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 ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF PETITIONERS AND REVERSAL

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INTEREST OF AMICUS CURIAE[1]

The Ethics and Public Policy Center is a non-profit research institution dedicated to defending American ideals and to applying the Judeo-Christian moral tradition to critical issues of public policy. It has an intense interest in this case because *Roe*'s declaration of a constitutional right to an abortion—and *Casey*'s reaffirmation of that decision—have inflicted continuing severe damage on our national culture, our political institutions, and our understanding of the judicial role.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has done much over the course of American history to protect and secure our constitutional system of government, but it has been far from infallible. This is a case about two of its worst mistakes.

The history of how the Nation and the Court have together come to recognize past constitutional errors is an uneven one. It took the Civil War and the Thirteenth and Fourteenth Amendments to correct the Court's grievous errors in *Dred Scott v. Sandford*, 19

[1] Pursuant to SUP. CT. R. 37.3(a), Amicus certifies that all parties have consented to the filing of amicus briefs in support of either or neither party. Pursuant to SUP. CT. R. 37.6, Amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than Amicus or its counsel made such a monetary contribution.

How. (60 U.S.) 393 (1857). In many other instances, however, the Court has recognized and corrected its own errors. Indeed, it was the Court's willingness to heed the call to turn from grievous error that led to "the single most important and greatest decision in this Court's history, *Brown* v. *Board of Education*, [347 U.S. 483 (1954),] which repudiated the separate but equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896)." *Ramos v. Louisiana*, 590 U.S. ---, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring). It has the opportunity and the duty to do so again today.

In 1973, the Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that the Constitution confers an expansive right to unrestricted abortion, "obliterat[ing] the abortion laws of all fifty States" with a single stroke. John T. Noonan, Jr., *The Hatch Amendment and the New Federalism*, 6 HARV. J.L. & PUB. POL'Y 93 (1982); *see also* Laurence H. Tribe, *Foreword: Toward A Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2 (1973) (explaining that after *Roe* "no abortion law in the United States remained valid"); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1797 (2012) ("*Roe* … effectively invalidated the then-operative laws of all fifty states."). As a matter of the Constitution's text and history, it is no secret that *Roe* is not just wrong but grievously so. *Roe* was roundly criticized as wrong the day it was decided, it has been robustly opposed both within and outside the Court ever since, and no sitting Justice has defended the merits of its actual reasoning.

By the narrowest of margins, this Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), refused to overrule *Roe*—not because it thought *Roe* was correct, but because it thought *Roe* must endure as a matter of *stare decisis*. But 30 years later it has become clear that *Casey*, too, was egregiously wrong, for *each one* of the *stare decisis* factors cited by *Casey* itself *supports Roe's repudiation*. While many Americans may *hope and expect* that the political victory *Roe* declared for their side of the abortion debate will remain unquestioned, this expectancy plainly does not constitute the type of detrimental reliance to which this Court has given weight in the *stare decisis* calculus. Judicial developments and scientific progress have undermined *Roe* as a matter of fact and law. And *Roe*'s doctrinal standards, as reframed by *Casey*, have proven unworkable.

The deeper sentiment behind *Casey*'s decision—a vision of the Court "call[ing] the contending sides of [the] national controversy" over abortion "to end their national division," *id.* at 867—has proved equally unsound. By reaffirming *Roe*, the *Casey* majority imagined that it could bind up the national division over abortion. But it was *the decision in Roe* itself that "stimulated the mobilization of a right-to-life movement," Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985), and the abortion controversy has endured and intensified since *Casey*. By reaffirming *Roe*, the *Casey* majority hoped that it could forestall a "loss in confidence in the Judiciary." 505

U.S. at 867. In fact, 30 more years of *Roe*'s misrule have proved that the greatest enduring threat to this Court's legitimacy is *Roe* itself. By reaffirming *Roe*, the *Casey* majority hoped to preserve "the Nation's commitment to the rule of law." *Id.* at 869. But rather than safeguarding our constitutional order, *Roe* and *Casey* have distorted it. By every measure—including the lines marked out by *Casey* itself—no judicial error stands in greater need of correction than the one made in *Roe*.

It is now 48 years "after [this Court]'s holding that the Constitution protects a woman's right to terminate her pregnancy," *Casey*, 505 U.S. at 844, and the legitimacy of that holding "is *still* questioned," *id.* (emphasis added), more intensely than ever. Another 48 years of standing by *Roe*'s error will not yield any different or better result. The time has come to overrule *Roe v. Wade*.

ARGUMENT

I. *Roe*'s Creation of a Constitutional Right to Abortion Was Egregiously Wrong.

As this Court has long recognized, stare decisis is "not an inexorable command," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009), and "is at its weakest when [the Court] interpret[s] the Constitution," *Agostini v. Felton*, 521 U.S. 203, 235 (1997). When "strong grounds" exist for overturning an erroneous constitutional precedent, the Court will do so. *See Ramos*, 140 S. Ct. at 1411 (Kavanaugh, J., concurring) ("[I]n just the last few Terms, every current member of this

Court has voted to overrule multiple constitutional precedents.").

