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* THE MARCH FOR LIFE EDUCATION AND DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether all pre-viability prohibitions on elective abortions are unconstitutional.

STATEMENT OF INTEREST OF AMICUS CURIAE

Approximately ten months after this Court's decision in *Roe v. Wade*, the March for Life was conceived in the home of Nellie Gray, the founder of the March for Life. For the next 48 years, starting on January 22, 1974, the first anniversary *of Roe*, the March for Life has occurred in Washington, D.C. annually. Since 1974, the March for Life has grown to the largest right to life demonstration. It is therefore no surprise that the March for Life is one of the most renowned pro-life organizations in the country.[1]

The March for Life Education and Defense Fund is a non-profit corporation organized under 501(c)(3) of the Internal Revenue Code and is incorporated in the District of Columbia. The March for Life attracts hundreds of thousands of people from around the country annually to protest the tragedy of abortion and cultivate in the United States a culture where every human life is valued and protected. The March

[1] Pursuant to this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. On June 1, 2021, and June 9, 2021, the Respondent and Petitioner, respectively, gave blanket consent to the filing of amici briefs.

for Life's mission is to promote the dignity of human life by working to end abortion; to make abortion unthinkable. This is accomplished through uniting, educating, equipping, and mobilizing persons who are pro-life in the public square.

Participants in March for Life have braved the January cold, rain, sleet, and blizzards to march in defense of the defenseless. The March for Life has attracted participants from all 50 states and U.S. territories. People from a broad spectrum of cultural, racial, spiritual, and political backgrounds participate. But out of these many people from diverse backgrounds, they are one in the conviction that this Nation's foundational creed is correct: that all persons are endowed with the right to life.

This is why they march for life.

SUMMARY OF THE ARGUMENT AND INTRODUCTION

This amicus brief advances two principal points.

First, *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) were wrongly decided. This Court's decision in *Roe* is "egregiously wrong", was discredited when issued, and remains so today. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring); *Citizens United v. FEC*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring).

This Court's decision in *Casey* has also caused confusion as to the content of the undue burden standard. *Compare, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000) (declining to grant deference to legislative decision where medical disagreement exists), *and Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016) (interpreting *Casey* to contain a balancing test), *with Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (granting legislature deference where medical disagreement exists), *and June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting) (noting that five justices rejected the balancing test in *Whole Woman's Health*). At the very least, *Casey* has not instilled predictability or consistency. *Ramos*, 140 S. Ct. at 1414-15 (Kavanaugh, J., concurring).

Also, the advancement of science has undermined the factual basis for this Court's viability standard. *See Akron v. Akron Cent. for Reprod. Health,* 462 U.S. 416, 457-58 (1983) (O'Connor, J., dissenting).

Second, this Court should acknowledge Mississippi's substantial interests in protecting the pre-born and the health and safety of women. *See, e.g., Gonzales*, 550 U.S. at 156-60. These interests are based upon a duty the Fourteenth Amendment imposes upon the States to protect pre-born life. *See generally* Joshua J. Craddock, Note, *Protecting Prenatal Persons: Does The Fourteenth Amendment Prohibit Abortion?* 40 HARV. J.L. & PUB. POL'Y 539 (2017). Accordingly, when plaintiffs challenge statutes that advance these interests, this Court should review these challenges under rational basis review. *See, e.g., June Med. Servs.*, 140 S. Ct. at 2171 (Gorsuch, J., dissenting).

ARGUMENT

I. *ROE* AND *CASEY* WERE WRONGLY DECIDED.

The courts below held that Mississippi's statute was unconstitutional under *Casey* because Mississippi prohibits abortion pre-viability. *Casey*, 505 U.S. at 846; *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 274 (5th Cir. 2019); *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 541-42 (S.D. Miss. 2018). This Court too has recently recognized that *Casey* "reaffirmed the most central principle of *Roe v. Wade*, a woman's right to terminate her pregnancy before viability." *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (internal quotation marks and citations omitted).

Importantly, in *June Medical*, this Court applied *Casey* because the parties did not ask this Court to overrule *Casey*. *See June Med. Servs.*, 140 S. Ct. at

2135 (Roberts, C.J., concurring) (acknowledging that both parties agreed that the *Casey* standard applied and that "[n]either party has asked us to reassess the constitutional validity of that standard."); *id.* at 2154 (Alito, J., dissenting) (same).

Mississippi now asks this Court to overrule *Casey*'s viability framework, just as *Casey* overruled *Roe*'s trimester framework. *See* Br. of Pet. at 1. This Court should do so.

A. *The Stare Decisis Factors Demonstrate That This Court Should Overrule Roe and Casey.*

"The doctrine of *stare decisis* is not as 'inflexible.'" *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring) (citing *Burnet v. Coronado Oil & Gas*, 285 U.S. 393, 406) (Brandeis, J., dissenting)). This is because constitutional precedent can be overruled by subsequent case law or through the constitutional amendment process. *Id.* at 1413. "Where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Id.* (quoting *Burnet*, 285 U.S. at 406-07) (Brandeis, J., dissenting).

Justice Kavanaugh has identified eight non-exclusive factors that the Court has used to overrule precedent. *Ramos*, 140 S. Ct. at 1414. These factors include the quality of the precedent's reasoning, the precedent's consistency with subsequent decisions, the changes in the law or facts. *Id.* Justice Kavanaugh condensed the eight factors into three focused considerations. *Id.* at 1414-15. Applying

them to the case at hand, the focused considerations are:

1. Whether *Roe* and *Casey* are grievously or egregiously wrong?;
2. Have *Roe* and *Casey* caused "significant negative jurisprudential or real-world consequences?";
3. Would overruling *Roe* and *Casey* unduly upset reliance interests?[2]

See id. Each one of these factors weighs in favor of overruling *Roe* and *Casey*.

