No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., IN HIS OFFICIAL CAPACITY AS 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 OF HEARTBEAT INTERNATIONAL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIELLE M. WHITE
Counsel of Record
HEARTBEAT INTERNATIONAL, INC.
5000 Arlington Centre
Suite 2277
Columbus, Ohio 43220
(614) 885-7577
dwhite@heartbeatinternational.org

Counsel for Amicus Curiae Heartbeat International, Inc.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES

STATUTES

OTHER MATERIALS

INTEREST OF *AMICUS CURIAE*[1]

Heartbeat International, Inc. ("Heartbeat") is uniquely positioned to provide relevant factual background and legal argument on a key issue in this case: *stare decisis* and the "reliance" rationale raised in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Heartbeat is an IRC § 501(c)(3) non-profit, interdenominational Christian organization whose mission is to serve women and children through an effective network of life-affirming pregnancy help centers. Heartbeat serves approximately 2,850 pregnancy help centers, maternity homes, and non-profit adoption agencies (collectively, "pregnancy help organizations") in over 65 countries, including approximately 1,722 in the United States—making Heartbeat the world's largest such affiliate network.

Heartbeat operates a 24/7 toll-free telephone and web-based help line called Option Line, which individuals facing unintended pregnancies can contact for information and referrals to nearby pregnancy help organizations. In 2020, Heartbeat's Option Line handled approximately 371,701 contacts—including phone calls, e-mails, instant messages, and online chats in English and Spanish. In 2020, Heartbeat connected individuals to

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus Curiae* or its counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to the filing of this brief through blanket consents filed with the Court on July 1 and 9, 2021.

pregnancy help organizations an average of once every 88 seconds.

Heartbeat is well positioned to address the *stare decisis* issues in this case because its work, and the work of the organizations it supports, refute the erroneous assumption underlying the plurality's decision in *Casey*, namely, that when a woman finds herself unexpectedly pregnant, her only or best feasible option is abortion. In discussing whether "reliance" considerations warranted applying *stare decisis*, the *Casey* plurality went so far as to state: "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856.

As shown below, however correct or incorrect that supposition may have been in 1992, it is demonstrably incorrect in 2021 given changes in society—including the growth and expansion of the pregnancy help network, advances in technology, and evolving social mores. Every day across the Nation, pregnancy help organizations serve women facing unintended pregnancies so that abortion is *not* their only option and giving birth does *not* mean sacrificing their educations, careers, or ability to "participate equally in the economic and social life of the Nation." *Id.* The proliferation and effectiveness of pregnancy

help organizations, together with the societal changes of the last three decades, moot the reliance concerns postulated in *Casey* and demonstrate that the Court should not apply *stare decisis* in this case.

SUMMARY OF ARGUMENT

In 1992, this Court endorsed the now-antiquated idea that pregnancy inhibits women from meaningfully participating in society. The *Casey* plurality relied on an incorrect and outdated dichotomy that women facing unexpected pregnancies can either fully participate in society or become mothers, but not both. It is the same untenable rationale that equates unplanned motherhood with being "cast[] into darkness." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 557 (1989) (Blackmun, J., concurring in part and dissenting in part). Regardless of whether *Casey* was rightly or wrongly decided in 1992, this rationale for applying *stare decisis* has been mooted in the decades since by technological and societal advances as well as changing social mores concerning children born out of wedlock and their mothers.

Heartbeat has been at the vanguard of such empowerment for decades, using ever-evolving technology and ever-expanding on-the-ground support to serve women. Through, in part, the efforts of Heartbeat and similar organizations along with thousands of volunteers, life today for women experiencing unexpected pregnancies is very different than in 1992.

Women today routinely obtain the highest reaches of socioeconomic status, while also having

children and raising families. Numerous laws prohibit sex and pregnancy discrimination, guarantee employment leave for pregnancy and childbirth, and help enable child-care support for working mothers. College and advanced degrees can be obtained online from the comfort of one's living room. And if women do not desire to be mothers, adoption and "safe haven" laws allow women to relinquish their infants to the care of adoptive families.

One critical societal development is the proliferation of pregnancy help organizations. Today, there are more than 2,700 pregnancy centers in the United States, as well as maternity homes, adoption agencies, and other organizations that educate, equip, and empower women to thrive during and after pregnancy. *See* Charlotte Lozier Institute, *Pregnancy Centers Stand the Test of Time*, at 16 (2020) [*hereinafter Charlotte Lozier Report*].[2] These pregnancy help organizations outnumber abortion clinics in nearly every State, and nationally by more than three to one. *See* Ramiro Ferrando, *While Abortion Clinics Diminish, Crisis Pregnancy Centers Flourish*, Midwest Center for Investigative Reporting (Feb. 19, 2019).[3] In 2019, pregnancy help centers provided nearly 1.85 million people with free services, including medical-grade pregnancy testing; ultrasounds; prenatal care; parenting classes; options

---

[2] *Available at* lozierinstitute.org/wp-content/uploads/2020/10/Pregnancy-Center-Report-2020_FINAL.pdf (visited July 12, 2021). Statistics cited herein from the Charlotte Lozier Report are as of 2019.

