No. 19-1392

In The
Supreme Court of the United States

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

v.

JACKSON WOMEN'S HEALTH ORGANIZATION,
ON BEHALF OF ITSELF AND
ITS PATIENTS, ET AL.,
Respondents.

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

BRIEF *AMICI CURIAE* FOR DEMOCRATS FOR LIFE OF AMERICA FIVE DEMOCRATIC LEGISLATORS FROM FIVE INDIVIDUAL STATE LEGISLATURES ON BEHALF OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Democrats for Life of America ("DFLA") is the preeminent national organization for pro-life Democrats. DFLA believes that the protection of human life at all stages is the foundation of human rights, authentic freedom, and good government. These beliefs animate DFLA's opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. DFLA shares the Democratic Party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure equality of opportunity, reduction in poverty, and an effective social safety net that guarantees that all people have sufficient access to food, shelter, health care, and life's other basic necessities.

Amici have a strong interest in seeing the Court uphold Petitioner's argument that Mississippi's Gestational Age Act pass Constitutional muster, with regard to both supporting the protection of human life, as well as supporting the ability of state

[1] Pursuant to U.S. Supreme Court Rule 37.6, the undersigned certifies that no counsel for a party authored any part of this brief, and no person other than *amici,* their members, or their counsel made a monetary contribution intended to fund its preparation or submission. *Amici curiae* timely provided notice of intent to file this brief to all parties, and all parties consented to the filing of this brief.

governments to mandate reporting requirements, as to ensure the effectiveness of implemented government regulatory schemes.

Amici are also include state legislators who are elected officials who have a direct interest in the outcome of this case to determine best practices of legislating for their constituents' interests in their respective states. (*See Appendix Page 1*)

INTRODUCTION

Mississippi's Gestational Age Act, Miss. Code Ann. §41-41-191, enacted in 2018, prohibits abortion after fifteen (15) weeks of gestation, with exceptions for medical emergency or severe fetal abnormality. Thereafter, Respondents Jackson Women's Health Organization filed a lawsuit challenging the legality of Mississippi's Gestational Age Act in the United States District Court for the Southern District of Mississippi Northern Division, which granted a temporary restraining order and later entered summary judgment in favor of respondents, which the United States Court of Appeals for the Fifth Circuit affirmed. This Court granted certiorari and limited the issue to the single question of "whether all pre-viability prohibitions on elective abortions are unconstitutional."

SUMMARY OF ARGUMENT

The fetal viability standards for abortion jurisprudence as set out by this Court in *Roe v. Wade*[2] and *Planned Parenthood of Southeastern*

[2] *Roe v. Wade,* 410 U.S. 113 (1973).

Pennsylvania v. Casey,[3] have contributed both to confusion and partisan political gridlock. Not only has the Court's fetal viability standard stopped necessary debate in the political branches of government as to the various ways to support mothers and children, its abstract and murky standards, and the balancing test of burdens and benefits that it requires in its application, has caused courts to act as legislators. The importance of regulation in all areas of government, particularly abortion, is stifled by the Court's current jurisprudence, as numerous state laws regulating abolition crafted and passed by legislators as representatives of the people have been struck down by these vague standards laid down by this Court, preventing debate and consensus on the issue.

Furthermore, reporting requirements are a necessary part of healthcare regulations, and those parts of Mississippi's Gestational Age Act should be upheld in a similar vein, so as to not disrupt a state's ability to pass reporting requirements in conjunction with normal healthcare regulations.

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[3] *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S 833 (1992).

ARGUMENT

I. The fetal viability standard of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* has stopped the necessary debate in the political branches of government about the various ways' government, and society in general, can and should support mothers and children.