B. *Roe and Casey Were Egregiously Wrong.*

The virtue of *stare decisis* is diminished when a precedent's "validity is so hotly contested that it cannot reliably function as a basis for decision in future cases[.]" *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring). Part of the reason why *Roe* is so hotly contested is that the quality of its reasoning is deficient, and its consistency with this Court's prior precedent is lacking. *Ramos*, 140 S. Ct. at 1414-15. For the past 48 years, scholars, advocates, and judges have consistently criticized *Roe*'s reasoning.

[2] This brief focuses principally on the first two considerations.

1. *The Legal Academy Has Consistently Contested The Validity Of Roe and Casey.*

Shortly after this Court issued its decision in *Roe*, Yale Law School Professor John Hart Ely wrote that *Roe* was a "very bad decision[]" 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). Professor Ely told his students that *Roe* "lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine . . . ." *Id.* at 943. For Professor Ely, what makes *Roe* "frightening" is that the purported right to an abortion that *Roe* protected "is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure." *Id.* at 935-36.

Professor Ely is not alone. From 1973 to the present, legal scholars have continually argued that the legal analysis in *Roe* was deficient. *See* Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments,* 43 HASTINGS CONST. L.Q. 187, 242 n. 97 (2016) (citing five examples of scholars from 1973 to 2013 arguing that *Roe*'s viability standard lacked justification). Professor Akhil Reed Amar described *Roe* as suffering from "many methodological lapses" and describing some of the constitutional arguments that the Court advanced as "clumsy." Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 778 (1999).

2. *Many Justices Have Consistently Criticized Roe and Casey.*

Justices of the United States Supreme Court have either described *Roe* as a bad decision or called on *Roe* to be reversed. Chief Justice Burger, part of the *Roe* majority, declared that *Roe* should be reexamined. *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 785 (1986) (Burger, C.J., dissenting). In that same case, Justice O'Connor referred to the Court's abortion jurisprudence as having "already worked a major distortion in the Court's constitutional jurisprudence." *Id.* at 814 (O'Connor, J., dissenting).

Then-Judge Ruth Bader Ginsburg stated that *Roe "*ventured *too far* in the change it ordered." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985) (emphasis added). The decision in *Roe*, "in contrast to decisions involving explicit male/female classification, has occasioned searing criticism of the Court . . ." *Id.* at 379.

Furthermore, *Roe* did not invite legislative involvement and instead removed the abortion issue from legislators entirely. Judge Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992); *see also id.* ("[T]he *Roe* decision left virtually no state with laws fully conforming to the Court's delineation of abortion regulation still permissible."). Justice Ginsburg also later acknowledged that *Roe* and *Casey* were not settled. In her dissent in *Gonzales*, Justice Ginsburg noted that the Court openly demonstrated "hostility"

towards *Roe* and *Casey*, merely assuming for the moment *Casey*'s recognition of *Roe*'s principles rather than reaffirming those principles. *Gonzales*, 550 U.S. at 186 (Ginsburg, J., dissenting). Additionally, the Court "blur[ed] the line" that the viability standard attempted to draw. *Id.*

Precisely because *Roe* removed the debate from the legislatures, Justice Scalia observed that "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular[.]" *Stenberg*, 530 U.S. at 956 (Scalia, J. dissenting) (citation omitted). Justice Scalia also recognized that the *Roe* decision lacked a basis in constitutional text and accepted tradition. *See id*. He further described the Court's abortion jurisprudence as a "novelty" that "must be chalked up to the Court's inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." *Id*. at 954. Accordingly, Justice Scalia urged this Court "[i]f only for the sake of its own preservation" to return the issue to the people through their legislatures. *See id*. at 956. Justice Thomas has similarly ruled that *Roe* and *Casey* have no basis in the Constitution. *See Gonzales*, 550 U.S. at 168-69 (Thomas, J., concurring).

Furthermore, four justices of this Court called for *Roe*'s reversal in *Casey*. *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting with whom White, Scalia, and Thomas, J., join concurring in part and dissenting in part). In fact, the dissent recognized that the *Casey* plurality "retains the outer shell of *Roe v. Wade* . . . but beats a wholesale retreat from

the substance of that case." *Id.* (internal citations omitted).

Additionally, on at least five occasions, the United States argued that *Roe* was wrongly decided and that this Court should overturn it. *Casey*, 505 U.S. at 844 ("Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*.").

3. *Judges On The United States Courts Of Appeal Have Also Criticized Roe and Casey.*

Judges of the United States Courts of Appeal too have found this Court's abortion jurisprudence lacking, describing it as an "aberration of constitutional law." *West Ala. Women's Cent. v. Williamson*, 900 F.3d 1310, 1314 (11th Cir. 2018); *see also id.* at 1330 (Dubina, J., concurring); *Margaret S. v. Edwards*, 794 F.2d 994, 995 (5th Cir. 1986) (Higginbotham, J.) ("It is no secret that the Supreme Court's abortion jurisprudence has been subjected to exceptionally severe and sustained criticism."); *see generally* Clarke Forsythe, *A Draft Opinion Overruling Roe v. Wade*, 16 GEORGE. J. L. & PUB. POL'Y at 491-93 (collecting judicial opinions criticizing *Roe* and *Casey*).