[3] *Available at* https://investigatemidwest.org/2019/02/19/while-abortion-clinics-diminish-crisis-pregnancy-centers-flourish (visited July 12, 2021).

counseling; community referrals to adoption agencies, maternity homes, job centers, housing agencies, drug rehabilitation centers, and other social services organizations; and material assistance, including more than 2 million baby clothing outfits, more than 1.2 million packs of diapers, more than 19,000 strollers, and more than 30,000 new car seats. *See Charlotte Lozier Report* at 16, 24, 61-62. Every day, pregnancy help organizations in every State of the Nation empower pregnant mothers to have richly satisfying, productive, and prosperous lives. Indeed, for many women struggling with addiction, abuse, and economic disadvantages, abortion does nothing to address their underlying needs. By contrast, pregnancy help organizations take a far more holistic approach: caring for, educating, and supporting the whole person by addressing such needs.

The situation was very different when *Casey* was decided. While pregnancy help organizations existed in 1992, they were nowhere near as prevalent as they are today. Technological advances have also allowed pregnancy centers to offer far more extensive services and maternal care. *See* Heartbeat International, Inc., *The Ground Is Tilled and the Seed Is Planted by the "Greatest Generation"* (observing that, since the early 1990s, Heartbeat expanded "to help create an even larger and more effective network of pregnancy help ministries worldwide").[4]

---

[4] *Available at* https://www.heartbeatinternational.org/heartbeat-history (visited July 27, 2021).

The growth of pregnancy help organizations has coincided with and been shaped by significant technological advances and changing societal norms, which further moot *Casey's* "reliance" rationale. With respect to changes in technology, in 1992, an unexpected pregnancy might have necessitated dropping out of school or leaving the workforce. Today, students can earn undergraduate and graduate degrees—including ABA accredited law degrees—almost without leaving their living rooms, which has simplified life for countless single mothers. *See, e.g.*, Mitchell Hamline School of Law, *Earn Your J.D. From Your Hometown*.[5] Similarly, remote work opportunities are increasingly available, and many companies compete to attract qualified female candidates by offering generous family leave or childcare benefits.

Much of this has been made possible by the largest technological development since the industrial revolution: the internet, which was inaccessible to ordinary people in 1992. Laptops, smartphones, and other portable electronic devices have further created ranges of options for unexpectedly pregnant women. When local help is simply a Google® search, text message, or online chat away, women are empowered to embrace motherhood without the alleged consequences relied upon by the *Casey* plurality.

As for changing societal mores, the social stigma associated with unexpected pregnancies today has all but disappeared. Today, 40% of U.S. births

---

[5] *Available at* https://mitchellhamline.edu/admission/intro/earn-your-j-d-from-your-hometown (visited July 26, 2021).

occur outside of wedlock, compared with only 30% at the time of *Casey*, or 13% at the time of *Roe v. Wade*, 410 U.S. 113, 153 (1973). It is simply a different world today wherein the factors underlying *Casey* no longer apply.

Because the *Casey* plurality determined that *stare decisis* sufficed to uphold the central holding of *Roe*, the plurality concluded: "We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions." *Casey*, 505 U.S. at 871. Heartbeat respectfully submits that, with the dramatic technological developments and societal changes since *Casey*, *stare decisis* no longer should be a significant issue, and the Court should squarely decide the question presented. Heartbeat urges the Court to overturn *Roe* and *Casey*, to apply rational basis review to abortion restrictions as urged by Petitioners, and to hold that States have interests sufficient to protect pre-viability life.

ARGUMENT

I. PREGNANCY HELP ORGANIZATIONS

A. The Early Years: A Fledgling Pregnancy Help Network Begins To Form

Pregnancy help organizations are a loving response to the myriad needs of millions of women and children. These needs have evolved as technological,

economic, and social conditions have varied. Beginning in the 1960s—and coinciding with technological and social changes which impacted traditional family structures—pregnancy help organizations began to emerge. Eager to help women facing unexpected or difficult pregnancies, individuals began taking women into their own homes, starting hotlines for women in crisis, and organizing local centers to respond to the needs of women in their own communities. *See* Margaret H. Hartshorn, *Foot Soldiers Armed With Love* 13, 19 (2014). The pregnancy help network began as, and continues to be, a grassroots effort to ensure that pregnant mothers are equipped with support, resources, and education.

Pregnancy centers are one type of help organization. Pregnancy centers are "community-based entit[ies] that 1) provide[] intentional intervention services on-site to create an alternative to abortion and 2) follow[] a compassionate model of care respecting the dignity and privacy of women." Charlotte Lozier Institute, *1968-2018: A Half Century of Hope*, at 5 (2018).[6] As pregnancy centers began to spring up, they recognized a need for operational standards, training resources, networking, a directory of pregnancy help organizations, and a hotline to connect women with such organizations. To satisfy this need, in 1971, several individuals founded what would later become Heartbeat: a federation of

[6] *Available at* https://s27589.pcdn.co/wp-content/uploads/2018/09/A-Half-Century-of-Hope-A-Legacy-of-Life-and-Love-FULL.pdf (visited July 15, 2021).

independently governed, locally funded pregnancy help organizations. *See World of Difference* at 11-12.

B. 1992: The Pregnancy Help Network Continues To Grow But Its Scope And Services Remain Limited

By 1992, the pregnancy help network had made progress but was still taking shape, and was nothing like it is today. Although there is "no reliable data about the total number and location" of pregnancy centers in the 1990s, Ferrando, *supra*, it is clear that there were far fewer than the thousands that exist today. *See Charlotte Lozier Report* at 16. It is also clear that pregnancy centers were vastly outnumbered by abortion providers, of which there were some 2,380 in the Nation. *See* S.K. Henshaw & J. Van Vort, *Abortion Services in the United States, 1991 and 1992*, 26 Family Planning Perspectives 100, 104-06 (1994).

