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* FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONERS

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July 29, 2021

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STATEMENT OF INTEREST[1]

Family Research Council (FRC) is a nonprofit research and educational organization that seeks to advance faith, family, and freedom in public policy from a biblical worldview. FRC recognizes and respects the inherent dignity of every human life from conception until death and believes that the life of every human being is an intrinsic good, not something whose value is conditional upon its usefulness to others or to the state. FRC also recognizes the inherent dignity of every woman and thus supports proper medical ethics and standards aimed at protecting the health and well-being of women.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or their counsel have made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Casey*, a plurality recognized that *Roe* and its trimester framework were unworkable and introduced a new "controlling standard" that was intended to provide judges clarity in deciding abortion cases. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality op.). But *Casey* only made things worse. Created "out of whole cloth," *id.* at 964 (Rehnquist, C.J., concurring in the judgment in part, dissenting in part), *Casey's* undue-burden standard provided no rule of law, instead forcing judges to evaluate abortion regulations on the basis of their own personal value judgments. And its viability rule relied on ever-changing medical technology, while preventing states from acting upon their important interests in protecting nascent life and beyond.

In the decades since *Casey*, "[m]embers of this Court have decried the unworkability of [its] abortion case law and repeatedly called for course corrections of varying degrees." *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2152 (2020) (Thomas, J., dissenting). This case presents an ideal opportunity for the Court to correct its course.

Petitioners ask the Court to overrule *Roe* and *Casey* because it cannot reconcile those cases with more recent precedent and with scientific advancements showing a compelling state interest in fetal life far earlier than those cases suggest. *See* Pet. Br. at 1. *Amicus* agrees. *Amicus* writes separately to emphasize that the undue-burden standard and its

accompanying viability rule are hopelessly unworkable, have proven to be nothing more than a vehicle for judges to make policy judgments, and have inflicted significant damage on this nation. In short, *Amicus* believes that *Roe* and "*Casey* must be overruled." *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting).

ARGUMENT

From the outset, the undue-burden standard was unworkable. Lacking any grounding in the Constitution, the undue-burden standard is "inherently manipulable" and neither guides nor constrains judges in navigating this controversial area. *Casey*, 505 U.S. at 986 (Scalia, J., concurring in the judgment in part, dissenting in part). Instead of aiding judges in "neutral and principled administration" of the law, *June Med.,* 140 S. Ct. at 2171 (Gorsuch, J., dissenting), the undue-burden standard forces them to rely on their own moral intuitions to decide cases. That practice perverts the judicial function and undermines the rule of law.

Not surprisingly, the undue-burden standard has created intractable confusion among the lower courts. Mere months after this Court decided *Casey*, lower courts explained that "passing on the constitutionality of state statutes regulating abortion ... ha[d] become neither less difficult nor more closely anchored to the Constitution." *Barnes v. State of Miss.*, 992 F.2d 1335, 1337 (5th Cir. 1993) (Jones, J.). "The undue burden test announced in *Casey*," they complained, was "more easily articulated than applied." *Payne v. Fontenot*, 925 F. Supp. 414, 420

n.24 (M.D. La. 1995). That confusion persists today. And because the undue-burden standard amounts to an effects test, any and all restrictions on abortion might be deemed "undue." Such a scheme fails to give judges any meaningful guidance and hinders a state's ability to regulate even the most extreme abortion practices.

The viability standard is similarly unworkable. *Casey* itself acknowledged that a viability standard was "imprecis[e]" and that the "medical community ... will continue to explore the matter." 505 U.S. at 870 (plurality op.). In so doing, *Casey* perpetuated a rule grounded not in biological reality, but in complex, contested statistical probabilities about fetal survival rates and irrelevant factors such as wealth, geography, and the optimism of the doctors making the predictions. Indeed, *Casey*'s rule "depend[s]" largely on "medical technology." *Id.* at 955 (Rehnquist, C.J., concurring in the judgment in part, dissenting in part). Even pro-choice scholars have recognized that "[v]iability is an incoherent legal concept" and "a conceptually illegitimate basis on which to ground abortion regulation." Elizabeth Chloe Romanis, *Is "Viability" Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States*, 7 J.L. & Biosciences 1, 28, 1 (2020). Viability as a standard has been nearly universally rejected by legal scholars, within other areas of law, and by countries with strong pro-abortion regimes. This Court should reject it too.

Ultimately, these standards prop up abortion as "the most favored right in American law." *Planned*

Parenthood of Indiana and Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health, 888 F.3d 300, 320 (7th Cir. 2018) (Manion, J., concurring in the judgment in part, dissenting in part). But this Court "never should have bent the rules for favored rights in the first place." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting). And it should not continue to uphold "special exceptions for special rights" today. *Id.* The Court should overrule *Roe* and *Casey* and reverse the decision below.

I. The *Casey* plurality's undue-burden standard has been unworkable from the start.

A. The *Casey* plurality failed to provide an objective standard for determining whether a burden is "undue."

The *Casey* plurality invented the undue-burden standard "out of whole cloth." *Casey*, 505 U.S. at 964 (Rehnquist, C.J., concurring in the judgment in part, dissenting in part). From the beginning, the undue-burden standard lacked any "historical or doctrinal pedigree," *Stenberg*, 530 U.S. at 982 (Thomas, J., dissenting), and "was as doubtful in application as it [was] unprincipled in origin." *Id.* at 955 (Scalia, J., dissenting) (cleaned up).

