[red] the line, firmly drawn in *Casey*, between previability and postviability abortions." 550 U.S. at 170-71 (Ginsburg, J., dissenting). While the viability line remains a feature of the Court's abortion jurisprudence, it now exists in a significantly weaker form than at the time of *Roe*.

Fifth, *Gonzales* opened the door for states to premise abortion regulations on new state interests, warranting fresh consideration of the durational issue. Beck, *State Interests*, 44 MCGEORGE L. REV. at 54-56. In his dissenting opinion in *Stenberg v. Carhart*, Justice Kennedy criticized the majority for confining states to the two regulatory interests recognized in *Roe*. 530 U.S. 914, 960-61 (2000). He interpreted *Casey* to mean that it is "inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion." *Id.* at 961.

Justice Kennedy subsequently wrote the opinion in *Gonzales*, and the more permissive position advocated in his *Stenberg* dissent was embraced by a majority of the Court. The *Gonzales* Court upheld the federal Partial-Birth Abortion Ban Act based on a variety of state interests that included preventing the coarsening effect of a brutal abortion method on societal views of innocent human life, protecting the integrity and ethics of the medical profession, and drawing a brighter line to distinguish abortion from infanticide. 550 U.S. at 157-58. The Court in *Gonzales* "assume[d]" the continued application of the viability rule "for the purposes of this opinion." *Id*. at 146; *see also id*. at 156 ("[u]nder the principles accepted as controlling here"). However, *Gonzales* described application of the viabil-

ity rule as an assumption and the Court's phrasing arguably implied an openness to revisiting the issue in a later case. Now that *Gonzales* permits states to advance new interests supporting previability regulations, the Court should rethink the durational question in a manner sensitive to the particular state interests involved, rather than mechanically applying an inapt and unjustified one-size-fits-all rule created when the Court took a far narrower view of the relevant state interests.

CONCLUSION

For the foregoing reasons, the Court should reject the rule that states may not protect the life of a fetus before it can survive outside the womb.

Respectfully submitted,

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**Application for Admission Pending*

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