The services that pregnancy help organizations offered in the early years were quite limited, focusing primarily on options counseling and referrals to adoption agencies. In 1984, however, a pregnancy center in California began doing something that has since become commonplace: It offered medical services under the supervision of a licensed physician, including ultrasounds and other medical care. *See Charlotte Lozier Report* at 6. Yet by 1991—as *Casey* was poised to be briefed—virtually no other pregnancy center in the Nation was yet providing such medical services. *See id.* (indicating that only three centers were providing such services as of 1991).

C. 2021: Modern Pregnancy Help Organizations Are Ubiquitous, And Offer A Wide Variety Of Resources To Empower Women To Thrive During and After Pregnancy

Today, pregnancy help organizations are ubiquitous and, given the broad range of pregnancy-related services they provide, are here to stay. Pregnancy centers in the United States now number more than 2,700—significantly more than at the time of *Casey*. *See Charlotte Lozier Report* at 16. They outnumber abortion clinics in nearly every State, and nationally by more than three to one—the reverse of the situation at the time of *Casey*. *See* Ferrando, *supra.* Indeed, in Mississippi, the State at issue in this case, the ratio of pregnancy help organizations to abortion clinics is an astonishing 29 to 1. *See id.*

Unlike in 1992, centers are now highly effective not only at providing options counseling, but at helping women through all stages of their pregnancy and beyond—including prenatal care, parenting classes, life-skill classes, and material assistance—to help ensure that women can "participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856. A significant majority of modern pregnancy centers provide medical services—about 2,132 today, as compared to a mere three at the time of *Casey*. *See Charlotte Lozier Report* at 25. These centers' services include (depending on the center) medical-grade pregnancy testing, ultrasounds to confirm a viable pregnancy and to rule out a dangerous ectopic pregnancy, and sexually transmitted disease and infection testing. *See id.* at

9, 34. Many centers also provide certain prenatal care (*e.g.*, free prenatal vitamins), and some provide more comprehensive prenatal care. *See id.* at 18, 35, 38. Hundreds of pregnancy centers also provide childbirth classes and lactation/breastfeeding consultations, *see id.* at 18, while others provide financial coaching, academic counseling and other educational courses for women and, where applicable, their partners.

In 2019, pregnancy centers served nearly 1.85 million people, including 967,251 new clients. *See id.* at 16. They administered 731,884 free pregnancy tests and provided 486,213 free ultrasounds. *See id.* They provided free parenting classes to 291,230 women and men to help equip them to provide excellent parenting to their children. *See id.* at 16, 50. And they provided massive amounts of free material assistance, including but certainly not limited to 2,033,513 baby outfits, 1,290,079 packs of diapers, 19,249 strollers, and 30,445 new car seats. *See id.* at 16, 62.

The pregnancy help network has expanded not only in size but also in scope and sophistication. Pregnancy help organizations today are supported by Heartbeat and several other professional, non-profit umbrella organizations, including Care Net,[7] Birthright International,[8] and the National Institute of Family and Life Advocates.[9] Most pregnancy centers have paid staffs and numerous volunteers.

---

[7] *See* https://www.care-net.org (visited July 21, 2021).

[8] *See* https://birthright.org (visited July 21, 2021).

[9] *See* https://nifla.org (visited July 21, 2021).

See Heartbeat International, Inc., *Life Trends Report,* at 4 (2018).[10]

In short, the pregnancy help network has grown from a fledgling, loose community in the days in which *Roe* and *Casey* were decided, to an established, vast, well-organized, and professional network that spans the country. Thanks to their expansion in size and scope, centers are now widely able to support women throughout their pregnancies and afterwards, thereby educating, equipping, and empowering women to thrive after making life-affirming choices. As shown below, this sea change since *Casey* has profound implications for *stare decisis* in this case.

II. THE PREVALENCE OF PREGNANCY HELP ORGANIZATIONS MOOTS *STARE DECISIS* CONCERNS

As the Court repeatedly has held, "'*stare decisis* is not an inexorable command,'" but rather is merely "'the preferred course'" because it tends to promote a number of legal and judicial benefits. *Janus v. Am. Federation of State, County, & Municipal. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009), and *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Accordingly, the Court has not hesitated to depart from "continued adherence to . . . erroneous precedent" where it was appropriate to do so. *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1492 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410

[10] *Available at* https://www.heartbeatinternational.org/pdf/ltr2018.pdf (visited July 27, 2021).

(1979)); *see also Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Payne*, 501 U.S. at 827 ("[W]hen governing decisions are unworkable or badly reasoned, this Court has never felt constrained to follow precedent.") (internal quotation marks and citation omitted).

Importantly, "'[t]he doctrine [of *stare decisis*] is at its weakest when [the Court] interpret[s] the Constitution because [that] interpretation can be altered only by constitutional amendment or by overruling [the Court's] prior decisions.'" *Janus*, 138 S. Ct. at 2478 (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)); *see also Casey*, 505 U.S. at 995 (Scalia, J., dissenting) ("Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it . . . . Pre-*Roe*, . . . political compromise was possible."). In constitutional cases, therefore, ensuring that the Court's rulings are *correct* takes on outsized importance. *See Payne*, 501 U.S. at 828 ("[T]he Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions."); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions."), *overruled in part by Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938).