Casey's definition of an undue burden was circular from the start. An "*undue burden*," it explained, is "shorthand for the conclusion that a state regulation has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of

a nonviable fetus." *Id.* at 877 (plurality op.) (emphasis added). But these two empty catchphrases were never more than synonyms for each other. *See* Khiara M. Bridges, *Capturing the Judiciary:* Carhart *and the Undue Burden Standard*, 67 Wash. & Lee L. Rev. 915, 950 n.108 (2010) (noting that "[an] 'undue burden' is synonymous with a 'substantial obstacle.'"). Thus, the plurality's definition amounts to the following: "[A]n *undue burden* is a shorthand for … a state regulation [that] … plac[es] [an *undue burden*] in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 877 (plurality op.).

This "verbal shell game" obscured the plurality's failure to provide "any meaningful content" to its concocted standard. *Id.* at 987, 992 (Scalia, J., concurring in the judgment in part, dissenting in part) (emphasis omitted). Instead of providing a "generally applicable principle," *id.* at 988, the plurality undertook a fact-intensive analysis and limited its conclusions to the "evidence on this record." *Id.* at 884 (plurality op.). *Casey* did not, for example, establish that 24-hour waiting periods were acceptable per se but only that Pennsylvania's particular 24-hour waiting period "on the record before [it]" was acceptable. *Id.* at 887. These qualified conclusions help explain how courts can use *Casey* to invalidate abortion regulations nearly identical to those *Casey* approved. *See, e.g.*, *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002) (Easterbrook, J.) ("For seven years Indiana has been prevented [by a federal district court] from enforcing a[n] [informed consent] statute materially identical to a law held valid by the Supreme Court in

Casey."); *Karlin v. Foust*, 188 F.3d 446, 485 (7th Cir. 1999) ("While a twenty-four hour waiting period that requires two trips to an abortion provider has been found not to impose an undue burden on Pennsylvania women based on the circumstances of that state at the time the Court decided *Casey*, a similar provision in another state's abortion statute could well be found to impose an undue burden on women in that state depending on the interplay of factors."). Indeed, "[b]ecause the portion of the joint opinion adopting and describing the undue burden test provides no ... useful guidance," courts "must turn to [*Casey*'s lengthy factual analysis] applying that standard" to the present facts of its case "for further guidance." *Casey*, 505 U.S. at 990 (Scalia, J., concurring in the judgment in part, dissenting in part). This is why Justice Scalia rightly recognized from the start that the undue-burden standard is "hopelessly unworkable in practice." *Id.* at 986.

The *Casey* plurality provided no objective way to decide whether a burden is "undue." *Id.* at 877 (plurality op.). Instead, the plurality "highlight[ed] certain facts in the record" and "then simply announce[d] that the provision either d[id] or d[id] not impose a 'substantial obstacle' or an 'undue burden.'" *Id.* at 991 (Scalia, J., concurring in the judgment in part, dissenting in part). With no legal principle to extract from the plurality opinion, *see id.* at 990, *Casey* leaves courts to make their own policy judgments about when an obstacle is "substantial" and, accordingly, when a burden is "undue."

The plurality's treatment of the spousal-notification and parental-consent requirements illustrates the point. After dedicating ten pages of its opinion to detailing the complex effects of spousal abuse on women, the plurality rejected the spousal-notification requirement as "repugnant to [their] present understanding of marriage." *Id.* at 838 (plurality op.). And in the next breath and "almost without discussion," Katherine C. Sheehan, *Toward A Jurisprudence of Doubt*, 7 UCLA Women's L.J. 201, 224 (1997), the plurality upheld the parental-consent requirement "on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart." *Casey*, 505 U.S. at 895 (plurality op.).

This inconsistent and contradictory treatment cannot be explained by legal principle. "The 'undue burden' inquiry does not in any way supply the distinction" drawn by the plurality. *Id.* at 965 (Rehnquist, C.J., concurring in the judgment in part, dissenting in part); *see also* Sheehan, *supra*, 225 ("In a world where all parents have the best interests of their children at heart, all wives benefit from consultation with their husbands. The spousal notice provision, moreover, imposes less of a burden on the pregnant woman than the parental consent requirement does."). Rather, the plurality relied on "policy judgment[s]" reflecting their "philosophical views" about marriage and parenthood. *Casey*, 505 U.S. at 965 (Rehnquist, C.J., concurring in the judgment in part, dissenting in part); *Stenberg*, 530 U.S. at 982 (Thomas, J., dissenting). *See also* J.

Shoshanna Ehrlich, *Minors as Medical Decision Makers: The Pretextual Reasoning of The Court in the Abortion Cases*, 7 Mich. J. Gender & L. 65, 82 n.66 (2000) ([S]ensitivity to the dangers of family violence disappeared without a trace when the Court went on to consider and uphold the parental consent provision of Pennsylvania's law.") "Under the guise of the Constitution," the plurality thus "impart[ed] its own preferences on the States in the form of a complex abortion code." *Casey*, 505 U.S. at 966 (Rehnquist, C.J., concurring in the judgment in part, dissenting in part).