After noting in *June Medical Services LLC v. Russo*, 591 U.S. 207, 140 S. Ct. 2103, (2020), that the Court in *Whole Woman's Health v. Hellerstedt*, 579 U.S. (2016), observed that "The rule announced in *Casey*…requires that courts consider the burdens a law imposes on abortion access together with the benefits those law confer," Chief Justice John Roberts went on to note in his concurring opinion that "nothing about Casey suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have explained that the "traditional rule" that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty" is "consistent" with *Casey*," *citing Gonzales v. Carhart*, 550 U.S. 124 (2007). *See June Medical Services LLC v. Russo*, *supra* 140 S. Ct 2136. (Roberts, J., concurring). In doing so, Justice Roberts had previously reasoned:

> "Read in isolation from *Casey,* such an inquiry could invite a grand "balancing test in which unweighted factors mysteriously are weighed." *Marrs v. Motorola, Inc.,* 577 F.3d 783, 788 (CA7 2009). Under such

tests, "equality of treatment is ... impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired." *Scalia, The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989)."

In this context, courts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other. *Casey,* 505 U.S. at 851, 112 S. Ct. 2791 (opinion of the Court); *id.,* at 871, 112 S. Ct. 2791 (plurality opinion) (internal quotation marks omitted). There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like "judging whether a particular line is longer than a particular rock is heavy," *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* 486 U.S. 888, 897, 108 S. Ct. 2218, 100 L. Ed .2d 896 (1988) (Scalia, J., concurring in judgment). Pretending that we could pull that off would require us to act as legislators, not judges, and would result

> in nothing other than an "unanalyzed exercise of judicial will" in the guise of a "neutral utilitarian calculus." *New Jersey v. T. L. O.,* 469 U.S. 325, 369, 105 S. Ct. 733, 83 L. Ed .2d 720 (1985) (Brennan, J., concurring in part and dissenting in part).
>
> *See June Medical Services LLC v. Russo*, *supra* 140 S. Ct at 2135-2136. (Roberts, J. concurring).

It is indeed this sense, as Justice Roberts noted above, requiring courts to act as legislators, and not judges, that has so compounded the fetal viability standard of *Roe* and *Casey* in the courts today, with the resulting effect that any debate on ways to support mothers and children, as well as the individual themselves, has been literally taken away from the proper branch of government that the founding fathers have long envisioned where it should remain in, namely Congress, and most importantly, state legislatures, directly elected by the people themselves.

This debate is not new and has long been with us as a nation. In *Calder v. Bull,* 3 U.S. 386, 401 (1798), the Court held that the Connecticut legislature had not violated the Constitution when it set aside a probate decree. In *Calder,* the concurring opinion of Justice James Iredell has long been the one that this Court has adopted in only validating acts of the legislative and executive branches of the federal and state governments on the basis of specific provisions of the Constitution. *See Nowak J., Rotunda R., & Young J., Hornbook on Constitutional Law 2nd*

Ed., Student Ed., West Publishing Company, St. Paul Minnesota, (1983). In *Calder, supra*, Justice Iredell noted:

> "If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they

> exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act.

(*See Calder v. Bull, supra* 3 U.S. at 399. (Iredell, J., concurring).

Additionally, in the abortion context, the line where the judicial and legislative branches of government interact gets blurrier, but Constitutional deference in this area should be given to the state legislators, who have not only taken testimony in drafting and reviewing legislation, but have debated the burdens and benefits of drafted legislation, such as in this case in Mississippi, as elected representative officials of the people of their districts.

In *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 64 (1976), this Court noted in *Roe, supra* that "viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term" *citing Roe* v. *Wade,* 410 U. S., at 160. *In Danforth, supra* this Court further elaborated:

> "[w]e agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each

> pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.
>
> *See Planned Parenthood of Central Mo. v. Danforth*, supra 428 U.S. 65.

Thus, if viability is such an abstract and vague concept to define for legislators, it is more of an abstract and vague concept for the courts as an institution, and Constitutional deference should be given back to individual state legislatures, who in weighing the actual burdens and benefits of any abortion regulation, is where the debate rightly belongs and not in the courts, and where as Chief Justice Roberts has noted, the "traditional rule" that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty" is "consistent" with *Casey*," *citing Gonzales v. Carhart*, 550 U.S. 124 (2007). *See June Medical Services LLC v. Russo*, *supra* 140 S. Ct 2136. (Roberts, J., concurring).