In conclusion, "[w]hen the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake . . .," the precedent should be

overturned. *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring). Furthermore, because members of this Court have consistently questioned the validity of *Roe* in later decisions, this Court should overrule *Roe*. *See Pearson v. Callahan*, 555 U.S. 223, 235 (2009).

4. *The Criticisms of Roe and Casey Are Justified.*

First, the Court decided *Roe* based upon factual assertions that the district court did not first pass upon. *See* Randy Beck, *Self-Conscious Dicta*: *The Origins Roe v. Wade's Trimester Framework*, 51 Am. J. Legal Hist. 505, 511 (2011). This violates longstanding Supreme Court practice that limits decisions to the facts presented in the record and the precise question presented. *See Bowen v. Roy*, 476 U.S. 693, 722-23 (1986); *see also Citizens United*, 558 U.S. at 373, 377 (Roberts, C.J., concurring) (stating that it is the Court's practice to consider only those arguments properly raised and to never create a rule of constitutional law beyond what the facts required).

Second, and more fundamentally, *Roe* itself could not precisely identify where the right to abortion is located in the Constitution. *See Roe*, 410 U.S. at 153; *see also* Amar, *Intratextualism*, 112 HARV. L. REV. at 774.

Third, this Court's reasoning that the Fourteenth Amendment's use of the term "person" did not include the pre-born contradicted this Court's prior precedents. The Court in *McArthur v. Scott* followed

the common law rule that "treated a child in its mother's womb as in being." 113 U.S. 340, 382 (1885); *see also Craddock*, 40 HARV. J. L. & PUB. POL'Y at 567. The Court "found that the grandchildren's rights had vested in utero at the time of their grandfather's death." *See id.* (citing *McArthur*, 113 U.S. at 382). "[I]t would be odd if the fetus had property rights which must be respected but could himself be extinguished." *See id*. (quoting Judge Noonan).

Because *Roe* conflicts with prior precedents, rejecting "an unbroken line of decisions" in place for a century, and because *Roe* lacks "constitutional roots" this Court should overrule *Roe*. *Adarand Constructors v. Pena*, 515 U.S. 200, 232 (1995) (internal quotation marks and citations omitted). Accordingly, the criticism of *Roe* is justified. *See generally A Draft Opinion Overruling Roe v. Wade*, 16 GEORGE. J. L. & PUB. POL'Y at 459-70.

C. *Casey Has Failed to Provide Consistency And Stability.*

This Court in *Casey* jettisoned *Roe*'s trimester framework. *Casey*, 505 U.S. at 872-73. But *Casey* replaced that standard with the undue burden standard. *Id*. at 876-77. The undue burden standard has not provided predictability or stability.

In *Stenberg*, the first case at the Court to interpret *Casey*, the majority ruled that because there was uncertainty in the medical community concerning the safety of dilation and evacuation ("D&E") procedures, this limited legislative decision

making. *Stenberg*, 530 U.S. at 937. Nebraska legislature's choice to not include a health exception in its statute was therefore fatal. *Id*. at 930.

But then, in *Gonzales*, Justice Kennedy reversed this view and ruled that the absence of uniformity of medical opinion meant that legislatures have "wide discretion" to make decisions. *Gonzales*, 550 U.S. at 162-63. Therefore, the Federal Partial Birth Abortion Ban Act was constitutional, despite the lack of a health exception. *Id*.

The Court then reversed itself from its seeming rational basis standard and injected additional uncertainty by applying a balancing test in *Whole Woman's Health*. 136 S. Ct. at 2309-10.[3] But then five Justices on the Court rejected the balancing test adopted in *Whole Woman's Health*. *See June Med. Servs.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting) (noting that five justices rejected the balancing test in *Whole Woman's Health*).

Casey has therefore not cultivated the necessary consistency in its application to justify the continued application of *stare decisis*. *See Ramos*, 140 S. Ct. at 1414-15 (Kavanaugh, J., concurring); *Pearson*, 555 U.S. at 235 (stating that where decisions have been questioned by justices of this Court and "later

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[3] *See generally* Laura Wolk & O. Carter Snead, *Irreconcilable Differences? Whole Woman's Health, Gonzales and Justice Kennedy's Vision of American Abortion Jurisprudence*, 41 HARV. J.L. PUB. POL'Y 719 (2018) (noting that the contours of *Casey*'s undue burden standard still remain elusive more than two decades after the decision).

decisions [have] defied consistent application by the lower courts, these factors weigh in favor of reconsideration."); *Payne*, 501 U.S. at 827 (stating that *stare decisis* promotes predictability and consistency). This demonstrates that Justice Scalia was right when he called for this Court to overrule *Casey*, describing the undue burden standard as "ultimately standardless." *Stenberg*, 530 U.S. at 956 (Scalia, J., dissenting).

In the partisan gerrymandering context, this Court overruled *Davis v. Bandemer* after 18 years of litigation produced no standards to evaluate partisan gerrymandering claims. *See generally Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (overruling *Bandemer sub silentio*); *Vieth v. Jubelirer*, 541 U.S. 267, 281, 292-306 (2004) (four justices voting to overrule *Davis*, after 18 years of litigation without developing a consistent standard to adjudicate partisan gerrymandering claims).

In *Citizens United*, this Court also overruled *Austin v. Michigan State Chamber of Com.*, 494 U.S. 652 (1990). *Citizens United*, 558 U.S. at 365. The Court overruled *Austin* after four justices of the Court in *McConnell v. FEC* initially called for *Austin* to be overruled. *Citizens United*, 558 U.S. at 332. Additionally, *Austin* broke with prior free speech precedents. *Id*. at 379-80 (Robert, C.J., concurring).