The *stare decisis* inquiry looks first to "the quality of [the precedent's] reasoning," *Janus v. AFSCME*, 585 U.S. ---, 138 S. Ct. 2448, 2479 (2018), including whether it is "not just wrong, but grievously or egregiously wrong," *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring). We begin, accordingly, by briefly surveying some of *Roe*'s most serious, and by now almost universally acknowledged, flaws.

A. *Roe* conceded up front that "[t]he Constitution does not explicitly mention any right of privacy," and it was remarkably coy about what provision of the Constitution, exactly, gives rise to the right. *Id.* at 152. Ultimately, the most it hazarded was the observation that "we feel it is" "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," *id.* at 153—by which it evidently meant the Due Process Clause. But whatever rights this clause protects, the right to an abortion is plainly not among them.

The reason for this is simple: The text of the Fourteenth Amendment does not even hint at such a right, and the generation that adopted the Fourteenth Amendment *overwhelmingly banned the practice* of elective abortion. By the time the Fourteenth Amendment was ratified in 1868, 30 of the 37 states in the Union had superseded the common-law prohibition on abortion by adopting criminal statutes banning elective abortions—and 27 of those 30 statutes applied

even before quickening, "the first recognizable movement of the fetus in utero." *Roe*, 410 U.S. at 132; *see* James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 33-34 & nn. 15, 18 (1985) (collecting sources). That includes 25 of the 30 States that had voted to ratify the Fourteenth Amendment by the end of 1868. *Id.* at 33. It is inconceivable that the same generation of Americans who enacted and enforced *outright bans* on abortion in overwhelming numbers nonetheless understood the text of the landmark constitutional amendment they adopted to *guarantee a right* to that very procedure.

B. *Roe* also gestured towards the view that the right it discovered was protected by the Ninth Amendment. 410 U.S. at 153. But whether or not the Ninth Amendment confers, and authorizes judicial enforcement of, any substantive unenumerated rights, a right to an abortion was clearly not one of them.

Like the generation that ratified the Fourteenth Amendment, the Founders understood abortion to be unlawful. Blackstone explained that the killing of an unborn child "in [the mother's] womb" was "a very heinous misdemeanor." 1 BLACKSTONE, COMMENTARIES 125-26 (1765). To be sure, Blackstone described this rule as *applying* once "a woman is quick with child." *Id.* at 125. But "at all times, the common law disapproved of abortion as *malum in se* and sought to protect the child in the womb from the moment his living biological existence could be proved." Robert M. Byrn,

An American Tragedy: The Supreme Court on Abortion, 41 FORDHAM L. REV. 807, 816 (1973).

C. In addition to being plainly and egregiously wrong, *Roe*'s reasoning is generally acknowledged to be unprincipled.

Roe's resort to privacy rights that "have materialized like holograms from the 'emanations and penumbras' " formed by the Bill of Rights, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 893 (1978), has been widely decried as "judicial legislation completely cut loose from any pretense of textual justification," Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1014 (2003). John Hart Ely famously derided *Roe* as "bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973). Many other scholars have concurred. *See, e.g.*, Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 110 (2000) ("In the year 2000, it is hardly a state secret that *Roe*'s exposition was not particularly persuasive, even to many who applauded its result."); PHILIP BOBBITT, CONSTITUTIONAL FATE 157 (1982) (arguing that "the universal disillusionment with *Roe v. Wade* can be traced to the unpersuasive opinion in that case" (footnote omitted)); ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113-14 (1976) (*Roe* "read[s] like a set of hospital rules and regulations" that "[n]either historian,

layman, nor lawyer will be persuaded … are part of … the Constitution").

Indeed, *Roe* has given rise to a cottage industry among pro-choice legal academics: penning faux-opinions in *Roe* attempting to do a more plausible job of justifying the decision. So popular has this sub-genre become that there is *an entire book* dedicated to the subject: WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack Balkin ed., 2005).

The judicial impression of *Roe*'s reasoning has not been more favorable. Justices have *repeatedly* pointed out *Roe*'s fatal analytical flaws. *See infra*, Part III.A. And *no* Justice on the Court, save *Roe*'s author, has written in defense of *Roe*'s *actual reasoning*.

II. *Casey*'s Reaffirmation of *Roe*'s Supposed "Central Holding" Was Egregiously Wrong.

Like *Roe*, the decision in *Casey* is demonstrably and grievously wrong. As with *Roe*, a full discussion of *Casey*'s errors could fill many pages, so we confine our discussion to a few of the most significant ones.

A. *Casey* went wrong from the beginning by failing to acknowledge the gravity of *Roe*'s own errors. The *stare decisis* inquiry depends in part on whether "the prior decision is not just wrong, but grievously or egregiously wrong," *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring), and as just described, *Roe* surely qualifies. But while the *Casey* plurality candidly acknowledged "the reservations [some] of us

may have in reaffirming the central holding of *Roe*," 505 U.S. at 853, it never faced up to the seriousness of *Roe*'s widely acknowledged flaws.