As shown below, the reliance concerns asserted by the *Casey* plurality have been overtaken by societal developments, including the expansion of the pregnancy help network. Such concerns do not

warrant adhering to *Roe* and its progeny if the Court determines that those cases were wrongly decided. The other *stare decisis* factors the Court customarily considers likewise do not warrant applying the doctrine in this case.

A. The Services And Resources Provided By Pregnancy Help Organizations Help Address The "Reliance" Concerns Asserted By The *Casey* Plurality

The *Casey* plurality invoked a nebulous form of reliance to justify its application of *stare decisis*, stating: "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856. This was a dubious assumption. As Chief Justice Rehnquist observed in his opinion concurring in the judgment in part and dissenting in part:

> The joint opinion [invokes] what can only be described as an unconventional—and unconvincing—notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. The joint opinion's assertion of this fact is

> undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their "places in society" in reliance upon *Roe,* rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.

Casey, 505 U.S. at 956-57 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citations omitted).

But whatever the merits of the *Casey* plurality's assumption in 1992, the assumption is demonstrably incorrect today. As shown below, no longer is it true, if it ever was, that abortion is necessary to allow women to lead productive and fulfilling lives and to participate equally in society.

1. Empowering Success in Education

The *Casey* plurality appeared tacitly to assume that when a student finds herself unexpectedly pregnant, her only means of completing her education is through abortion. This is simply not true in 2021. In fact, in 2016, the most recent year for which data is available, fully 22% of all undergraduate students were parents. *See* Institute for Women's Policy

Research, *Parents in College: By the Numbers* at 1.[11] Pregnancy help organizations provide the resources and support necessary to finish school, an endeavor that is entirely within reach for today's mothers.

Indeed, as the past year of pandemic has shown, it is increasingly feasible for women to use new technologies to facilitate their educations, even when childbirth may temporarily prevent in-person learning for a short time. Countless colleges and universities now offer fully online courses, and many institutions and professors accommodate medical absences of any kind by simply using webcams and free software such as Zoom® or Skype® to live-stream lectures. The past several decades have also seen an explosion in other new technologies which have made education easier for expectant mothers, including laptops, smartphones, and various cloud-based educational and collaboration software.

Mothers who visit pregnancy centers are also presented with suggested resources for child care while in school, and may be encouraged to learn that "[r]oughly half of the colleges in the U.S. offer some type of child care," and there are low-cost off-campus options as well. Accredited Schools Online, *Kids on Campus: Colleges Offering Child Care* (June 16, 2021);[12] *see also* Katy Hopkins, *Child-Friendly College Programs for Parents*, U.S. News & World Report

---

[11] *Available at* https://iwpr.org/wp-content/uploads/2020/08/C481_Parents-in-College-By-the-Numbers-Aspen-Ascend-and-IWPR.pdf (visited July 26, 2021).

[12] *Available at* https://www.accreditedschoolsonline.org/resources/colleges-offering-child-care (visited July 16, 2021).

(Mar. 23, 2011) ("With the help of school programs across the country, from residential support systems to campus lactation rooms, there are options available to women and their children.").[13] In short, pregnancy centers provide medical and other supportive resources that empower women to successfully complete their educations as new parents.

2. Equipping for Success in the Workplace

The *Casey* plurality also appeared to assume that abortion was necessary for women to have successful careers. Nearly three decades later, this is an even more dubious notion than it was at the time.

Pregnancy help organizations around the Nation offer women assistance in finding work to provide for themselves and their children. Pregnancy centers provide crucial connections to the community, helping women locate the local organizations or agencies best suited to fulfilling their career needs. They offer assistance in job searches, and support to women as they navigate the challenges of the workplace.

Working motherhood itself has become commonplace. In 2020, fully 71% of all women in the United States with children under the age of 18 participated in the workforce. *See* U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment Characteristics of Families—2020* at 2 (Apr. 21,

---

[13] *Available at* https://www.usnews.com/education/best-colleges/articles/2011/03/23/child-friendly-college-programs-for-parents (visited July 16, 2021).

2021).[14] Around the time *Roe* was decided, it was closer to 47%. *See* U.S. Bureau of Labor Statistics, *Labor Force Participation Rate of Mothers, 1975-2007* (Jan. 8, 2009).[15]

Women also enjoy a plethora of legal protections in the workplace that were not available at the time of *Roe* and/or *Casey*. Federal and state laws now prohibit pregnancy discrimination, guarantee employment leave for pregnancy and childbirth, and help enable child-care support for working mothers. *See, e.g.*, 29 U.S.C. § 2612 (employment leave enacted post-*Casey* in 1993); 26 U.S.C. § 21 (tax credit enacted post-*Roe* in 1976); 42 U.S.C. § 2000e(k) (Pregnancy Discrimination Act enacted post-*Roe* in 1978 in response to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that pregnancy discrimination was not a form of sex discrimination under Title VII).