Roe and *Casey* were, therefore, wrongly decided. *Roe*'s reasoning was woefully deficient and contradicted this Court's prior precedents. Additionally, since 1973, *Roe* has sustained substantial and persistent criticism. Similarly,

Casey's attempt to reframe *Roe*'s standard has been applied inconsistently, preventing the development of stability. Furthermore, *Casey*'s ruling that states cannot prohibit abortion prior to viability contradicts this Court's past precedents that recognize pre-born children have legal rights.

II. MISSISSIPPI'S ABORTION RESTRICTION IS JUSTIFIED BY THE STATE'S DUTY TO AND INTEREST IN PROTECTING LIFE.

A. *Mississippi Has A Duty To Protect Nascent Human Life.*

The Fourteenth Amendment guarantees that no State shall deprive "any *person* of life, liberty or property, without due process of law; nor deny any *person* within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1 (emphasis added).

Because the Constitution is a written document, the meaning of the words contained in the Constitution do not change. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (Thomas, J., concurring) (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905)). Accordingly, this Court has long recognized that interpretation of the Constitution "must necessarily depend on the words of the Constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states." *Id.* (quoting *Rhode Island v. Massachusetts*, 12 Pet. 657, 721 (1838)).

In 1866 the House and the Senate passed the Fourteenth Amendment and proposed it to the States for ratification. In 1868, the States ratified it. *See* Calabresi & Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868*, 87 TEXAS L. REV. 7, 82 (2008). Therefore, to ascertain what the drafters meant by the word "person," one must look to the meaning of the word "person" in 1866.

1. The Fourteenth Amendment's Use Of The Term "Person" Included The Pre-born.

William Blackstone is "the preeminent authority on English law for the founding generation." *Ramos*, 140 S. Ct. at 1411 (Kavanaugh, J., concurring in part) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). Blackstone's preeminence continued through the 19th Century, particularly among lawyers and those who crafted the Fourteenth Amendment. John Finnis, *Abortion is Unconstitutional*, First Things No. 312 at 29 (April 2021).[4] When introducing the Civil Rights Act of 1866, the Chairman of the House Judiciary Committee, James F. Wilson, said that the rights protected in the Act were those same rights that Blackstone recognized under: "The right of personal security . . . The right of personal liberty . . . The right of personal property." *Id*. at 30.

In the first book of the Commentaries, entitled "Of the Rights of Persons" and in the first chapter

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[4] *Available at* https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional (last visited July 5, 2021).

entitled "Of the Absolute Rights of Individuals," Blackstone states that the right of personal security "consists in a person's legal and uninterrupted enjoyment of, [among other things], his life . . . ." 1 William Blackstone *Commentaries on the Laws of England* 125 (1769); *see also* John Finnis, *Abortion is Unconstitutional*, First Things at 30.

The term "person" includes both natural and artificial persons, including corporations. 1 William Blackstone *Commentaries on the Laws of England*, 119. Those natural persons are "such as the God of nature formed us." *Id*.

"Life is the immediate gift of God, a right inhere by nature in every individual[.]" *Id*. Most importantly, Blackstone recognized that the right to life "begins in contemplation of the law as soon as an infant is able to stir in the mother's womb." *Id*.; *see also* John Finnis, *Abortion is Unconstitutional*, First Things at 30.

In having the right to life, a child in the mother's womb is "capable of having a legacy," having a "guardian assigned" to the child, and "enabled to have an estate limited to its use, and to take afterwards by such limitation as if it were then actually born." 1 William Blackstone's *Commentaries on the Laws of England* 126. In summary, an infant in the mother's womb "is supposed in law to be born for many purposes." *Id*.

2. The States That Ratified The Fourteenth Amendment Had Statutes Protecting The Life Of The Pre-born.

When the Fourteenth Amendment was ratified, "[N]early every state had criminal legislation proscribing abortion . . . ." *Craddock*, 40 HARV. J.L. & PUB. POL'Y at 552 (internal quotation marks and citation omitted). Importantly, "most of these statutes were classified among offenses against persons." *Id*. (internal quotation marks and citation omitted). Accordingly, at the time of the Fourteenth Amendment's ratification, included in the term "person" was prenatal life. *Id*. In fact, "in twenty-three states and six territories, laws referred to the pre-born individual as a child." *Id*. (internal quotation marks and citation omitted).

Courts too recognized the harm of abortion. The Supreme Court of Pennsylvania ruled that "the moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated . . . [There] was therefore a crime at common law." *Id*. at 555 (alteration in original) (quoting *Mills v. Commonwealth*, 13 Pa. 631, 633-634 (Pa. 1850)); *see also Smith v. State*, 33 Me. 48, 55 (Me. 1851) (ruling that at common law if a woman were quick with child "[t]he *child* had a separate and independent existence, [and] it was held highly criminal[]" to kill the child.). Maine superseded the common law by statute. Maine's statute "essentially changed the common law" by removing the "unsubstantial distinction" that the crime of abortion could only occur after quickening. *Smith v. State*, 33 Me. at 57. Under the statute, it was "equally

criminal to produce abortion *before and after* quickening." *Id.* Furthermore, even the attempt "to cause the destruction of an unborn *child* is a crime; whether the *child* be quick or not." *Id.* (emphasis added).