Nor does anything *Casey* say meaningfully fill *Roe*'s gaping analytical holes. Like *Roe*, *Casey* simply *does not grapple* with the undisputed fact that 30 out of 37 States criminalized abortion when the Fourteenth Amendment was adopted—27 of them from the beginning of pregnancy onward.

B. The new doctrinal framework *Casey* erects in place of *Roe*'s trimester-based schema is also seriously flawed. Perhaps most fundamentally, while *Casey* appears to draw the critical line at "viability," from *Roe* to today, "[e]xactly why [viability] is the magic moment" has been a mystery. Ely, *supra*, at 924. After all, if a State's interest in protecting prenatal life is "compelling after viability," then it "is equally compelling before viability." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 519 (1989) (plurality). *Casey*'s naked conclusion that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate" is asserted as though it is self-evident, 505 U.S. at 860, but it simply does not follow from the premises. Just as Professor Tribe observed of *Roe*'s similar non-defense of the viability line, "[o]ne reads the Court's explanation several times before becoming convinced that nothing has inadvertently been omitted," Laurence H. Tribe, *Foreword: Toward A Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 4 (1973).

C. Rather than meaningfully defend *Roe* on the merits, *Casey* principally rests its reaffirmation of *Roe* on the prudential *stare decisis* factors. But none of these other factors justified retaining *Roe*; and *Casey*'s misapplication of those factors was far from a "garden-variety error." *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring).

With respect to three of the traditional *stare decisis* factors—whether the precedent is "unworkable," and whether subsequent legal or factual developments have undermined its foundations—*Casey*'s discussion is remarkably cursory. 505 U.S. at 855-60. And with respect to the remaining factor—reliance interests—*Casey* acknowledged that traditional considerations of reliance had little force in this context because "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." *Id.* at 856.

Instead, *Casey* created an *altogether novel* category of "reliance," grounded in the "economic and social developments" that have occurred since *Roe*. "[P]eople have organized intimate relationships and made choices that define their views of themselves and their places in society" based on *Roe*. *Id.* What this means is known for sure only by its authors, but whatever it means the Court has consistently insisted on a showing of more concrete forms of reliance when addressing *stare decisis* outside the abortion context. *E.g.*, *Ramos*, 140 S. Ct. at 1409; *Arizona v. Gant*, 556 U.S. 332, 349 (2009); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). And with good reason. If "economic and

social developments" that have taken place after a prior decision sufficed, *Casey*, 505 U.S. at 856, then the element of reliance would *always* be satisfied and the concept would be emptied of meaning. No doubt "economic and social developments" premised on the continued lawfulness of race-based segregation took place in the 58 years between *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); and no doubt many white southerners "made choices that define[d] their views of themselves and their places in society" based on the institution. But that did not give the *Brown* Court any pause before restoring the Fourteenth Amendment's promise of equal protection.

Roe, according to *Casey*, has also facilitated "[t]he ability of women to participate equally in the economic and social life of the Nation." *Id.* But *Casey* offered no meaningful evidence that it was abortion rather than other factors—such as women's "determination to obtain higher education and compete with men in the job market," 505 U.S. at 957 (Rehnquist, C.J., dissenting in part)—that is responsible for their welcome advancement in the last 50 years. To the contrary, evidence indicates that women's social advancement began several decades before *Roe* and is not correlated with abortion rates. *See* Brief of 241 Women Scholars and Professionals, and Prolife Feminist Organizations in Support of Petitioners. And rather than abortion becoming ever more entrenched in American

life, Americans in fact have fewer abortions per capita today than before *Roe* was decided.[2]

Indeed, some pro-choice scholars have argued that *Roe* has to some extent *hindered* women's equality, by "legitimat[ing] … the lack of public support given parents in fulfilling their caregiving obligations," with especially dire consequences for the "woman who is poor and chooses to parent." Robin West, *From Choice to Reproductive Justice*, 118 YALE L.J. 1394, 1411 (2009). Moreover, *Casey* says nothing about the harm to women's equality inflicted by the free availability of sex-selective abortions—a phenomenon that is pervasive and widely acknowledged in other countries[3] and also appears to be common in some communities in the United States.[4] We do not ask the Court to assess or quantify this harm, but it must be noted that *Roe*'s constitutional right to abortion on demand plainly has done nothing to secure the equal social and political participation of millions of

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[2] *Compare* CENTERS FOR DISEASE CONTROL, *Abortion Surveillance—United States, 1992* at tbl.2, https://bit.ly/3h2NTj4 (13 abortions per 1,000 women in 1972), *with* CENTERS FOR DISEASE CONTROL, *Abortion Surveillance—United States, 2018* at tbl.1, https://bit.ly/3gXzULI (11.3 abortions per 1,000 women in 2018).