Unworkable from the start, the undue-burden standard was "not built to last." *Id.* at 965. The Court should abandon it.

B. Over time, the undue-burden standard has proven to be nothing more than a vehicle for judges to make policy judgments.

Abortion remains "one of the most contentious and controversial [issues] in contemporary American society." *Stenberg*, 528 U.S. at 947 (O'Connor, J., concurring). It is thus "exactly the context where this Court should be leaning most heavily on the rules of the judicial process" that require judges to stay in their "constitutionally assigned lane." *June Med.,* 140 S. Ct. at 2171 (Gorsuch, J., dissenting). The undue-burden standard is "inherently manipulable" and neither guides nor constrains judges in navigating this controversial area. *Casey*, 505 U.S. at 986 (Scalia, J., concurring in the judgment in part, dissenting in part). Instead of aiding judges in "neutral and

principled administration" of the law, *June Med.,* 140 S. Ct. at 2171 (Gorsuch, J., dissenting), the undue-burden standard authorizes—indeed, forces—them to rely on their own moral intuitions to decide cases. That practice perverts the judicial function and undermines the rule of law.

The undue-burden standard makes it "impossible" to say what the law is. *Stenberg*, 530 U.S. at 955 (Scalia, J., dissenting). As Judge Easterbrook put it, the standard "does not call on a court … to interpret a text" nor to "produce a result through interpretation of the Supreme Court's opinions." *Planned Parenthood of Indiana & Kentucky, Inc. v. Box*, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., concurring in denial of rehearing *en banc*). Thus "a court of appeals *cannot* decide whether [any law in a particular context] is an 'undue burden' on abortion" because that is "a matter of judgment" reserved "only [to] the Justices, the proprietors of the undue-burden standard." *Id.* at 998-99 (emphasis added).

Members of this Court, too, have found it "impossible" to make principled decisions under that standard. *Stenberg*, 530 U.S. at 955 (Scalia, J., dissenting). In every case, the undue-burden analysis boils down to a "policy-judgment-couched-as-law." *Id.* Accordingly, "whether a burden is deemed undue depends heavily on which factors the judge considers and how much weight he accords each of them.'" *June Med.*, 140 S. Ct. at 2180 (Gorsuch, J., dissenting) (cleaned up). "[I]t should not be terribly shocking to see that … judges vote their convictions" when left to their own moral intuitions. Cass R. Sunstein et.

al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 352-53 (2004). Indeed, empirical research confirms that "the undue burden standard has given judges the ability to make decisions based on their political or ideological beliefs." Niraj Thakker, *Undue Burden with A Bite: Shielding Reproductive Rights from the Jaws of Politics*, 28 U. Fla. J.L. & Pub. Pol'y 431, 474 (2017); *see* Sunstein, *supra*, 352-53.

By forcing judges to make such value judgments, the undue-burden standard not only frustrates the judicial function but undermines the rule of law. The rule of law rests on "the perception—and reality—that [judges] exercise humility and restraint in deciding cases according to the Constitution and law." *Obergefell v. Hodges*, 576 U.S. 644, 708 (2015) (Roberts, C.J., dissenting). If anything, "the judicial responsibility to avoid standardless decisionmaking is at its apex" when the Court approaches controversial issues. *June Med.*, 140 S. Ct. at 2179 (Gorsuch, J., dissenting). Yet the undue-burden standard "perver[ts]" this logic. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 469 (2014) (Garza, J., dissenting). Instead, it invites judges to "make policy decisions about which abortion restrictions are 'undue,' and then escape any jurisprudential ramifications of those decisions by taking refuge in the purportedly distinct factual context of that particular application." *Id.* In applying such a malleable standard—especially to so controversial an issue—the undue-burden standard "deliver[s] neither predictability nor the promise of a judiciary bound by

the rule of law." *Hellerstedt*, 136 S. Ct. at 2321 (Thomas, J., dissenting).

C. The undue-burden standard has created intractable confusion among the lower courts.

In *Hellerstedt*, Justice Thomas predicted that the Court's application of the undue-burden standard would "surely mystify lower courts for years to come." 136 S. Ct. at 2326 (Thomas, J., dissenting). That prediction has come true. *Casey* has only perpetuated the "jurisprudence of doubt" it was originally meant to address. 505 U.S. at 844 (plurality op.). More than 29 years after this Court invented the undue-burden standard, the lower courts still struggle with its meaning and application. Indeed, the undue-burden standard has created confusion and division in every court to apply it. This is no doubt due in large part to its malleability and to the policy judgments it forces upon judges. *See supra* Section I.B. The resulting range of contradictory decisions serve as further proof of the standard's unworkability.