It is, therefore, no surprise that by 1868, 30 out of 37 states "had enacted anti-abortion statutes." *Craddock*, 40 HARV. J. L. & PUB. POL'Y at 555. *see also June Med. Servs.*, 140 S. Ct. at 2151, n.7 (Thomas, J. dissenting) (noting that by 1868, a majority of States and Territories either prohibited or limited abortion). Of the 30 states that limited abortions by statute, 27 of them "punished abortion before and after quickening." *Craddock*, 40 HARV. J. L. & PUB. POL'Y. at 556. Additionally, "twenty-eight jurisdictions labeled abortion as an offense against the person or an equivalent criminal classification." *Id.* (cleaned up) (internal quotation marks and citation omitted).

Also contemporaneous to the ratification of the Fourteenth Amendment, legislatures also recognized that life began at conception and sought to protect it. The same Ohio legislature that ratified the Fourteenth Amendment also amended its abortion statute that was originally enacted in 1834. *Craddock*, 40 HARV. J. L. & PUB. POL'Y at 557. In its report, the Ohio senate proclaimed that abortion is "child-murder." *Craddock*, 40 HARV. J. L. & PUB. POL'Y at 558 (internal citation omitted). The Ohio Senate further proclaimed to the world that "the willful killing of a human being, at any stage of its *existence*, is murder." *Id.* (emphasis added) (internal citation omitted). The Ohio legislature passed this

statute just four months after ratifying the Fourteenth Amendment. *Id*. at 557-58 (internal citation omitted).

The state legislatures that ratified the Fourteenth Amendment, the courts, and Blackstone all used the term "person" in a manner that conforms with how the word was commonly used. Webster's Dictionary from that time defined a person as "relating especially to a living human being; a man, woman, or child; an individual of the human race." *Craddock*, 40 HARV. J. L. & PUB. POL'Y at 549 (citing the 1864 edition of Webster's *American Dictionary of the English Language*). Importantly, birth was not the *sine qua non* of what constitutes a person. *Id*. at 549.

Furthermore, and following Blackstone's distinction of artificial persons, this Court decided early that the Fourteenth Amendment's use of the term "person" included corporations. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 781 n.15 (1978). Even though a corporation cannot testify, even though a corporation is not counted in the Census for apportionment purposes, it is still considered a person under the Fourteenth Amendment. Here, the pre-born child cannot testify but can inherit property. *McArthur,* 113 U.S. at 382. The term person applies to pre-born children at least as much as the term person applies to all persons born.

From this historical perspective, from Blackstone's use of the word person, the courts, the legislatures', and contemporaneous dictionaries, the word person includes those persons who are pre-

born. Accordingly, the Constitution imposes a duty on the States, like Mississippi, to protect the pre-born's right to life, liberty, and property.

B. *The Most Prevalent Abortion Procedure From Approximately 12-Weeks To 24-Weeks Is Dilation and Evacuation.*

Except to preserve the life of the mother, or to prevent substantial and irreversible bodily harm to the mother, or the presence of a severe fetal abnormality, after the pre-born child has exceeded 15-weeks gestational age, Mississippi prohibits abortion. Miss. Code Ann. §§ 41-41-191(3)(j), (4)(b). Mississippi enacted this statute to protect the life of the pre-born child from the pain and suffering an abortion causes to 15-week-old and older pre-born children and to protect the mother from the risks abortion poses at that point in the pregnancy. *See generally id*. § 41-41-191(2)(b).

In 2017, 2,594 abortions were performed in Mississippi.[5] Approximately 241 of these abortions were performed between 13- and 21-weeks' gestation.[6]

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[5] *See* Tessa Longbons *Abortion Reporting Mississippi (2017)*, Charlotte Lozier Institute (May 16, 2019), https://lozierinstitute.org/abortion-reporting-mississippi-2017.

[6] *See id*. (stating that approximately 9% of the abortions were performed between weeks 13-16, with five abortions being performed between 17 and 20 weeks gestation and two abortions occurred at 21 weeks or later).

The breakdown in the timing of abortions in Mississippi is consistent with the breakdown nationally. In 2018, 77.7% of abortions were performed at nine weeks gestation or earlier, and a total of 92.2% of abortions in the United States were performed at thirteen weeks or earlier.[7] These numbers seem consistent over the past twenty years. *See Stenberg*, 530 U.S. at 923; *Gonzales*, 550 U.S. at 134.

The most commonly used method for abortion from about 12-weeks gestational age to 20-weeks gestational age is dilation and evacuation. *Stenberg*, 530 U.S. at 924; *Gonzales*, 550 U.S. at 134; *see also id.* at 173 n.3 (Ginsburg, J., dissenting); Stuart WG Derbyshire, 46 Journal of Med. Ethics 3 (stating that the most common surgical abortion method after 13-weeks is D&E).

The D&E procedure is deeply invasive and even brutal. Prior to surgery, a doctor must first dilate the cervix sufficiently enough so that the doctor can "insert surgical instruments into the uterus and to maneuver them to evacuate the fetus." *Gonzales*, 550 U.S. at 135 (citation omitted). The dilation process commences with the insertion of osmotic dilators into the cervix. These dilators include laminaria, which are sticks of seaweed. *Gonzales*, 550 U.S. at 135. The amount of dilation necessary is not uniform, but "the longer dilators remain in the

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[7] *See* Center for Disease Control and Prevention, *Morbidity and Mortality Weekly Report, Abortion Surveillance—United States, 2018*, https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm (last visited July 6, 2021).

cervix, the more it will dilate." *Id*. The "length of time doctors employs osmotic dilators varies," with some keeping dilators "in the cervix for two days, while others use dilators for a day or less." *Id*.