Indeed, the notion that a woman cannot have both a baby and a successful career is not only antiquated, but *illegal*. If an employer took that position with a female employee today, the employer could look forward to a swift lawsuit and substantial liability for pregnancy discrimination. *See generally, e.g.*, *Young v. United Parcel Service, Inc.*, 575 U.S. 206 (2015); *Deneen v. Nw. Airlines, Inc.*, 132 F.3d 431, 435 (8th Cir. 1998) (holding that a plaintiff can prevail on a pregnancy discrimination claim by "show[ing] that

---

[14] *Available at* https://www.bls.gov/news.release/pdf/famee.pdf (visited July 26, 2021).

[15] *Available at* https://www.bls.gov/opub/ted/2009/jan/wk1/art04.htm (visited July 27, 2021).

she was treated differently because of her pregnancy or a pregnancy-related condition") (internal quotation marks and citation omitted).

3. Enabling Success in Society

The *Casey* plurality's *stare decisis* analysis rested in part on its assertion that abortion was necessary for women to participate in the "social life of the Nation." *Casey*, 505 U.S. at 856. The plurality did not explain what it meant by this, but presumably it was referring to what the Court has called a "stigma of unwed motherhood," *Roe*, 410 U.S. at 153, or, when referring to the child, what the Court has called "the stigma of bastardy." *Parham v. Hughes*, 441 U.S. 347, 353 (1979); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 696 n.21 (1977) (opinion of Brennan, J.) (referring to a purported "continuous stigma associated with unwed motherhood") (internal quotation marks and citation omitted); *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting) (referring to "the embarrassment of illegitimacy").

This would be an anachronism today, to say the least. Evolving social mores have all but eradicated the stigmas associated with pregnancy outside of wedlock. Today, a full 40% percent of U.S. births occur outside of marriage, compared with only 30.1% in 1992 (when *Casey* was decided) or 13% in 1973 (when *Roe* was decided). *See* Centers for Disease Control and Prevention, National Center for Health Statistics, *Unmarried Childbearing* (data as of

2019);[16] Centers for Disease Control and Prevention, National Center for Health Statistics, *National Vital Statistics Reports* at 17 (Oct. 18, 2000) (historical data).[17] Childbirth out of wedlock simply no longer includes the same stigmas as it once did—further mooting *Casey's* reliance argument.

And if women wish to avoid the obligations of motherhood, abortion is unnecessary for them to do so. Adoption and "safe haven" laws in all States allow women to relinquish their infants to the care of adoptive families. *See* Child Welfare Information Gateway, *Infant Safe Haven Laws* at 2 (U.S. Dept. of Health & Human Servs., Children's Bureau, 2016).[18]

Similarly, the *Casey* plurality appeared to assume that economically disadvantaged women must abort because of the costs of childbirth and childrearing. But pregnancy centers offer myriad resources to address this issue. Upon visiting a pregnancy help center, women will learn that government programs can cover the cost of prenatal care and childbirth for low-income women. *See, e.g.*, Cal. Dept. of Health Care Servs., *Full Scope Medi-Cal Coverage and Affordability and Benefit Program for Low-Income Pregnant Women and Newly Qualified Immigrants* (explaining that California provides coverage for "prenatal care, services for other

---

[16] *Available at* https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm (visited July 26, 2021).

[17] *Available at* https://www.cdc.gov/nchs/data /nvsr/nvsr48 /nvs48_16.pdf (visited July 26, 2021).

[18] *Available at* https://perma.cc/ZL5D-9X24 (visited July 24, 2021).

conditions that might complicate the pregnancy, labor, delivery, [and] postpartum" care for women with incomes of up to 213% of the Federal Poverty Level).[19] They also may receive free prenatal care directly from the pregnancy center. Mothers who are interested in exploring adoption are given facts and resources to that end. Mothers who choose to parent can be given free diapers, baby clothing, a stroller, a car seat, and even direct financial assistance. In all events, women can receive referrals to job agencies or other organizations that they can use to help set themselves on paths to upward mobility.

Another unstated underpinning in *Casey* is the notion that a woman in an abusive situation may feel the need to pursue an abortion because her partner (or other family member) will become violent if he learns she is pregnant. Such an approach does nothing to address the root causes of abuse or to help these victims escape. Moreover, the psychological harm felt by many post-abortive women can reinforce systematic factors that trap them in abusive relationships. *See, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 775 (8th Cir. 2015) (citing evidence and briefing showing that "abortion is psychologically damaging to the mental and social health of significant numbers of women," and can result in "depression, anxiety, panic attacks, low self esteem and suicidal ideation") (internal quotation marks and citations omitted); *McCorvey v. Hill*, 385 F.3d 846, 850-51 (5th Cir. 2004) (Jones, J., concurring) ("Studies by scientists, offered by McCorvey [the 'Roe'

---

[19] *Available at* https://www.dhcs.ca.gov/services/medi-cal/Pages/Affordability-and-Benefit-Program.aspx (visited July 29, 2021).

in *Roe v. Wade*], suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions."). Indeed, "a small but growing body of research suggests that intimate partner violence prevalence is *higher* among abortion patients than among women who continue their pregnancies." Audrey F. Saftlas, Ph.D. et al., American Journal of Public Health, *Prevalence of Intimate Partner Violence Among an Abortion Clinic Population* (Aug. 2010).[20]

By contrast, when victims of abuse visit a pregnancy center, they find compassion, a listening ear, and a wealth of resources to help with each unique situation—*e.g.*, referrals to domestic abuse shelters, maternity homes, other community organizations, and if so desired by the mother, law enforcement. If the victim is a minor and is experiencing abuse from a parent, step-parent, or similar figure, she may be referred to legal aid agencies or other resources that can put her on an expedited path to legal emancipation. *See, e.g.*, Cal. Family Code §§ 7000-7143. A victim of abuse will also receive emotional support to help her take the difficult and consequential step out of such a relationship, which she might otherwise be less inspired to take if she sees abortion as a path of less resistance.