The undue-burden standard has confused the lower courts from the start. Mere months after this Court decided *Casey*, lower courts explained that "passing on the constitutionality of state statutes regulating abortion ... ha[d] become neither less difficult nor more closely anchored to the Constitution." *Barnes*, 992 F.2d at 1337 (Jones, J.). "The undue burden test announced in *Casey*," they

complained, was "more easily articulated than applied." *Fontenot*, 925 F. Supp. at 420 n.24.[2]

That confusion persists today. Just this year, one judge complained about the "seemingly endless task of determining whether a law unduly burdens a woman's ability to obtain an abortion." *Planned Parenthood of Indiana & Kentucky, Inc. v. Box*, 991 F.3d 740, 752 (7th Cir. 2021) (Kanne, J., dissenting). Whether any given regulation constitutes an undue burden continues to be "more easily asked than answered." *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 524 (6th Cir. 2021) (Batchelder, J.).

Of all the confusion generated by the undue-burden standard, two areas have roiled the lower courts in particular. First, the *Casey* plurality held that, for facial challenges to abortion laws, a law is invalid if it poses an "undue burden" in a "large fraction" of "relevant" cases. *Casey*, 505 U.S. at 895 (plurality op.). But the lower courts are hopelessly lost about how to conduct such an assessment. To begin

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[2] That confusion was not limited to the lower courts. The three Justices who made up *Casey's* plurality *themselves* disagreed forcefully about the meaning and application of the undue-burden standard only eight years later and then again seven years after that. *See Stenberg*, 530 U.S. at 979 (Kennedy, J., dissenting) (criticizing the majority for "misinterpreti[ng] … *Casey*" so as to protect "a[n] [abortion] procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life"); *see generally Gonzales v. Carhart*, 550 U.S. 124 (2007).

with, a fraction requires a numerator and a denominator, but the plurality failed to specify how to determine those inputs. And even assuming judges could agree on an appropriate numerator and denominator (they cannot), the plurality never even suggested how to determine what constitutes a "large" fraction.

These missing specifications render the large-fraction test pure guesswork. It thus is only natural that lower courts have found the large-fraction test anything but "easy to apply." *McCloud*, 994 F.3d at 534 (collecting cases). One circuit court has given up altogether, declining to blindly guess at how to apply the large-fraction test. *See A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 699 (7th Cir. 2002) (Coffey, J., concurring) ("The *Casey* plurality did not explain, and thus we refuse to peer into the dark abyss of speculation in an attempt to determine at precisely what point a fractional part of a group becomes an impermissibly 'large fraction' and a statute becomes unduly burdensome."). Even this Court "has been forthcoming about its own difficulties" with the test. *McCloud*, 994 F.3d at 534. *See, e.g.*, *June Med.*, 140 S. Ct. at 2176 (Gorsuch, J., dissenting) (noting that "this circular test is unlike anything we apply to facial challenges anywhere else"); *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting) ("I must confess that I do not understand this [application of this test].").

Several Justices and judges have recognized that the large-fraction test is practically meaningless because it appears to call for an equivalent numerator

and denominator, which yields no fraction at all. *Gonzales v. Carhart*, 550 U.S. 124, 188 n.10 (Ginsburg, J., dissenting, joined by Stevens, Souter, Breyer, JJ.) ("There is … no fraction because the numerator and denominator are the same."); *see Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting) ("Under the [majority's] holding, we are supposed to use the same figure (women actually burdened) as both the numerator and the denominator. By my math, that fraction is always '1,' which is pretty large as fractions go."); *see e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 809 (6th Cir. 2020) (defending an application of the large fraction test that found that "100%" of the "relevant individuals … would be [unduly] burdened"). In short, the large-fraction test is hopelessly flawed and "ultimately standardless." *Casey*, 505 U.S. at 988 (Scalia, J., concurring in the judgment in part, dissenting in part).

Second, whether this Court requires a balancing test has also divided the lower courts. Some circuits, for example, have "regularly," *EMW*, 960 F.3d at 796, interpreted the undue-burden standard to require "balancing [of the] law's benefits against its burdens," *Box*, 991 F.3d at 743, such that abortion regulations must "confer[] … benefits sufficient to justify the burdens upon [abortion] access." *Hellerstedt*, 136 S. Ct. at 2300; *see also* Pet. Supp. Br. at 1-3. Others have generally rejected this "home-brewed" balancing test in favor of rational-basis review combined with a "substantial obstacle" determination. *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 931 (7th Cir. 2015) (Manion, J., dissenting); *see*

also Whole Woman's Health v. Lakey, 769 F.3d 285, 297 (5th Cir. 2014) ("[S]ome circuits have used the balancing test to enjoin abortion regulations; other circuits—including ours—have not."). As a consequence, courts employing the balancing test have employed the undue-burden standard to strike down common-sense regulations—including those that were seemingly approved by the Court in *Casey*. *See, e.g.*, *Newman*, 305 F.3d at 693 (Easterbrook, J.).

This very split in authority has now worked its way to this Court, which embraced a balancing approach in 2016 only to have a majority of its individual members renounce it four years later. *See June Med.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting) ("[F]ive Members of the Court reject the *Whole Woman's Health* cost-benefit standard"). And so lower courts continue to struggle over whether *Casey* requires a balancing test.

Three decades on, the undue-burden standard's only contributions to abortion jurisprudence are confusion and division. That so many lower courts could have adopted (and continue to embrace) such contradictory interpretations of *Casey* serves as further "proof," *Stenberg*, 530 U.S. at 955 (Scalia, J., dissenting), of *Casey*'s "inherently manipulable" and "hopelessly unworkable" standard, *Casey*, 505 U.S., at 986 (Scalia, J., concurring in the judgment in part, dissenting in part). It was clear from the beginning, and it is clear now: "*Casey* must be overruled." *Stenberg*, 530 U.S. at 956 (Scalia, J., dissenting).