Then, once there is sufficient dilation, the abortion commences. The mother is either placed under general anesthesia, or a paracervical block is used for conscious sedation. *See Gonzales*, 550 U.S. at 135. After the procedure commences, the doctor "inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus." *Id.* The doctor then "grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix." *Id*. It is this friction from the resistance that "causes the fetus to tear apart." *Id*. The child is torn to pieces, limb from limb "until it has been completely removed." *Id*. at 136. *See also,* Miss. Code § 41-41-191(2)(b)(i)(8) (describing that the D&E procedure involves "the use of surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb."). Sometimes, the child dies like any adult human would, by bleeding to death as the doctor, armed with forceps, rips the child's body apart. *Stenberg*, 530 U.S. 958-59 (Kennedy, J., dissenting). Typically, a doctor takes 10 to 15 passes through the cervix and vagina to pull pieces of the baby out of its mother. *Gonzales*, 550 U.S. at 136. As the doctor conducts these passes and rips off the baby's arms and legs, the child is often alive. *Stenberg*, 530 U.S. at 959 (Kennedy, J., dissenting) (citing and quoting Dr. Carhart's testimony that confirmed that the child is alive when its arms and legs are torn off); Stuart WG

Derbyshire, 46 Journal of Medical Ethics at 3 (stating that in a D&E abortion "fetal death follows either direct feticide performed before the D&E *or the trauma of the D&E* results in the death of the fetus.") (emphasis added). Dr. Carhart testified that while he was conducting the "dismemberment" process, he could see the child's heart beating, and it continued to beat even after the child's arm was removed. *Stenberg*, 530 U.S. at 959. Dr. Carhart also testified that he knew of a doctor who removed an arm when performing a dilation and evacuation procedure, but then the child was born alive. *Id*. The child lived with one arm missing. *Id*.

Then, the "placenta and any remaining fetal material are suctioned or scraped out of the uterus." *Gonzales*, 550 U.S. at 136. Finally, the doctor surveys the severed collection of body parts "to ensure the entire fetal body has been removed." *Id.*; *Stenberg*, 530 U.S. at 959 ("In Dr. Carhart's words, the abortionist is left with 'a tray full of pieces.'") (citation omitted).

By the time a D&E is performed, those body parts have taken on the human form. *See Gonzales*, 550 U.S. at 160; *see also* Miss. Code. § 41-41-191(2)(b)(i)(6) (stating that at 12-weeks' gestation, an unborn human being has taken on the human form and, among other things, sense stimulation; the unborn human being can also open and close its fingers).

C. *Mississippi Has A Substantial Interest In Protecting Life.*

This Court has previously acknowledged that the State "has a legitimate and substantial interest in preserving and promoting fetal life . . . ." *Gonzales*, 550 U.S. at 145; *Casey*, 505 U.S. at 876. In fact, the State's substantial interest in protecting potential life exists throughout pregnancy. *Casey*, 505 U.S. at 876. This substantial interest in protecting potential life throughout pregnancy conforms with what this Court has recognized that under both "common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales*, 550 U.S. at 147; *see also Webster v. Reprod. Health Servs.,* 492 U.S. 490, 519 (1989) ("[T]he State's interest [in protecting potential human life], if compelling after viability, is equally compelling before viability."); *Gonzales*, 550 U.S. at 171 (Ginsburg, J., dissenting) (describing the Court's opinion in *Gonzales* as blurring the line "firmly drawn in *Casey* between pre-viability and post-viability abortions.").

That States, like Mississippi, have at least a substantial interest, if not a compelling interest, in protecting life from the beginning of pregnancy has reasonably supported by science.

First, due to the advances of scientific technology, this Nation has a greater understanding of fetal development today than in 1973, including how a baby senses stimuli much earlier than was believed. *See, e.g., McCorvey v. Hill,* 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring). These

developments have called into question the Government's viability standard because scientific advancements have made fetal viability possible at an earlier date. *See Akron,* 462 U.S. at 457-58 (O'Connor, J., dissenting); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774-75 (8th Cir. 2015) (stating that the viability standard is subject to change because in 1973, viability was considered 28-weeks, but now there are examples of viability even at 21-weeks). Accordingly, it cannot be consistent "with a state's interest in protecting unborn children that the same fetus would be deserving of state protection in one year but undeserving of state protection in another . . ." *MKB Mgmt. Corp.*, 795 F.3d at 774.

Placing constitutional rights at the mercy of scientific advancement is another reason to overrule *Roe* and *Casey* as it is inconsistent with this Court's precedent. In the Eighth Amendment context, this Court has previously dismissed "cruel and unusual punishment" death penalty cases where the plaintiff's claim was based upon a new medical technique that was deemed safer. *Baze v. Rees*, 553 U.S. 35, 51 (2008). The Court rejected this approach because permitting a claim based upon a new medical technique risked transforming "courts into boards of inquiry" where each decision was outdated and subject to challenge with each scientific advancement. *Id.* "Such an approach finds no support in our cases." *Id.*

The heart is a vital organ of a human. And its development begins soon after conception. The heart begins to develop at just three weeks gestation.[8] By approximately the end of the fourth week of gestation, the heartbeat of the human embryo begins.[9] Between the fifth week of gestation to the seventh week, the child's heartbeat increases from 110 beats per minute to 170 beats per minute. The heart rate slows to an average of 150 beats per minute by the 13th week.[10]

Around approximately the sixth week of gestation, the child's central nervous system is developing. Between the fifth week and eighth week of gestation, the "CNS undergoes the development of its vesicles, which are embryologic precursors to different structures of the brain."[11] Then, as early as the eighth week of gestation, the fetus exhibits reflex movement during invasive procedures via spinal reflex pathway."[12] Accordingly, scientists have

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[8] Oriana Valenti, *Fetal Cardiac Function During The First Trimester Of Pregnancy*, 5 Journal of Prenatal Med. 59-62 (July 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3279166/.