Simply put, pregnant women seeking to complete their educations, enter or remain in the workforce, or escape poverty or abuse have available

---

[20] *Available at* https://ajph.aphapublications.org/doi/10.2105/AJPH.2009.178947 (visited July 27, 2021).

to them local, on-the-ground help in thousands of pregnancy help organizations around the Nation.

4. Lived Experiences

The following are a few of the hundreds of thousands of success stories coming out of pregnancy help organizations every single year:

Nikki Pinkley found out she was pregnant just after high school as she was about to start college. *See* Heartbeat International, Inc., *Nikki Pinkley*.[21] In her words, "Thousands of thoughts were racing through my mind: . . . 'How was I supposed to have a life? What about college? How would I have a career?'" *Id.* She went to a center called Options Pregnancy Clinic, which "helped me prepare for successful parenting by encouraging a healthy pregnancy and then providing parenting education for my newborn. They even helped supply baby items (which was a big financial help)." *Id.* She reports that "[a] major part of my story is how Options helped me continue with my plans for college." *Id.* She "worked hard to earn [her] bachelor's degree in psychology, before earning a Master's of Science Degree in Counseling Psychology." *Id.* Nikki now has a private practice counseling center, Restoring Wellness Counseling, LLC, and is "working toward a doctoral degree." *Id.*

Brittni Curl learned she was pregnant in the midst of severe financial difficulties. In her words: "[P]anic mode set in. . . . How am I going to do this without any family close by? . . . How will I afford

---

[21] *Available at* https://www.heartbeatinternational.org/nikki (visited July 16, 2021).

taking care of a baby?" Heartbeat International, Inc., *Meet Brittni*.[22] She went to a pregnancy center called Reliance Center, which provided counseling and resources and even gave her direct financial assistance to help pay the bills until she was able to do so on her own. Brittni also received parenting classes from Reliance Center "to learn new things and think about how I am going to raise [my son, Brantlee] to the best of my ability." *Id.* Today, Brittni is married, and will soon finish earning her degree in Health Information and Technology. She has already enjoyed career success, recently receiving a promotion to a new position within the hospital where she works. The Reliance Center provided critical connections to the community, nominating Brittni for a Habitat House. After doing the hard work, Brittni got the keys to her home in 2020. She volunteers at the Reliance Center to help others facing similar situations. *See id.*

Michelle Bisbee was in a very different situation. She previously had had an abortion, had lost four other babies to miscarriages, and in 2013, found herself "far from home, scared, alone, and pregnant. [She] was living in an unhealthy and dangerous environment, with the baby's father, a drug dealer." Heartbeat International, Inc. *Michelle Bisbee*.[23] As she puts it: "On a daily basis I was hurt physically, emotionally, and mentally. . . . I vividly remember being locked in a room for three days without food. He would lock me up and then return to

---

[22] *Available at* https://www.heartbeatinternational.org/brittni (visited July 16, 2021).

[23] *Available at* https://www.heartbeatinternational.org/michelle (visited July 16, 2021).

beat me . . . ." *Id.* She finally fled, and went to a pregnancy center called The Open Door, where the staff "helped me to know what to expect and what to do next," and provided "resources, support, and the referrals I needed to get help during my pregnancy." *Id.* As she explains, "I voluntarily started a CPS [Child Protective Services] case because of my past [substance abuse], the past abusive relationship, and to prevent future problems. I wanted help to be a good mother. CPS helped me get a protective order against [the] father. They were able to close my case quickly since I had been clean and sober and was taking classes at The Open Door." *Id.* Now Michelle is pursuing her "education to become a Nurse Practitioner." *Id.*

The lived experiences of Nikki, Brittni, and Michelle, and those of others like them, refute the assumption made by the plurality in *Casey* that women facing unintended pregnancies have to choose between abortion on the one hand, and "participat[ing] equally in the economic and social life of the Nation" on the other. *Casey*, 505 U.S. at 856. Simply put, however legitimate the reliance concerns articulated by the *Casey* plurality may have been in 1992, they have been overtaken by massive societal changes, including the expansion of the now widespread, longstanding, and locally rooted pregnancy help network. This obviates *stare decisis* concerns in this case.

B. Other *Stare Decisis* Factors Should Not Deter The Court From Ensuring That It Correctly Answers The Important Constitutional Question Presented By This Case

Other *stare decisis* factors likewise should not prevent the Court from squarely deciding the question presented by this case.