Moreover, even while *Casey* instead has focused on the existence of a substantial obstacle test, which is familiar to judges across a variety of contexts as Chief Justice Roberts had noted in *June Medical Services LLC v. Russo*, *supra,* the substantial obstacle test of *Casey* has repeatedly contributed to a stifling of debate and consensus within the branches of federal, state, and local government.[4] It should not be

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[4] See, *e.g., Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 694-695, 134 S. Ct. 2751, 18 9 L. Ed. 2d 675 (2014) (asking whether the government "substantially burdens a person's exercise of religion" under the Religious Freedom Restoration

lost to history that the first state restrictions on abortions that were upheld by this Court in *Casey* nearly thirty years ago were signed into law and championed by Pennsylvania Governor Robert P. Casey, a member of the Democratic party. Similarly, the Louisiana law requiring doctor's admittance privileges struck down by this Court in *June Medical Services v. Russo, supra* were drafted by state legislator Katrina Jackson and signed into law by Governor John Bel Edwards, also registered Democrats. As Democrats, these elected officials understood the importance of the proper role of government in implementing regulations in areas of private industry to ensure the life, health, and well-being of their citizens.

Furthermore, state legislatures are better equipped to deliberate about and secure the rights of all persons, as they identify and specify the boundaries between rights. *See Gregoire Webber Et. al., Legislated Rights: Securing Human Rights Through Legislation* (2018). Across the daily news cycle American citizens have repeatedly noted the increased polarization, especially around the abortion issue in recent decades, initially more so based on individual feelings and preferences than along

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Act); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S. 721, 748, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011) (asking whether a law "imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups"); and *Murphy v. United Parcel Service, Inc.,* 527 U.S. 516, 521, 119 S. Ct. 2133, 144 L. Ed. 2d 484 (1999) (asking, in the context of the Americans with Disabilities Act, whether an individual's impairment "substantially limits one or more major life activities." *See June Medical Services LLC v. Russo*, *supra* 140 S. Ct at 2136. (Roberts, J. concurring).

political lines, but that has since changed. For example, in the 1990 Pennsylvania gubernatorial election, polling data showed that voters' preference between pro-life Democratic Governor Robert P. Casey Sr., and pro-choice Republican Party nominee Barbara Hafer lined up more with their views on abortion than along party registration[5], and where in 2010, over sixty (60) Democrats in the United States House of Representatives were identified by Democrats for Life of America as being "pro-life," as contrasted to 2021, where there is only one pro-life Democrat so identified.[6]

In the last decades sense, division between the political parties on abortion has only worsened. Taxpayer funding for abortion is one of these issues. Prior to *Casey, supra* this Court found that it was not constitutionally required for states to fund abortions with taxpayer dollars. *See Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977). Similarly, this Court has upheld federal bans of taxpayer funding of abortion. *Harris v. McRae*, 448 U.S. 297 (1980). However, in contrast, this Court's current confusing jurisprudence developed since *Casey, supra* of courts weighing anew the burdens and benefits of reasonable federal and state regulations in the abortion context has continued a national debate that many now argue for the mandatory funding of abortions, against the wishes of state legislators, who

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[5] *See Jelen, T. (1995). Perspectives on the Politics of Abortion. Westport, Connecticut: Praeger Publishers. p. 76.*

[6] Democrats for Life of America, "Open the Big Tent: Make room for Pro-Life Democrats and achieve party goals nationwide.", https://www.democratsforlife.org/images/stories/pdfs/DNC-The_Case_to_Open_the_Big_Tent_6-26-2017_FINAL.pdf (Jun. 26, 2016).

represent their individual citizens and have made a choice for themselves.[7]