[9] *Id*.

[10] *Id*.

[11] Mary F. Donovan; Marco Cascella, *Embryology, Weeks 6-8* (last update, Oct. 16, 2020), https://www.ncbi.nlm.nih.gov/books/NBK563181/ (last visited July 23, 2021).

[12] Arina O. Grossu, *What Science Reveals About Fetal Pain*, FRC Issue Analysis (ed. 2017) *available at* https://downloads.frc.org/EF/EF15A104.pdf (last visited July 23, 2021) (quoting Y. Ohashi, *Success rate and challenges of fetal anesthesia for ultrasound guided fetal intervention by maternal opioid and benzodiazepine administration*, JOURNAL OF MATERNAL FETAL NEONATAL MED. 26, no. 2 (2013): 158-160)).

observed fetal reactions to painful stimuli as early as 7.5-weeks' gestation.[13]

The pre-born child's vital organs begin developing around 9- to 10-weeks' gestation. The liver begins to develop, the kidneys begin making urine, and the pancreas begins making insulin.[14]

At approximately 13-weeks, the pre-born child's toenails form, the neck is formed, lower limbs are formed, the child begins to hear, the lungs begin to form tissue that will enable breathing, and the pre-born child's bones begin to harden.[15]

Next, a child can begin to feel pain around 12-weeks' gestation. Stuart WG Derbyshire, *Reconsidering Fetal Pain*, 46 Journal of Med. Ethics 3 (2020).[16] At the outset, the medical community has not reached a consensus as to when a pre-born child begins to feel pain. *Id*. at 4. Some in the medical community contend that a pre-born child begins to feel pain at 24-weeks. *Id*. Others in the medical community contend that the pre-born child feels pain at 20-weeks. *Id*. There is now evidence that a pre-born child at 12-weeks can feel pain. *Id*. Accordingly,

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[13] *Id.* (quoting and citing Aida Salihagić Kadić, *Fetal neurophysiology according to gestational age*, SEMINARS IN FETAL & NEONATAL MED. 17, no. 5 at 256-60 (2012).

[14] The American College of Obstetricians and Gynecologists, *How Your Fetus Grows During Pregnancy*, https://www.acog.org/womens-health/faqs/how-your-fetus-grows-during-pregnancy (last visited July 12, 2021).

[15] *Id.*

[16] *Available at* https://jme.bmj.com/content/medethics/46/1/3.full.pdf (last accessed July 12, 2021).

because D&E abortions will deliver "repeated" painful events, it is recommended that the pre-born child receive "fetal analgesia" prior to the D&E. *Id.* at 5. Some in the medical community believe that "abortion is inherently violent and may subject the fetus to unnecessary pain and distress after the first trimester." These doctors recommend that "fetal analgesia and anesthesia should thus be standard for abortions in the second trimester . . . ." *Id.* Although in this particular study, one of the authors stresses the need for fetal analgesia "especially after 18 weeks," both authors conclude that the evidence, "and a balanced reading of that evidence points towards an immediate and unreflective pain experience mediated by the developing function of the nervous system from as early as 12 weeks." *Id.* at 5-6.

Compounding the concern for pain in pre-born children, studies have found that because a fetus's body has not sufficiently developed pain inhibitors by the 15th week, the intensity of the pain felt by the fetus is more "diffuse." The fetus is therefore extremely sensitive to pain.[17]

In enacting its statute, Mississippi is therefore furthering its substantial interest in protecting "the life of the fetus that may become a child" an interest that exists from the outset of pregnancy. *See Casey*,

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[17] *See* Slobodan Sekulic, *Appearance of Fetal Pain Could Be Associated With Maturation of The Mesodiencephalic Structures*, J Pain Research Nov 11;9:1031-1038 (2016) (abstract) *available at* https://pubmed.ncbi.nlm.nih.gov/27881927/ (last visited July 23, 2021).

505 U.S. at 846; *Gonzales*, 550 U.S. at 158. Included within this interest in protecting nascent human life is protecting the pre-born child from pain. *See Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).

Additionally, Mississippi's statute is an expression of the State's voice and legislative power "to show its profound respect for the life within the woman." *Gonzales*, 550 U.S. at 157. A State can promote its interests in respect for human life by preventing the killing of a pre-born child who has taken on the human form. *See Gonzales*, 550 U.S. at 157, 160 (recognizing that the partial-birth abortion ban act promotes respect for the dignity of human life and acknowledging that by the second trimester, the child has taken on the human form). A State also has an interest in "drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned." *Id.* at 158. It is unsurprising that many find the "D&E procedure itself laden with the power to devalue human life." *Id.*

By generally prohibiting abortions after 15-weeks, Mississippi is furthering its substantial interest.

D. *Mississippi Has a Substantial Interest In Protecting The Life and Health of Mothers.*

A State has "legitimate interests from the outset of pregnancy in protecting the health of women." *Casey*, 505 U.S. at 846. Medical authorities have

recognized that abortions that occur after the tenth week of gestation are far riskier to a woman's health than first-trimester abortions. Linda A. Bartlett, *Risk Factors for Legal Induced Abortion—Related Mortality in the United States*, 103:4 OBSTETRICS & GYNECOLOGY 729 (April 2004) ("Compared with women whose abortions were performed at or before 8 weeks of gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes."). With each gestational week after 10-weeks, the risk of complications from abortion increases 38%. *See id*. For instance, one study found that women obtaining abortions at 16 weeks' gestation or later face a risk of death nearly 15 times higher than that of women having abortions at 12 weeks' gestation or earlier. H.W. Lawson, *Abortion Mortality, United States, 1972 through 1987*, 171 OBSTETRICS & GYNECOLOGY 1365-72 (1994); *see also* S. Zane, *Abortion Related Mortality in the United States*: *1998-2010*, OBSTETRICS & GYNECOLOGY 126:2 (2015) (comparing the mortality rate between first-trimester abortions and second-trimester abortions, noting that the mortality rate rose from 0.3 deaths per 100,000 procedures to 6.7 deaths per 100,000 procedures). Furthermore, a majority of abortion-related deaths after 13-weeks' gestation was "associated with infection and hemorrhage." *Id*.