[3] Fengqing Chao *et al.*, *Systematic assessment of the sex ratio at birth for all countries and estimation of national imbalances and regional reference levels*, 116 PROC. NAT'L ACAD. SCI. 9303 (2019).

[4] Douglas Almond & Lena Edlund, *Son-biased sex ratios in the 2000 United States Census*, 105 PROC. NAT'L ACAD. SCI. 5681 (2008).

unborn human females, some unknown portion of which were aborted because of their sex.

* * *

Roe and *Casey* are thus wrong, demonstrably and egregiously wrong, and were wrong from day one. That arguably should suffice to justify their repudiation.

In his concurring opinion in *Gamble v. United States*, Justice Thomas articulated an approach to *stare decisis* under which "if the Court encounters a decision that is demonstrably erroneous … the Court should correct the error, regardless of whether other factors support overruling the precedent." 587 U.S. ---, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring). That view, Justice Thomas urged, "follows directly from the Constitution's supremacy over other sources of law—including our own precedents," and it is also consistent with "the nature of the 'judicial Power' vested in the federal courts," which "is not the power to 'alter' the law; it is the duty to correctly 'expound' it." *Id.* at 1982, 1984; *see also* Amy Coney Barrett, *Stare Decisis & Due Process*, 74 U. COLO. L. REV. 1011 (2003) (explaining the due process concerns raised by *stare decisis* in some cases).

There is much to be said for this view. All acknowledge that application of the traditional *stare decisis* factors is far from "mechanical," *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), and their subjective nature creates the risk, often realized, that judges may apply the doctrine to protect those decisions they

favor on policy grounds but offer no refuge to those precedents they dislike. Moreover, given "the Constitution's supremacy over [the Court's] own precedents," *Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring), it is paradoxical that the Court should demand a "special justification" before *correcting* a demonstrably wrong decision, *Allen v. Cooper*, 589 U.S. ---, 140 S. Ct. 994, 1003 (2020), rather than a "special justification" for *continuing to adhere* to a decision it has concluded is in error.

Ultimately, however, the debate over the correct approach to *stare decisis* is beside the point, for the special justifications for overruling *Roe* and *Casey* are overwhelming.

III. The Other *Stare Decisis* Factors Support Overruling *Roe* and *Casey*.

The other *stare decisis* factors this Court has considered also demonstrate that *Roe* and *Casey* should be overruled. Indeed, by every measure, it is difficult to imagine a constitutional precedent *less worthy* of adherence than *Roe* and *Casey*.

A. There Is No Valid Reliance Interest in the Continued Availability of a Constitutional Abortion Right.

Begin with the role of *stare decisis i*n protecting against upsetting "*detrimental* reliance," *Lawrence*, 539 U.S. at 577 (emphasis added)—the frustration of transactions or conduct premised upon precedent in a way that leaves those involved "worse off than [they] would have been had … the mistaken earlier ruling …

never occurred." Vikram David Amar, *Justice Kagan's Unusual and Dubious Approach to "Reliance" Interests Relating to Stare Decisis*, VERDICT (Jun 1, 2021), https://bit.ly/3zT6abu; *see also Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality) (*stare decisis* weakened where "it is hard to imagine how any action taken in reliance upon [the precedent] could conceivably be frustrated"). Because this type of reliance generally occurs where overruling would inflict a "broad upheaval of private economic rights," *Ramos*, 140 S. Ct. at 1409, reliance interests "are at their acme in cases involving property and contract rights," *Payne*, 501 U.S. at 828.

There is nothing like this here. Of course, many Americans hope and expect that *Roe* will not be overruled, but the law does not protect this type of "mere expectancy," Amar, *supra*, or else *every* precedent would create reliance interests. And while the abortion industry could see its profits suffer in some States if *Roe* is overruled, the fact that abortion providers "may view [the continued rule of *Roe* and *Casey*] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest" in correcting grave error. *Gant*, 556 U.S. at 349.

Moreover, any assertion of reliance "ignores the checkered history" of this Court's abortion-rights jurisprudence. *Gant*, 556 U.S. at 350. While *Casey* purported to reaffirm *Roe*'s "central holding," 505 U.S. at 860, it simultaneously interred the great bulk of *Roe*'s doctrinal framework, *id.* at 860, 869-78—and also overruled several post-*Roe* abortion decisions, *id.* at

881-83. Nor did the twists and turns in abortion-rights jurisprudence end with *Casey*. *Compare Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (invalidating partial-birth abortion ban), *with Gonzales v. Carhart*, 550 U.S. 124, 151-67 (2007) (upholding similar law), *and compare Whole Woman's Health v. Hellerstedt*, 579 U.S. ---, 136 S. Ct. 2292, 2309-10 (2016) (appearing to revise *Casey*'s test to require a balancing of burdens and benefits), *with June Medical Servs., L.L.C. v. Russo*, 591 U.S. ---, 140 S. Ct. 2103, 2138 (2020) (opinion of Roberts, C.J.) (rejecting such balancing). This vacillation diminishes any legitimate expectation that *Roe* and *Casey* will apply in perpetuity.