More specifically as to government funded abortions, in 2010 alone, a majority of elected officials, including sixty-four (64) Democrats in the United States House of Representatives voted in favor of the *Stupak-Pitts Amendment to H.R. 3962* in the "*The Affordable Health Care for America Act*."[8] The *Stupak-Pitts Amendment* stated that "No funds authorized or appropriated by this Act (or an amendment made by this Act) may be used to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion, except in the case where a woman suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the woman in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself, or unless the pregnancy is the result of an' act of rape or incest." *Id.* The *Stupak-Pitts Amendment* to the *Affordable Health Care for America Act* in 2009 "mirrored the principle" of the federal *Hyde*

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[7] Despite this Court's attempt to quell national debate on the issue, these debates continue in state courts. *See generally Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.,* 249 A.3d 598 (Pa. Commw. Ct. 2021).

[8] "The *Stupak Amendment*, added to *H.R. 3962* by a vote of 240-194, with 64 Democrats voting in favor of the amendment" *Mary E. Harned, J.D. The Stupak Amendment to H.R.3962 — Maintaining Existing Law* https://aul.org/2009/11/11/the-stupak-amendment-to-h-r-3962-maintaining-existing-law/ (Nov. 11, 2009).

Amendment,[9] which has been contained in Congressional yearly budgets now for decades.[10] This is compared to the 2021 House Budget cycle, where Appropriations Committee Democrats voted to remove both the *Hyde Amendment* and the *Weldon Amendment* from the annual budget.[11] A motion to include the amendments in the bill failed in committee, with only one Democrat voting in favor of including the amendments.[12]

In summary, with such stark political divisions on the issue of abortion, the proper role for the courts should be to allow deference on this issue to state legislatures, giving them wide discretion to pass legislation in this area, where they are clearly better equipped to consider and deliberate the burdens a law imposes on abortion access, together with the benefits

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[9] Mary E. Harned, J.D. The Stupak Amendment to H.R.3962 — Maintaining Existing Law https://aul.org/2009/11/11/the-stupak-amendment-to-h-r-3962-maintaining-existing-law/ (Nov. 11, 2009).

[10] "The Hyde Amendment was first attached to the federal budget in 1976" *Green, E. (2019). Why Democrats Ditched the Hyde Amendment, The Atlantic* https://www.theatlantic.com/politics/archive/2019/06/democrats-hyde-amendment-history/591646/ (last visited Jul. 26, 2021)

[11] *Weixel, N. (2021). HHS spending bill advances without Hyde Amendment*, The Hill https://www.msn.com/en-us/news/politics/hhs-spending-bill-advances-without-hyde-amendment/ar-AAM3PWN (Jul. 12, 2021).

[12] U.S. House of Representatives, Committee on Appropriations, Full Committee Vote on Labor, Health and Human Services, Education, and Related Agencies Bill FY 2022, 117th Cong., 1st Sess. (July 15, 2021), https://docs.house.gov/meetings/AP/AP00/20210715/113908/CRPT-117-AP00-Vote001-20210715.pdf.

those laws confer upon the citizens of their individual state.

II. To strike down the Mississippi law would be to interfere with the state's need for data and mandatory reporting laws, which is essential with regard to evaluating how the states can craft regulations that best protect their citizens.

Reporting requirements are at the heart of a functioning healthcare system, as well as a functioning government, and striking down the mandatory reporting requirements in Mississippi's Gestational Age Act could hinder state regulatory schemes of healthcare. Currently, only four states (Alabama, New Mexico, Oklahoma, and Wyoming) do not require any mandatory reporting requirements on healthcare providers.[13] State and local government agencies have used mandatory reporting requirements in the healthcare field to craft policy and advance government interest in a variety of ways, notably in the areas of suicides, gun violence, domestic abuse,[14] and child sexual abuse.[15] Some commentators have noted the legal difficulties that could occur with regard to child sexual abuse reporting when access to medical records for abortion procedures are blocked.[16] The view of mandatory

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[13] Mandatory reporting laws, 1 Health L. Prac. Guide § 6A:4 (2021)