D. The undue-burden standard treats abortion as a "super right," shielding bad actors from accountability.

The undue-burden standard elevates abortion above all other rights in our constitutional framework. Because the undue-burden standard amounts to an effects test, any and all restrictions on abortion might be deemed "undue." This ultimately hinders a state's ability to regulate even the most extreme abortion practices.

The *Casey* plurality rejected a universal strict scrutiny regime for abortion. It did so because such a regime was "incompatible with the recognition" of a "substantial state interest in potential life throughout pregnancy." *Casey*, 505 U.S. at 876 (plurality op.). Instead, the plurality created the undue-burden standard to serve as "the appropriate means of reconciling the State's interest with the [abortion right]." *Id*. Its creation, however, has not only failed to protect the states' substantial interest in fetal life the *Casey* plurality itself recognized but has also obstructed states from promoting other compelling interests, such as protecting women from unsafe and unethical medical practices.

The undue-burden standard thus treats abortion as a "super-right." *Indiana State Dep't of Health*, 888 F.3d at 311 (Manion, J., concurring in the judgment in part, dissenting in part). Abortion thus is perceived as "more sacrosanct even than the enumerated rights in the Bill of Rights," because it is "the *only* one that may not be infringed even for the very best reason." *Id.* at 312. As a result, bad actors in the abortion industry

enjoy special protections from states seeking to regulate them.

Because any burden can be deemed "undue," the undue-burden standard has the practical effect of hindering even those state laws aimed at stopping the most egregious abortion practices. It remains to be seen, for example, whether a state may shut down a particularly unethical practitioner if doing so might substantially limit the availability of abortions. In states with just one abortion facility or in rural areas where access to abortion clinics is already limited, must an abortionist like Kermit Gosnell, *see* Enjoli Francis, *Abortion Doctor Kermit Gosnell Guilty of First Degree Murder*, ABC News (May 13, 2013), abcn.ws/3726vex, or Steven Chase Brigham, *see* Eyal Press, *A Botched Operation*, New Yorker (Jan 26, 2014), bit.ly/2TxM0TU, be left at large, lest their removal be a substantial obstacle to women in those states? If taken at its word, the undue-burden standard would seemingly forbid any attempt to protect women from unethical practitioners and their abhorrent practices. This leaves already vulnerable women even more vulnerable. *See* Francis, *supra* (explaining that in Gosnell's "house of horrors," "many of the women patients were infected with sexually transmitted diseases from contaminated instruments, had suffered from botched procedures or had been given overdoses of dangerous drugs").

Sadly, this is already the case. The undue-burden standard already bars states from regulating practitioners who lack admitting privileges at any hospital whatsoever. *See e.g., June Med.*, 140 S. Ct. at

2157 (Alito, J., dissenting) ("The grand jury concluded that closer supervision would have uncovered Gosnell's egregious health and safety violations. Gosnell had a medical license, but it is doubtful that any hospital would have given him admitting privileges."). It has permitted this Court to strike down laws protecting women from practitioners or practices that are "[dis]respect[ful]," "misleading," or "[h]azard[ous]." *Hellerstedt*, 136 S. Ct. at 2352 (Thomas, J., dissenting). The undue-burden standard has also protected abortionists whose practices "approach[] infanticide," *Stenberg*, 530 U.S. at 1006-07 (Thomas, J., dissenting) ("The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.") (internal citations omitted), and those who would "dismember[] … a living child," *Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606, 2607 (2019) (Thomas, J., concurring in the denial of cert.). And it has protected those who would knowingly perform abortions based on a child's sex, race, or disability. *See id.*; *see generally* Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 Harv. L. Rev. F. 415 (2021). "A civilized society" would not tolerate these practices, much less prevent individual states from passing reasonable measures to stop them. *Stenberg*, 530 U.S. at 1007-08 (Thomas, J., dissenting).

Ultimately, the undue-burden standard props up abortion as "the most favored right in American law." *Indiana State Dep't of Health*, 888 F.3d at 320 (Manion, J., concurring in the judgment in part, dissenting in part). But these "special exceptions for special rights" continue to shield bad actors from accountability. *Hellerstedt*, 136 S. Ct. at 2322 (Thomas, J., dissenting). This Court should not continue to "bend the rules" for abortion. *Id.* at 2321.

II. The viability rule is similarly arbitrary and unworkable.

A. The viability rule fails to honor the state interests involved.

Under *Roe* and *Casey*, a state law restricting abortion may not pose an "undue burden" on obtaining an abortion before viability. *Casey*, 505 U.S. at 877 (plurality op.). Drawing a line at viability, however, "is misplaced" and fails to honor the important state interests involved. *McCloud*, 994 F.3d at 521, 525-26. The *Casey* plurality recognized that states possess a "substantial interest" in the preservation of unborn life. *Casey*, 505 U.S. at 876 (plurality op.). By adopting the viability rule, however, the plurality imposed an arbitrary standard that frustrates state efforts to advance that "substantial interest." Moreover, the viability rule's inability to account for other important state interests beyond the protection of nascent life, including preventing discriminatory abortions, protecting women from coercion to abort by physicians, and protecting the integrity and ethics of the medical profession. "The strength of these interests is the same throughout pregnancy" and does

not "turn[] on the viability of the fetus." *McCloud*, 994 F.3d at 521. Indeed, if a state's interests are "compelling" enough after viability to support a prohibition, they are "equally compelling before" then. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting).