The repeated calls by Members of this Court to overrule *Roe* likewise undermine any reliance. *See Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 785 (1986) (White, J., dissenting); *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting); *id.* at 979 (Scalia, J., dissenting); *Stenberg*, 530 U.S. at 980 (Thomas, J., dissenting). The Nation has "been on notice for years regarding this Court's misgivings about" *Roe*. *Janus*, 138 S. Ct. at 2484.

B. *Roe* and *Casey* Do Not Cohere With This Court's Broader Constitutional Jurisprudence.

Next, "related principles of law" have "developed" in the last three decades in a way that has rendered *Roe* and *Casey* increasingly isolated. *Casey*, 505 U.S. at 855. In the past several decades, this Court has frequently approached novel or monumental questions of

constitutional law with an approach that hews closely to the Constitution's text, history, and tradition. Perhaps the best exemplar of this approach is *District of Columbia v. Heller*, 554 U.S. 570 (2008). The first decision from this Court to seriously examine the Second Amendment, *Heller* was firmly rooted in the original meaning and historical understanding of that provision's text. The Court has increasingly taken a similar approach to cases involving the Constitution's structural protections. *See, e.g.*, *Seila Law LLC v. CFPB*, 591 U.S. ---, 140 S. Ct. 2183, 2192 (2020); *Edmond v. United States*, 520 U.S. 651, 658-65 (1997).

In the past several years this Court has also frequently worked to narrow or replace subjective and manipulable balancing tests with more rule-like doctrines grounded in text, history, and tradition. *See, e.g.*, *American Legion v. American Humanist Ass'n*, 588 U.S. ---, 239 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring); *accord id.* at 2081-85 (plurality); *United States v. Jones*, 565 U.S. 400, 404-11 (2012); *Crawford v. Washington*, 541 U.S. 36, 42-56 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-90 (2000). As Justice Alito noted last Term, the Court's more recent opinions "respect the primacy of the Constitution's text," *Fulton v. City of Philadelphia, Pa.*, 593 U.S. ---, 141 S. Ct. 1868, 1894 (2021) (Alito, J., concurring), as well as the Nation's history and traditions. The judicial lawmaking style epitomized by *Roe* is increasingly out-of-place in modern constitutional case law.

Roe and *Casey* are in tension with the Court's larger jurisprudence in another way as well, as they

have caused distortions in other doctrinal areas. The line of First Amendment cases beginning with *Hill v. Colorado* has sanctioned limits on abortion-related speech "in stark contradiction of the constitutional principles … appl[ied] in all other contexts." 530 U.S. 703, 742 (Scalia, J., dissenting). The majority in *Whole Woman's Health* reached the merits of the constitutional challenge only by "disregard[ing] basic rules" of *res judicata* "that apply in all other cases." 136 S. Ct. at 2330 (Alito, J., dissenting). And the plurality in *June Medical* granted abortion providers third-party standing to challenge, on behalf of their patients, regulations designed to protect those patients' health and safety, contrary to the rule that "third-party standing is not appropriate where there is a potential conflict of interest." 140 S. Ct. at 2167 (Alito, J., dissenting). The fact that *Roe* and *Casey* have repeatedly led to such incoherent "jurisprudential consequences," *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring), is an additional reason to overrule them.

C. Factual Developments Have Also Undermined *Roe* and *Casey*'s Reasoning.

Apart from these legal developments, "facts have so changed, or come to be seen so differently" since *Roe* and *Casey* were decided as to have significantly sapped those decisions of whatever residual force they might be thought to have. *Casey*, 505 U.S. at 855.

Roe recognized that whether "life begins at conception and is present throughout pregnancy" was of pivotal importance, but it asserted that "at this point

in the development of man's knowledge" medical science had been "unable to arrive at any consensus" on the issue. 410 U.S. at 159. *Roe* thus proceeded on the assumption that life "as we recognize it" "does not begin until live birth." *Id.* at 160-61. This "unsupported empirical assumption" has been significantly undermined by subsequent developments. *See Janus*, 138 S. Ct. at 2483.

It is now clear that an unborn fetus is not merely "potential life," but is a "a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales*, 550 U.S. at 147. As a recent, exhaustive review of the scientific literature concludes, "[t]he scientific evidence clearly indicates that a one-cell human organism, the zygote, forms immediately at fusion of sperm and egg. From a scientific perspective, this single cell is inarguably a complete and living organism; i.e. a member of the human species at the earliest stage of natural development." Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and Terminology Revisited*, 8 U. ST. THOMAS J.L. & PUB. POL'Y 44, 70 (2013); *see also* Hana R. Marsden *et al.*, *Model systems for membrane fusion*, 40 CHEM. SOC'Y REV. 1572, 1572 (2011) ("The fusion of sperm and egg membranes initiates the life of a sexually reproducing organism."); Enrica Bianchi *et al.*, *Juno is the egg Izumo receptor and is essential for mammalian fertilization*, 24 NATURE 483, 483 (2014) ("Fertilization occurs when sperm and egg recognize each other and fuse to form a new, genetically distinct organism.").