Courts have found that the harm to a woman's health from delaying abortion into the second trimester, as demonstrated in these studies, constitutes irreparable harm. *See Garza v. Hargan*, 874 F.3d 735, 741-742, n.6 (D.C. Cir. 2017) (en banc) *vacated as moot sub nom. Azar v. Garza*, 138 S. Ct.

1790 (2018); *see also Williams v. Zbaraz*, 442 U.S. 1309, 1314-1315 (1979) (Stevens, J., circuit justice) (crediting the district court's finding of irreparable harm where statute effectively required a woman to wait until later in pregnancy to have an abortion when an abortion is more dangerous to the mother and therefore increases maternal morbidity and mortality).

Second-trimester abortions pose a risk to a woman's physical health and a woman's psychological health. This Court has previously acknowledged that "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." *Gonzales*, 550 U.S. at 159. It is therefore "self-evident" that a "mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form." *Id.* at 159-60.

Litigation elsewhere has confirmed this pain. In *McCorvey v. Hill*, approximately 1,000 women filed affidavits asserting under penalty of perjury that they suffered "long-term emotional damage and impaired relationships" from their decision to abort. 385 F.3d at 850 (Jones, J., concurring). These affidavits are supported by scientific studies demonstrating that "women may be affected emotionally and physically for years afterward." *Id.* at 850-51. Furthermore, these studies show that

women who have had an abortion "may be more prone to engage in high risk, self-destructive conduct . . ." *Id.* at 851. One study of young women demonstrated that those who had obtained an abortion at least once prior to age 25 experienced substantially elevated rates of subsequent mental health problems, including depression, anxiety, suicidal behaviors, and substance use disorders, even when controlled for other independent confounding factors. D.M. Fergusson, *Abortion in Young Women and Subsequent Mental Health,* 4 7 J. CHILD PSYCHOLOGY & PSYCHIATRY 16 (2006). Another study revealed that women with a prior history of abortion were 65% more likely to score in the "high-risk" range for depression after controlling for age, race, education, income, marital status, and history of divorce. J.R. Cougle, *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, 9 MED. SCI. MONITOR 162 (2003). And in a major record-based study of suicide rates and pregnancy outcomes, the odds of dying from suicide following an induced abortion were found to be significantly higher than they were both for women who delivered and for women who had not been pregnant in the prior year. *Id.*

Abortion's harmful effects on women are not limited to their psychological health. Other women have suffered "chronic bladder infections, debilitating menstrual cycles, cervical cancer and early hysterectomy" as a result. *See MKB Mgmt. Corp.*, 795 F.3d at 775. A study found that women's complications from abortion, including heavy bleeding, severe pain, incomplete abortions, and infection in the upper genital tract, took place in

6.7% of all abortions. Carlsson, *Complications related to induced abortion: a combined retrospective and longitudinal follow-up study*, 18(1) BMC WOMEN'S HEALTH 158 (Sept. 2018). Another 2013 study affirmed earlier studies' demonstration that abortion caused an increased risk of antepartum hemorrhage and placenta previa in subsequent pregnancies. Woolner, *The effect of method and gestational age at termination of pregnancy on future obstetric and perinatal outcomes: a register-based cohort study in Aberdeen, Scotland*, 121 BJOG: AN INT'L JOURNAL OF OBSTETRICS AND GYNECOLOGY 309-18 (2014).

Mississippi's statute generally prohibiting abortions after 15-weeks' gestation furthers its interest in maternal health.

E. *The Court Should Analyze Restrictions and Prohibitions To Abortion Under Rational Basis Review.*

When confronting a constitutional challenge to a law, this Court ordinarily reviews a state legislature's factual findings under a "deferential" if not "[u]ncritical" standard. *See Gonzales*, 550 U. S. at 165-166. Accordingly, legislatures with "a rational basis to act" can often use their regulatory power to bar certain abortion procedures and substitute others "in furtherance of [their] legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *See id.* at 158; *Berman v. Parker*, 348 U. S. 26, 32 (1954) (noting that the Court usually accepts that in

passing a statute, the legislature has conclusively declared the public interest).

In the medical arena, this Court generally grants deference to the legislature for its predictive judgments. In *Jones v. United States*, this Court reviewed a Fourteenth Amendment due process challenge to the District of Columbia's civil confinement statute. 463 U.S. 354, 362 (1983). Specifically, the petitioner claimed that Congress lacked sufficient empirical evidence to commit someone based upon a finding of not guilty by reason of insanity. *Id*. at 364 n.13. This Court rejected that argument noting the "uncertainty" in the psychological field and accordingly deferring to Congress to make "reasonable legislative judgments." *Id*. at 364 n.13.

This Court should accord the same deferential review to Mississippi's statute.

CONCLUSION

For the foregoing reasons, this Court should overrule *Roe* and *Casey*. It should then sustain Mississippi's statute.

Respectfully submitted,

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