[14] *See Okla. Stat. Ann. Title. 22, § 58*

[15] *See* N.C. Gen. Stat. Ann. § 7B-301

[16] *See generally Bailey, M. The Alpha Subpoena Controversy: Kansas Fires First Shot in Nationwide Battle over Child Rape, Abortion and Prosecutorial Access to Medical Records*, 74 UMKC L. Rev. 1021 (2006).

reporting is similar at the federal level: Patrick R. Mullen notes that "Congressional reporting requirements are an integral part of congressional oversight."[17] The *Congressional Research Service* notes that "[s]tatutory reporting requirements can be useful in facilitating congressional oversight by enhancing Congressional access to information about the implementation of public policy."[18] In this vein, states also benefit from mandatory reporting requirements to increase access to data that can be used to craft better healthcare policies.

Furthermore, the legality of mandatory reporting requirements in conjunction with abortion restrictions have been repeatedly upheld by this Court as not placing a substantial obstacle to a woman's ability to obtain an abortion. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 900. The plurality in *Casey* noted that "recordkeeping and reporting provisions that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 900 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 80 (1976)) (*internal quotations omitted*). The Court in *Danforth, supra* further noted that "Recordkeeping of this kind, if not abused or overdone, can be useful to the State's

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[17] *Mullen, P. (2006). Congressional Reporting: A Management Process to Build a Legislative-Centered Public Administration, https://vtechworks.lib.vt.edu/handle/10919/27049 (Apr. 07, 2006).*

[18] *Egar, W. Congressional Research Service, Congressionally Mandated Reports: Overview and Considerations for Congress, Report # R46357*, dated May 14, 2020.

interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." *See Danforth*, *supra* 428 U.S. at 81. In *Danforth, supra* this Court noted that Missouri's medical providers already had mandatory reporting requirements in places for births, deaths, and communicable diseases when upholding mandatory recordkeeping. *Id.,* at n.13. According to the Guttmacher Institute, "Forty-Six (46) states and the District of Columbia require hospitals, facilities and physicians providing abortions to submit regular and confidential reports to the state," sixteen (16) of which "require providers to give some information about the patient's reason for seeking the procedure.[19]

More recently, Chief Justice Roberts concurrence in *June Medical Services v. Russo*, *supra* noted that *Casey's* plurality holding, when upholding the recordkeeping and reporting requirements at question in the Pennsylvania law, did not apply a balancing test standard merely weighing the costs of the reporting requirements to the benefits of the law. Instead it applied a lower standard, that the reporting requirements were lawful only if they did not place a substantial obstacle to the woman's right to receive an abortion. *See June Medical Services,* 140 S. Ct. at 2137 (2020) (Roberts J., Concurring in judgment).

In summary, to prevent Mississippi from passing the *Gestational Age Act's* reporting requirements would not only prevent the Mississippi state government from asserting their interest in

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[19] *Guttmacher Institute, Abortion Reporting Requirements https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements*. Last accessed July 28, 2021.

protecting fetal life, but also can undermine all branches of government from generally collecting data that can be used for better enforcement against a variety of societal ills. This Court therefore, should not strike down the mandatory reporting requirements of the *Gestational Age Act* passed by the Mississippi legislature, as it would both be out of step with prior case law on abortion regulations, as well as hinder the government's ability to issue mandatory reporting requirements in a number of different areas of healthcare regulation.

CONCLUSION

For the above reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

Dated this 29th July, 2021

Respectfully submitted

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Democrats for Life of America
Five Democratic Legislators from
Five Individual State Legislatures

APPENDIX

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LIST OF AMICI STATE LEGISLATORS

Representative's Name	**State Legislative Body**
Representative Anthony Allison	New Mexico House of Representatives
Representative Grace Diaz	Rhode Island House of Representatives
Representative Angie Hatton	Kentucky House of Representatives
Senator Tim Mathern	North Dakota Senate
Representative Alan Silva	Massachusetts House of Representatives