Further, in 1973—and, to some extent, even in 1992—it was widely assumed that an unborn human being had no ability to sense and experience pain. Stuart W.G. Derbyshire & John C. Bockmann, *Reconsidering fetal pain*, 46 J. MED. ETHICS 3, 3 (2020). Today, by contrast, there is a growing scientific consensus that the unborn can feel pain as early as 12 weeks gestation. *Id.* at 6; *see also* American College of Pediatricians, *Fetal Pain: What is the Scientific Evidence?* at 1, 7 (2021), https://bit.ly/3AeDrhf (concluding that "a large body of scientific evidence demonstrates that painful or noxious stimulation adversely affects immature human beings, both before and after birth," "as early as 12 weeks gestation (and possibly earlier)"). These scientific advances further undermine *Roe*'s underpinnings.

D. *Casey*'s "Undue Burden" Test Has Proven To Be Hopelessly Indeterminate and Unworkable.

Finally, consider the "practical workability" of the precedent in question. *Casey*, 505 U.S. at 854.

1. The overarching standard established by *Casey*—whether a restriction "imposes [an] undue burden on a woman's abortion right," *id.* at 880—is so subjective that it has proven incapable of guiding constitutional analysis. That can surprise no one: the adjective "undue" simply means "[e]xcessive or unwarranted." *Undue*, BLACK'S LAW DICTIONARY (8th ed., 2004). The phrase effectively takes *the conclusion* of the constitutional inquiry and costumes it *as the*

constitutional standard. The "undue burden" test—which was "plucked from nowhere," *Casey*, 505 U.S. at 965 (Rehnquist, C.J., dissenting in part)—is thus an "ultimately standardless" standard, *id.* at 987 (Scalia, J., dissenting in part), that turns entirely on "a judge's subjective determinations" and seems designed for the purpose of "engender[ing] a variety of conflicting views," *id.* at 965 (Rehnquist, C.J., dissenting in part).

The last three decades have borne out Chief Justice Rehnquist's concerns. The authors of the joint opinion disagreed even among themselves on the correct application of *Casey* in *Stenberg* and again in *Gonzales*. And consider merely a handful of examples from the lower courts: they have split over whether parental notification requirements that lack a judicial bypass procedure constitute an undue burden. *Compare Planned Parenthood v. Camblos*, 155 F.3d 352, 367 (4th Cir. 1998) (en banc), *with Planned Parenthood v. Adams*, 937 F.3d 973, 985-90 (7th Cir. 2019), *aff'd on reconsideration sub nom. Planned Parenthood v. Box*, 991 F.3d 740 (7th Cir. 2021), *and Planned Parenthood v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995). They have differed over the constitutionality of laws that bar doctors from performing abortions for certain reasons, such as the unborn child's diagnoses with Down syndrome. *Compare Preterm-Cleveland v. McLoud*, 994 F.3d 512, 520-35 (6th Cir. 2021), *with Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 688-90 (8th Cir. 2021). And they have divided over the constitutionality of requirements that physicians make certain disclosures before

administering an abortion. *Compare EMW Women's Surgical Ctr. v. Beshear*, 920 F.3d 421, 430-32 (6th Cir. 2019), *and Planned Parenthood v. Rounds*, 686 F.3d 889, 893-906 (8th Cir. 2012), *with Stuart v. Camnitz*, 774 F.3d 238, 244-55 (4th Cir. 2014). These conflicts bespeak the fundamentally *ad hoc* and standardless judicial inquiry that the undue burden standard forces courts to undertake.

Perhaps most critically, the lower courts—and even this Court—have struggled without success to determine what the "undue burden" test even means. As laid bare by the dueling opinions in *Whole Woman's Health*, this confusion stems from *Casey* itself. The plurality in *Casey* equated the "undue burden" inquiry with asking whether the challenged law places "a substantial obstacle in the path of a woman seeking an abortion," *Casey*, 505 U.S. at 877, without any inquiry into the law's benefits. *See Whole Woman's Health*, 136 S. Ct. at 2324 (Thomas, J., dissenting). The majority in *Whole Woman's Health*, however, read *Casey* differently, as requiring "that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2309 (majority).

When the Court reconsidered the matter in *June Medical*, it brought more darkness than light. The plurality insisted, again, that the "undue burden" inquiry required a balancing of burdens against benefits, 140 S. Ct. at 2120, but the Chief Justice's concurrence expressly disclaimed any such "weighing of costs and benefits," *id.* at 2136 (Roberts, C.J., concurring). And because the four dissenters took the Chief

Justice's view, "five Members of the Court" rejected a cost-benefit reading of *Casey*, *id.* at 2182 (Kavanaugh, J., dissenting), such that "no five Justices [could] agree on the proper interpretation of [the Court's] precedents," *id.* at 2152 (Thomas, J., dissenting).