The *Casey* plurality acknowledged that "there is a substantial state interest in potential life throughout pregnancy." *Casey*, 505 U.S. at 876 (plurality op.) Indeed, the plurality argued that the trimester framework should be abandoned because it had failed to "fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life." *Id.* But the viability rule has failed to fulfill this "promise" just the same.

The viability rule arbitrarily discounts states' substantial interest in pre-viability fetal life. The *Casey* plurality claimed that "[b]efore [fetal] viability" the states' interest in protecting fetal life is "not strong enough to support" the prohibition or imposition of an undue burden on abortion access. *Id.* at 846. The plurality, however, failed to provide any meaningful, non-cursory justification for the viability rule. *See infra* Section II.B. As Justice O'Connor recognized, "potential life is *no less potential* in the first weeks of pregnancy than it is at viability or afterward." *City of Akron v. Akron Ctr. For Reprod. Health* (*Akron I*), 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting). The states' interest, moreover, "is in the fetus as an entity in itself, and [because] the character of this entity does not change at the point of viability under conventional

medical wisdom[,] … the States interest, if compelling after viability, is equally compelling before viability." *Thornburgh*, 476 U.S. at 795 (White, J., dissenting). The plurality cannot have it both ways. If there is a substantial state interest after viability, then there is a substantial state interest before viability.

The viability rule also removes states' ability to adapt abortion regulations to advances in science and medicine. *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (Shepherd, J.) ("By taking this decision away from the states, the Court has also removed the states' ability to account for advances in medical and scientific technology [that] have greatly expanded our knowledge of prenatal life.") (internal citations omitted). Courts are not "suited to make the necessary factual judgments" about viability and the "medical" practice of abortion. *Akron I*, 462 U.S. at 458 (O'Connor, J., dissenting). That is because "science … progress[es] even though [this] Court averts its eyes," and legislatures are most capable of debating and responding to that progress. *McCorvey v. Hill*, 385 F.3d 846, 853-54 (2004) (Jones, J., concurring). The viability rule, however, forces courts to "pretend to act as science review boards," removing the regulation of abortion from the democratic process. *Akron I*, 462 U.S. at 458 (O'Connor, J., dissenting). This rule has "rendered basic abortion policy beyond the power of our … representative government [which] may not meaningfully debate" abortion-related scientific and medical advances. *McCorvey*, 385 F.3d at 852. The "perverse result" of the "constitutional adjudication

[of] this fundamental social policy … is that … facts no longer matter." *Id.* That cannot be the rule.

Moreover, "[v]iability as a standard is overly simplistic and overlooks harms that go beyond the state's interest in a nascent life alone." *Little Rock Family Planning Services v. Rutledge*, 984 F.3d 682, 693 (8th Cir. 2021) (Erickson, J., concurring). Among other things, it "fails to adequately consider ... the state's 'compelling interest in preventing abortion from becoming a tool of modern-day eugenics.'" *Id.* at 693 (Shepherd, J., concurring). States undoubtedly have a "compelling interest" in the prevention of eugenics and discriminatory trait-selective abortions, more broadly. *Id.* The viability rule, however, acts as a straitjacket, preventing states from acting upon this compelling interest. Accordingly, lower courts have complained about being compelled to apply the "unworkable viability standard to [legislation] aimed at preventing eugenics-based abortions." *Id.* But there is nothing else for them to do "unless and until [this] Court dictates otherwise." *Id.*

The viability standard has proved "unworkable" and is "ill-fitt[ed]" to honor the states' important interests. *Id.* Accordingly, the Court should abandon it.

B. There is scholarly consensus that the viability rule is arbitrary.

Courts "must justify the lines [they] draw." *Casey*, 505 U.S. at. 870 (plurality op.). Under *Casey*, viability is the "critical fact" that determines whether an unborn child may live or die. *Id.* at 860. Yet this Court

"has never offered any justification for the viability rule in a majority opinion." Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 Hastings Const. L.Q. 187, 191 (2016). And the "weak rationalizations" articulated in separate opinions "do not offer a principled rationale to distinguish viability from earlier lines that might be drawn." *Id.* That is not surprising given that "[t]he choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." *Akron I*, 462 U.S. at 461 (O'Connor, J., dissenting) (emphasis omitted). As even pro-choice scholars have recognized, "[v]iability is an incoherent legal concept" and "a conceptually illegitimate basis on which to ground abortion regulation." Romanis, *supra*, 28, 1. Viability has been nearly universally rejected by legal scholars, within other areas of law, and by countries with strong pro-abortion regimes. This Court should reject it too.