Quality of the Prior Decision's Reasoning: "An important factor in determining whether a precedent should be overruled is the quality of its reasoning," especially when it comes to constitutional questions. *Janus*, 138 S. Ct. at 2479. *Roe* has been rightly criticized as utterly deficient on this score. *Roe* held that the "right of privacy" supposedly "founded in the Fourteenth Amendment's concept of personal liberty" protects "a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. But whatever may be said of a right to privacy generally, neither the Constitution's text nor our Nation's historical traditions abide the right to an abortion in particular. To the contrary, "when the Fourteenth Amendment was ratified, a majority of the States and numerous Territories had laws on the books that limited (and in many cases nearly prohibited) abortion." *June Medical Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2151 & n.7 (2020) (Thomas, J., dissenting). Indeed, *Roe*'s majority recognized that the statutes "under attack" in that case were "typical of those that," at that time, had "been in effect in many States for approximately a century." *Roe*, 410 U.S. at 116. *Roe* thus elevated to constitutional status a right "[i]t would no doubt shock the public [in 1868] to

learn" even existed. *June Medical*, 140 S. Ct. at 2151 (Thomas, J., dissenting).

Roe also reasoned that "the State's important and legitimate interest in potential life" arises only "at viability . . . because the fetus then presumably has the capability of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163. That logic, too, is faulty: A life is no less existent, or "potential," before viability than after, and nothing in the Constitution or our historical traditions even arguably draws any sort of line at viability. *See, e.g.*, *Webster*, 492 U.S. at 519 (opinion of Rehnquist, C.J.) ("The key elements of the *Roe* framework—trimesters *and viability*—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. . . . We do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.") (emphasis added); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 924 (1973) ("With regard to why the state cannot consider this 'important and legitimate interest' prior to viability, the opinion is even less satisfactory."). For these and other reasons, *Roe* and *Casey* have been "subject to unrelenting criticism." *Lawrence*, 539 U.S. at 589 (Scalia, J., dissenting).

Legal and Factual Developments: Since *Roe* and *Casey* were decided, legal and factual developments have eroded those opinions' underpinnings. *See Janus*, 138 S. Ct. at 2482-83. For one, those decisions are anomalies among the Court's

more recent fundamental rights cases. Since they were decided, the Court generally has bestowed constitutional protection on an unenumerated right only when, carefully defined, the right is "objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (declining to recognize a fundamental right to assisted suicide); *see also Chavez v. Martinez*, 538 U.S. 760, 775-76 (2003) (declining to recognize a fundamental right to "freedom from unwanted police questioning"); *cf. Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (holding that the Fourteenth Amendment incorporates the Excessive Fines Clause of the Eighth Amendment, because protection against excessive fines is "'both fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition'") (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)). *Roe* and *Casey* did not follow that framework; instead, they subjected abortion restrictions to heightened scrutiny without determining that the freedom to abort before viability is embedded in our country's settled traditions—which, of course, it is not. *See June Medical*, 140 S. Ct. at 2151 (Thomas, J., dissenting).

Advancements in medical knowledge since 1992, especially with respect to fetal development, also change the calculus. *Casey* drew the line at the ever-receding point of viability on the rationale that it marks the soonest the State "can in reason and all fairness" prohibit abortion in the name of preserving fetal life. *Casey*, 505 U.S. at 870. But newer literature teaches that the State has other interests that justify prohibiting abortion even before a baby can live outside the womb. For instance, some studies suggest

a fetus may feel pain "mediated by the developing function of the nervous system from as early as 12 weeks" of gestation. Derbyshire & Bockmann, *Reconsidering Fetal Pain*, 46 J. Med. Ethics 3, 6 (2020); *see also, e.g.*, Sekulic et al., *Appearance of Fetal Pain Could Be Associated With Maturation of the Mesodiencephalic Structures*, 9 J. Pain Res. 1031, 1036 (2016) ("[A]n early form of pain may appear from the 15th week of gestation onward."). Indeed, the evidence "suggests younger fetuses are *more* sensitive to painful stimuli than older ones" because the body's mechanism "to block painful stimuli" matures over time. Sekulic et al., *supra*, at 1035-36 (emphasis added).

Additionally, we now know that invidious discrimination often underlies a decision to abort, yet neither *Roe* nor *Casey* considered "states' wholly separate interest in eliminating discrimination as a reason for an abortion." *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 544 (6th Cir. 2021) (Bush, J., concurring); *see also Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 693-94 (8th Cir. 2021) (Erickson, J., concurring). Sex-selective abortions—typically targeted against unborn females—are common. *See Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1790-91 (2019) (Thomas, J., concurring); Adam Forrest, *Early Gender Tests "Leading to Selective Abortions of Girls in UK"*, The Independent (Sept. 17, 2018).[24] Selective abortions targeting unborn children with potential disabilities also have

[24] *Available at* https://tinyurl.com/tndmj6h2 (visited July 18, 2021).

proliferated, even as protections for *born* individuals with disabilities have increased. *See Box*, 139 S. Ct. at 1791 (Thomas, J., concurring); *Preterm-Cleveland*, 994 F.3d at 517 (en banc majority).

Further, it is now well documented that many women report "adverse consequences" to their "health and well-being" from having abortions. *MKB Mgmt.*, 795 F.3d at 775; *see also McCorvey*, 385 F.3d at 850 (Jones, J., concurring) (citing "about a thousand affidavits of women who have had abortions and claim to have suffered long-term emotional damage and impaired relationships from their decision"). Obviously States have a strong interest in preventing abortion from inflicting such harms on women.

Roe and *Casey* did not consider these interests that a State rightfully might wish to vindicate with pre-viability bans or limitations on abortion.