Predictably, the divisions within this Court over the proper reading of the "undue burden" test have led to a parallel division in the lower courts. *Compare Preterm-Cleveland v. McCloud*, 994 F.3d 512, 524 (6th Cir. 2021) (en banc) (applying the Chief Justice's concurrence); *and Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (same), *with Reproductive Health Servs. v. Strange*, 2021 WL 2678574, at *12 (11th Cir. June 30, 2021) (applying plurality opinion); *see also Box*, 991 F.3d at 741–42 (7th Cir. 2021) (finding the Chief Justice's concurrence "controlling" but not those parts identified as that opinion's "dicta," including "its stated reasons for disagreeing with portions of the plurality opinion").

All told, 30 years after *Casey* this Court's "abortion jurisprudence remains in a state of utter entropy." *June Medical*, 140 S. Ct. at 2152 (Thomas, J., dissenting).

2. *Casey*'s viability line has also proven indeterminate and incoherent. For starters, and as *Casey* itself acknowledged, viability is a contingent and arbitrary line that depends on "advances in neonatal care." *Id.* at 860. While *Casey* pegged the date "at 23 to 24 weeks," *id.*, viability "is inherently tied to the state of medical technology that exists whenever

particular litigation ensues," *City of Akron v. Akron Ctr. for Reproductive Health, Inc.,* 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting), and as a result "will only increase" with further "[m]edical and scientific advances," rendering the standard "even less workable in the future," *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774-75 (8th Cir. 2015). Even today, viability varies from case to case; it may generally occur around 24 weeks gestation, but the most premature "viable" newborn so far—born at just 21 weeks and two days—recently celebrated his first birthday.[5] And determining precisely when gestation began in any given case is a matter of guesswork.

Moreover, while *Casey* assured States that upon viability their interest in prenatal life could "be the object of state protection that now overrides the rights of the woman," 505 U.S. at 870, some cases have interpreted *Casey*'s exception barring post-viability restrictions where "the life or health of the mother is … at stake," *id.* at 872, so expansively as to largely vitiate the Court's assurances. *See, e.g.*, *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 209 (6th Cir. 1997) (interpreting this Court's precedents as requiring an exception for "severe mental or emotional harm").

The short of it is this: 30 years of judicial experimentation with *Casey*'s undue-burden framework

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[5] Sydney Page, *A newborn weighed less than a pound and was given a zero percent chance of survival. He just had his first birthday*, WASH. POST, June 23, 2021, https://wapo.st/2SJ1AvH.

have confirmed Chief Justice Rehnquist's prediction that it would "present[ ] nothing more workable than the trimester framework which it discard[ed]." *Casey*, 505 U.S. at 966 (Rehnquist, C.J., dissenting in part). As a consequence, "this Court's abortion jurisprudence has failed to deliver the principled and intelligible development of the law that *stare decisis* purports to secure," *June Medical*, 140 S. Ct. at 2152 (Thomas, J., dissenting) (quotation marks omitted).

IV. Three Decades of Upheaval and Controversy over Abortion Rights Have Conclusively Shown that *Casey*'s Call for a Halt to the National Abortion Debate Is a Complete Failure.

A candid assessment of the very same "prudential and pragmatic considerations" cited by *Casey*, 505 U.S. at 854, thus shows that those cases should be repudiated. But while *Casey* briefly rehearsed the *stare decisis* factors just discussed, *id.* at 846, 855-61, the dominant considerations that appear to have animated the *Casey* plurality are instead set forth in the concluding section of the joint opinion's discussion of *stare decisis*: the special precedential force of the rare case, like *Roe*, that "calls the contending sides of a national controversy to end their national division" and the institutional concern that owning up to *Roe*'s errors would come "at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Id.* at 867-69. But these same considerations today affix the final seal on the warrant for overruling *Roe*.

A. *Roe*'s call did not so much resolve the national debate over abortion as supercharge it. As Justice Scalia observed in his dissent in *Casey*, "*Roe* fanned into life an issue that has inflamed our national politics … ever since." 505 U.S. at 995 (Scalia, J., dissenting). The ensuing three decades have amply vindicated Justice Scalia's prediction that *Casey*'s failure to overturn *Roe* would perpetuate the firestorm. *See id.* The abortion issue remains as contentious and divisive as ever. Indeed, between 1995 and 2021, the share of Americans who describe themselves as pro-life jumped from 33 to 47 percent.[6] A total of 28 States, moreover, have "sought a federal constitutional amendment—either proposed by a constitutional convention or by Congress—that would prohibit abortion or restore the states' authority to do so." Paul B. Linton, *Overruling Roe v. Wade: Lessons from the Death Penalty*, 48 PEPP. L. REV. 261, 275 (2021).