Legal scholars agree that the viability line is arbitrary. Indeed, "no one defends the Court's opinion in *Roe*." Richard S. Myers, *Lower Court "Dissent" from* Roe *and* Casey, 18 Ave Maria L. Rev. 1, 6 (2020). Most notably, Professor John Hart Ely lambasted the *Roe* Court's defense of its viability rule, noting that "[e]xactly why that is the magic moment is not made clear." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 924 (1973). He concluded that "[*Roe*] is … a very bad decision … 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." *Id.* at

947. Professor Ely's criticism "has come to summarize the scholarly consensus that the Court failed to offer a meaningful justification of its viability standard." David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 Baylor L. Rev. 119, 137 n.79 (1995), Indeed, "the academic consensus [is] that *Roe* failed to defend the viability rule." Beck, *Four Arguments* at 200.

Numerous legal scholars (including many who are proponents of abortion) have condemned the viability rule as unjustified or arbitrary. *See e.g.*, Laurence H. Tribe, *Foreword: Toward A Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 4 (1973) ("Clearly, [the Court's explanation of the viability standard] … offers no reason at all for what the Court has held."); Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. Cal. L. Rev. 47, 96 (1995) (criticizing *Roe*'s justification as "blatantly circular"); Nancy K. Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 Yale L.J. 639, 664 (1986) ("[*Roe* provided] nothing more than the definition of viability."); John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. Pa. J. Const. L. 327, 359 (2011) ("[T]he Court has never given a convincing account of why viability is key," which is "yet another reason why the Court's opinion struck so many as … not founded in any valid conception of constitutional law."); Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. Davis L. Rev. 1285, 1329 (2013) (noting the viability rule was "seemingly pulled from thin air.").

It is a testament to the arbitrariness of the viability rule that legal academia is in agreement here.[3]

What's more, the viability rule has been abandoned as arbitrary in other areas of the law, such as criminal law and tort law. In adopting the viability rule from *Roe*, the *Casey* plurality claimed that viability was appropriate because "[n]o evolution of legal principle" nor "[legal] growth in the intervening years has left [the viability] rule a doctrinal anachronism." *Casey*, 505 U.S. at 857, 855 (plurality op.). That is especially untrue today. In criminal law, for example, thirty-six states have enacted statutes defining the killing of an unborn child (excepting abortions) as a form of homicide, and thirty of those states make such killings a crime without reference to

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[3] Individual members of this Court, too, have consistently recognized the viability rule as arbitrary. *See* Joseph F. Kobylka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy*, 70 Mo. L. Rev. 1075, 1102 (2005) (Justice Blackmun acknowledged in his private papers that "viability[] is [as] equally arbitrary" as the trimester scheme) (quoting Blackmun Papers, Box 151); *Akron I*, 462 U.S. at 461 (O'Connor, J., dissenting) ("[P]otential life is no less potential in the first weeks of pregnancy than it is at viability or afterward.") (emphasis omitted); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519 (1989) (Rehnquist, CJ., joined by Kennedy, J.) ("[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, [or] [why] there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."); Beck, *Four Arguments*, at 192 n. 30 (noting that Justices White, Rehnquist, Scalia, and Thomas have all criticized or joined opinions criticizing viability as arbitrary).

gestational age or viability. Paul Benjamin Linton & Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of* Roe v. Wade*? A Critique of* Planned Parenthood v. Casey 321-22 (citing Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 U. St. Thomas J.L. & Pub. Pol'y 141, 143 (2011)). Indeed, only one state, Maryland, uses viability as the dividing line. *See id.* at 322 n.207.

Similarly, in tort law, courts in thirty states have either "expressly or impliedly rejected viability as an appropriate cutoff point for determining liability for nonfatal prenatal injuries." Linton, *supra*, 146. For wrongful death, forty-three states "now allow recovery … for prenatal injuries resulting in stillbirth … [and] the modern trend, supported by legislative reform, is toward abolishing any viability (or other gestational) requirement." *Id.* at 323-24. *See also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 55, at 369 (5th ed. 1984) (stating viability is "arbitrary" because it "of course does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is a most unsatisfactory criterion, since it is a relative matter."). These legal developments put to bed the plurality's claim that "[n]o evolution of legal principle has left [the viability rule's] doctrinal footings weaker than they were in 1973." *Casey*, 505 U.S. at 857 (plurality op.). To the contrary, *Roe* and *Casey* have become doctrinal anachronisms.

Finally, even nations with very pro-abortion regimes have rejected the viability rule. The vast majority of countries forbid abortion after 12 weeks,

and "most nations, if they permit abortion at all, view it as an act requiring justification." Randy Beck, Gonzales*,* Casey*, and the Viability Rule*, 103 Nw. U. L. Rev. 249, 263-64 (2009). The United States is one of "only six nations … [to] allow unrestricted abortion to the point of viability." *Id.* at 264. This puts the United States in the company of China, Vietnam, and North Korea, *id.*, which suggests that the viability rule was not a "reasoned statement, elaborated with great care" but rather an arbitrary imposition of "raw judicial power" "reflecting the views and values of the [American] lawyer class" as it existed in 1972. *Casey*, 505 U.S. at 870 (plurality op.); *Roe v. Wade*, 410 U.S. 179, 222 (1973) (White, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting). This Court should abandon it now.