Workability of the Rule: The rigid viability rule established by *Roe* and *Casey* also has proven to be unworkable. It prevents States from considering the sort of interests just described, even though *Roe* and *Casey* did not consider those interests either. *See Little Rock*, 984 F.3d at 693 (Erickson, J., concurring). The viability rule ignores—and forces States to ignore—"advances in medical and scientific technology," as well as other factual and legal developments since *Casey* that can impact the constitutional analysis. *MKB Mgmt.*, 795 F.3d at 774 (alteration omitted). Thus, the viability rule has proven to be impractical and unworkable. *See June Medical*, 140 S. Ct. at 2152 (Thomas, J., dissenting) (collecting cases decrying "the unworkability of our abortion case law").

More broadly, *Casey* purported to clarify *Roe*'s "jurisprudence of doubt" by articulating "a standard of general application," and to "resolve the sort of intensely divisive controversy reflected in *Roe*" by calling "the contending sides of a national controversy to end their national division." *Casey*, 505 U.S. at 844, 866-67. In reality, *Casey* did the opposite; courts have struggled to apply its nebulous "undue burden" standard, disagreeing on everything from what factors make a burden "undue," *see, e.g.*, *June Medical*, 140 S. Ct. at 2180 (Gorsuch, J., dissenting) ("Whether a burden is deemed undue depends heavily on which factors the judge considers and how much weight he accords each of them.") (alterations omitted), to whether a law's benefits can offset its burdens, *see id.* at 2136 (Roberts, C.J., concurring in the judgment). What is more, the Court's abortion jurisprudence has done "more than anything else to nourish" the deep divisions on both sides of the abortion debate "by elevating it to the national level where it is infinitely more difficult to resolve." *Casey*, 505 U.S. at 995 (Scalia, J., dissenting). In "imposing such an order of priorities on the people and legislatures of the States," *Doe*, 410 U.S. at 222 (White, J., dissenting), *Roe* and *Casey* foreclosed one of the principal virtues of federalism: that "citizens of different states can effectively agree to disagree by achieving their own policy objectives within their own jurisdictions." J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 310 (2009).

In short, *stare decisis* should not deter the Court from revisiting its prior abortion jurisprudence,

and ensuring that the Court's application of constitutional principles is correct.

III. *STARE DECISIS* IS NOT A MATERIAL ISSUE TO THE EXTENT THE COURT DETERMINES MERELY TO MODIFY ITS APPROACH TO ABORTION CASES

To the extent the Court determines not to overrule its prior cases in whole or in substantial part, and instead determines merely to modify its approach to abortion cases, there is of course no material *stare decisis* concern. As the Court has recognized, a precedent's "uncertain status" and "lack of clarity" "undermine the force of reliance" on such precedent. *Janus*, 138 S. Ct. at 2485. Where the Court's approach to an issue has been evolving, further steps in that process do not substantially implicate *stare decisis*. *See, e.g.*, *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019) (the fact that a doctrine "continues to evolve" is a "factor undermining the force of *stare decisis*"). Such is the case here, because the Court's abortion jurisprudence has always been evolving.

For example, *Roe* adopted an "elaborate but rigid" trimester framework that *Casey* later eschewed. *Casey*, 505 U.S. at 872. *Casey* also overruled some of the Court's post-*Roe* abortion cases. *See id.* at 882 (overruling *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983)).

Subsequently, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016), and the

plurality opinion in *June Medical*, 140 S. Ct. at 2112, 2120, interpreted *Casey* to require consideration not only of whether a regulation imposes an undue burden, but also the strength of the State's interest. This prompted some Members of the Court to argue that these cases adopted a new standard altogether. *See Whole Woman's Health*, 136 S. Ct. 2292, 2324-26 (2016) (Thomas, J., dissenting); *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment); *id.* at 2153 (Alito, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).

And the Court's approach to abortion cases remains uncertain even after those decisions. In fact, most of the Members of the Court appear to have rejected the standard applied in *Whole Woman's Health* and *June Medical*. *See June Medical*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting) ("Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard."); *see also id.* at 2152 (Thomas, J., dissenting) ("[T]he fact that no five Justices can agree on the proper interpretation of our precedents today evinces that our abortion jurisprudence remains in a state of utter entropy.").

Given this continuing evolution, any "'arguments for reliance based on [the precedents'] clarity are misplaced.'" *Janus*, 138 S. Ct. at 2484 (quoting *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2086 (2018)). To be sure, the parties in this and other pending cases may be affected by modification of the Court's approach, but such "case-specific" interests "are not among the reliance interests that [sh]ould persuade [the Court] to adhere to an incorrect

resolution of an important constitutional question." *Franchise Tax Bd.*, 139 S. Ct. at 1499.

Given that *stare decisis* is at its weakest when the Court interprets the Constitution, particularly on matters involving innocent life or death, *stare decisis* should pose no hurdle to the Court modifying its approach here—or, as explained above, wholly overruling its prior cases.

CONCLUSION

For the reasons stated above and in the briefing of Petitioners, *stare decisis* should not deter the Court from ensuring that it correctly answers the important constitutional question presented by this case.

Respectfully submitted,

DANIELLE M. WHITE
Counsel of Record
HEARTBEAT INTERNATIONAL, INC.
5000 Arlington Centre
Suite 2277
Columbus, Ohio 43220
(614) 885-7577
dwhite@heartbeatinternational.org

Counsel for Amicus Curiae
Heartbeat International, Inc.

JULY 29, 2021