That enduring controversy refutes any suggestion that *Roe* should be entitled to some sort of "super-precedential" force. *Richmond Med. Ctr. v. Gilmore*, 219 F.3d 376, 376 (4th Cir. 2000) (Luttig, J., concurring). This "super-precedent" idea has no basis in law. The Court has not hesitated to overrule even landmark decisions that had previously been reaffirmed without the slightest hint that it had to overcome some sort of "super" precedential weight. *Plessy v. Ferguson*, for example, was reaffirmed in *Chiles v. Chesapeake & Ohio Ry. Co.*, 218 U.S. 71, 77 (1910), *McCabe*

[6] *Abortion*, GALLUP, https://bit.ly/3y3sBsG.

v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 160 (1914), and *Gong v. Rice*, 275 U.S. 78, 86 (1927), before *Brown* finally (and correctly) buried it.

Moreover, even scholars who believe as a descriptive matter that some precedents are practically "immune from judicial overruling" concede that "a decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration." Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116 (2008); *see also* Amy Coney Barrett, *Precedent & Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1735 n.141 (2013) (collecting citations).

Casey lamented that "19 years after our holding" in *Roe*, "that definition of liberty is still questioned." 505 U.S. at 844. It is no less questioned after another 29 years. Even in 1992, a student of history could have doubted the ability—or legitimate authority—of this Court "to resolve the sort of intensely divisive controversy reflected in *Roe*." *Id.* at 866; *cf. Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857). Today there can be no doubt that the effort has failed.

B. *Roe*'s attempt, and then *Casey*'s, to resolve the national division over abortion has failed for any number of reasons, but surely one of them is the widespread belief that the decisions are fundamentally illegitimate exercises of judicial power. It is thus ironic that *Casey* found adherence to *Roe* "imperative" to preserve both "the Court's legitimacy" and "the

Nation's commitment to the rule of law." 505 U.S. at 869. In so doing, *Casey* elevated *Roe* above the Constitution itself as the rule of law.

It is for this reason that a great many Americans have refused to accept the legitimacy of *Roe* and *Casey*. As the *Casey* plurality wrote, again ironically, "the Court's legitimacy depends on making legally principled decisions" whose "principled character is sufficiently plausible to be accepted by the Nation." 505 U.S. at 865-66. The plurality penned these words to justify its refusal "to overrule [*Roe*] under fire," *id.* at 867, but it is *this Court's creation of a constitutional abortion right* that has failed *Casey*'s "principled justification" test and, for that reason, will never receive widespread acceptance by the Nation.

C. The enduring debate over *Roe*'s legitimacy leads us, finally, to a far-reaching consequence of the decision that cannot be ignored: the way in which *Roe* has not only intensified America's political divisions over abortion but perverted the very institutions and mechanisms that are meant to resolve them.

The story of much of the dysfunction in American politics over the last 50 years can be told through the prism of *Roe*. The difficulty is not only that Americans are intractably divided over the abortion issue, but that the views of each side are extraordinarily intense. Public opinion polls have consistently showed that around half of Americans view the issue as either

extremely or very important.[7] Because of this Court's decision in *Roe*, however, the only place where the political energy over this issue can realistically be channeled is the debate over Supreme Court appointments. Thus in 2016, for example, 26% of Americans who voted for Donald Trump—and 18% of voters for Hillary Clinton—listed appointments to this Court as the most important factor in their vote.[8]

Focusing all of the political activism over the abortion issue on judicial selection has resulted, inevitably, in the poisoning of the process. For much of the 20th century prior to *Roe*, nominees to this Court were confirmed largely without controversy.[9] As the battle over *Roe* began to emerge as a central issue in the appointments process, however, these dynamics changed dramatically: Every Supreme Court nominee since Justice Stevens in 1975 has been explicitly asked about his or her views on *Roe v. Wade*,[10] and the

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[7] Karlyn Bowman & Heather Sims, *Abortion As An Election Issue* 1-2, AMERICAN ENTERPRISE INSTITUTE (2016), https://bit.ly/367fdrm (compiling survey data).

[8] Philip Bump, *A quarter of Republicans voted for Trump to get Supreme Court picks — and it paid off*, WASH. POST, June 26, 2018, https://wapo.st/3qB6Wpa.

[9] *See Supreme Court Nominations* (1789-Present), U.S. SENATE, https://bit.ly/2UXvcq1.

[10] *See* PAUL M. COLLINS & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 122 fig.4.6 (2013); S. HRG. 115-208 at 76 (2017); S. HRG. 115-545, pt. 1 at 75 (2018); Barrett Confirmation Hearing, Day 2 Part 1 at 35:30, C-SPAN, Oct. 13, 2020, https://bit.ly/3juaGHJ.

judicial confirmation process has become increasingly divisive. There can be no doubt that *Roe* has significantly contributed to the deterioration of the process.

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Nearly half a century into its effort "to end [the] national division" over abortion, *Casey*, 505 U.S. at 867, it is time for this Court to admit that the effort has failed.

CONCLUSION

The Court should overrule *Roe* and *Casey* and reverse the judgment of the Fifth Circuit.

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Respectfully submitted,

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