C. Scientific and medical advances since *Roe* and *Casey* underscore the standard's unworkability.

The viability rule is unscientific. Indeed, viability "changes as medicine changes." *Isaacson v. Horne*, 716 F.3d 1213, 1233 (9th Cir. 2013) (Kleinfeld, J., concurring). Just between the time this Court decided *Roe* and *Casey*, "viability dropped from 28 weeks to 23 or 24 weeks, because medical science became more effective at preserving the lives of premature babies." *Id. Casey* itself acknowledged that a viability standard was "imprecis[e]" and that the "medical community ... will continue to explore the matter." 505 U.S. at 870 (plurality op.). In so doing, *Casey* perpetuated a rule grounded not in biological reality, but in complex, contested statistical probabilities about fetal survival

rates and irrelevant factors such as wealth, geography, and the optimism of the doctors making the predictions. Indeed, *Casey*'s rule "depend[s]" solely on "medical technology." *Id.* at 955 (Rehnquist, C.J., concurring in the judgment in part, dissenting in part). Such "imprecision" was not "tolerable" then, as the plurality claimed, and it is not "tolerable" now. *Id.* at 870 (plurality op.).

Viability has no biological significance. It is, as even pro-choice scholars have noted, "wholly dependent on geography and resources." Romanis, *supra*, 25. Viability is "an odd rule," because it measures "developments in obstetrics, not … developments in the unborn." *Isaacson*, 716 F.3d at 1233 (Kleinfeld, J., concurring); *MKB*, 795 F.3d at 774 (Shepherd, J.). The *Casey* plurality embraced the "imprecision" of its rule, explaining that the "soundness … of [the viability rule] in no sense turns on *when* viability occurs … [because] [w]henever it may occur, its attainment will continue to serve as the critical fact." *Casey*, 505 U.S. at 836 (plurality op.) (emphasis added). Depending on the status of medical technology, therefore, viability could occur at any point. Thus, viability amounts to "the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother." *Id.* at 989 n.5 (Scalia, J., concurring in the judgment in part, dissenting in part). No other constitutional right is so wholly dependent on the state of the nation's technology.

Viability is not a simple, workable "line" but a complex prediction based on statistical probabilities of contested significance. In its opinion, the *Casey* plurality offered a "viability line" that was purportedly "more workable" than any alternative. *Id.* at 870 (plurality op.). But the very concept of a viability "line" is a misnomer because "viability is not really a defined line at all." Linton & Quinlan, *supra*, 296. "Rather, it is a *prediction*— an educated guess— about the statistical probability that a baby (given certain characteristics) has of surviving if born prematurely." *Id.* This is a "complex estimation made on the basis of assessing multiple factors," and it is "usually … done in the context of managing a pregnancy at risk of premature birth or in the context of determining the type and amount of care to be provided to a baby that has already been born prematurely." *Id.* But even "if a uniform and accurate source were available to establish [fetal] survival rates at various ages," there is "no consensus within the medical community" about what probability constitutes "viability." *Id.* at 300-01. Indeed, some doctors "may deem a baby to be viable when there is ... a 10 percent chance of survival, while others may not do so unless there is a 25 percent (or even a much greater) chance of survival." *Id.* at 301. Ultimately, "[t]he viability standard will prove even less workable in the future." *MKB*, 795 F.3d at 775 (Shepherd, J.). Accordingly, viability is not a line but "an illusion." Linton & Quinlan, *supra*, 297.

This viability *prediction* is unworkable, too, since it is based on irrelevant factors. In addition to the status of medical technology, whether any particular

child is viable depends on her mother's physical and financial access to that medical technology. For example, a woman who is 25 weeks pregnant and traveling between Melbourne, Australia and Papa New Guinea would move back and forth between "the 'point' of viability several times, becoming viable whenever she was near sophisticated medical facilities, and not viable whenever she returned to the remote Papua New Guinea highlands." Beck, Gonzales, at 259 (quoting Stephen Coleman, *The Ethics of Artificial Uteruses: Implications for Reproduction and Abortion* 87 (2004)).

The viability line therefore tends to afford greater protection to unborn children of the wealthy. *See* Beck, Gonzales at 259. Those unborn children whose parents are either closer to advanced medical technology or can afford to travel to receive high-quality medical care would be protected from abortion sooner than those children from poorer families. If, however, viability is based on the best technology currently in use, but unavailable to any particular woman, then "the [viability] rule is unprincipled for a different reason[,]" namely "caus[ing] the constitutional status of some fetuses to turn on unattainable hypothetical conditions, rather than real-world prospects for survival." *Id*. Neither is a workable line.

Finally, viability varies based on the competence and optimism of the doctor responsible for the evaluation. An incompetent doctor may place viability too late (or early). An overly pessimistic or otherwise ideological doctor may set the threshold too high. The

average patient hardly has the ability to question these determinations. Moreover, this deference to "disputable medical judgments becomes particularly problematic when the doctor has financial, legal, or ideological interests at stake in the determination." *Id.* at 260. These factors cannot be "the sole criterion for deciding whether [a] child will live or die." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

In short, the viability rule is and always has been arbitrary and unworkable. The Court should no longer retain it.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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July 29, 2021