No. 19-1392

IN THE
Supreme Court of the United States

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

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF INTERNATIONAL AND COMPARATIVE LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are international and comparative legal scholars, whose scholarship covers a wide range of topics, including issues of equality, health, abortion and comparative law. *Amici* are experts in foreign, international, and comparative law, and have published extensively in these fields. *Amici* submit this brief to provide the Court with a comparative analysis of international abortion laws in support of Respondents and to correct the grossly misleading presentation of comparative abortion law offered by the Petitioners and their *amici*.

Amici are the following scholars:[2]

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[1] This brief is filed with the written consent of all of the parties. Pursuant to Rule 37.6, counsel for *amici curiae* authored this brief in whole; no party's counsel authored, in whole or in part, this brief; and no person or entity other than *amicus* and its counsel contributed monetarily to preparing or submitting this brief.

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SUMMARY OF THE ARGUMENT

In asking the Court to uphold the Mississippi Act, Petitioners seek to eliminate decades of precedent protecting access to abortion up to viability established in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Petitioners argue that overturning *Roe* and *Casey* would bring U.S. abortion laws in line with abortion laws of other countries. This argument is based on an oversimplified and cursory review of foreign abortion laws, which looks only to time limits on abortion access without any regard for the broader context and application of those laws. The Court should reject this analysis, as it is neither relevant nor compelling; rather, it is misleading. If the Court is to consider foreign abortion laws, it should do so—as it has in other contexts—by looking to the laws of comparable jurisdictions, including their application, and the direction in which these countries are trending. A review of that far more pertinent universe of laws reveals that overturning *Roe* and *Casey* would be deeply out of step with the laws of comparable jurisdictions, which, in turn, form part of a broad global trend of liberalization.

First, this Court has recognized that laws of foreign jurisdictions with similar legal traditions and political systems can provide useful guidance, including in the context of the constitutional protection of abortion. Because laws are not enacted or enforced in a vacuum, comparative law theory and methodology prioritizes the laws and regulations of nations

that share the United States' legal traditions, as well as other liberal democracies. As such, American courts have afforded greater weight to the laws of jurisdictions such as Canada and the United Kingdom.

A comparison of U.S. abortion laws with those of common-law, liberal democracies demonstrates that the U.S. viability standard (approximately 23-24 weeks of pregnancy) established in *Roe* and *Casey* is consistent with comparable jurisdictions' abortion laws, which provide for abortion access up to or around viability.

Second, a methodologically rigorous comparative law analysis looks beyond a single component of the law. Looking at abortion laws in their broader context reveals that comparable countries which, on their face, set shorter time limits on abortion access than the United States, often provide greater flexibility in obtaining abortions after those limits pass, with exceptions for a broad range of circumstances. A superficial examination of gestational time limits misconstrues the reality of access to abortion in these countries. Unlike the United States, many foreign jurisdictions also provide greater support for reproductive healthcare, including access to contraception and abortion through government-funded healthcare systems, at no or limited cost to the patient.

Third, since this Court reaffirmed the Constitutional right to abortion in *Casey*, the global trend towards liberalization has gained momentum, and an increasing number of countries have expanded

access to abortion through their laws, jurisprudence, and policies. Over 50 countries have liberalized their abortion laws in the past 25 years, and a number of countries have explicitly done so in recognition that reproductive rights are protected under international human rights law.

Thus, finding in favor of Petitioners would make the United States one of the very few examples of *regression* with respect to abortion rights, and more broadly, women's autonomy and equality.

Finally, if the United States were to regressively overturn *Roe* and *Casey*, it would find itself in the company of countries whose political systems are moving away from the values espoused by the United States—those like Poland, whose "quality of democratic governance . . . continue[s] to deteriorate," due to diminished judicial independence and increased extremist and illiberal discourse, and Nicaragua, whose authoritarian political system is characterized by "significant human rights issues," including restrictions on freedoms of expression, association, and assembly.[3] Indeed, if the constitutional protections established in *Roe* and *Casey* were overturned, up to 24 states in the United States could seek to ban

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[3] *See* Anna Wójcik & Miłosz Wiatrowski, *Nations in Transit 2020: Poland*, Freedom House, https://freedomhouse.org/country/poland/nations-transit/2020 (last visited Sept. 18, 2021); *see also* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Nicaragua 2020 Human Rights Report 1 (Mar. 30, 2021).

abortion outright,[4] causing this country to truly become an outlier among comparable liberal democracies with respect to the protection of women's autonomy and reproductive rights.

Consequently, we respectfully ask the Court to affirm the lower court's decision, and find in favor of Respondents.

ARGUMENT

A. A Rigorous Comparative Law Analysis of Foreign Abortion Laws Provides This Court with a Useful Perspective.

1. This Court has long recognized the importance and utility of comparative law analysis when interpreting the fundamental rights protected by the Constitution.

This Court, and American courts in general, have long looked to foreign and international laws when interpreting fundamental rights—including the right to abortion—protected by the U.S. Constitution. They do this because foreign and international laws can guide the Court to the shared fundamental values that underpin Constitutional law and provide solutions to common constitutional problems. *See,*

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[4] *What If Roe Fell?*, Center for Reproductive Rights, 9 (Aug. 28, 2019) https://reproductiverights.org/sites/default/files/2019-11/USP-2019-WIRF-Report-Web.pdf.

e.g., *Roe*, 410 U.S. at 132–38 (looking to English common law principles and statutes as guidance for its interpretation of abortion rights); *Casey*, 505 U.S. at 945 n.1 (citing opinions from the West German Constitutional and Canadian Supreme Courts on abortion access).

In conducting comparative law analysis, American courts afford particular weight to the laws of liberal, democratic states. *See* Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 80, 114 (2006) (noting the Supreme Court's "longstanding jurisprudential tradition of looking to practices in Western Europe to help illuminate U.S. understandings of 'liberty'"); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 Stan. L. Rev. 131, 159–60 (2006) ("[A]n ideal exercise in comparative constitutionalism would survey all countries . . . and place more weight on the legal materials of democracies than on those nondemocracies without neglecting the latter."). Indeed, "[p]ractices of countries with commitments to human rights, democracy, and the rule of law roughly comparable to ours are likely to have a more positive persuasive value as to the . . . implications of basic constitutional commitments." Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109, 125–26 (2005), *reprinted in Comparative Constitutional Law* (Vicki C. Jackson and Mila Versteeg eds., 2020).

Petitioners have acknowledged and accepted the value of comparative law analysis in determining the protection that should be afforded to abortion rights

under the U.S. Constitution by citing to foreign abortion laws in their own submissions. *See* Petrs. Br. at 31; *see also* Petrs. Writ of Cert. at 25. However, in presenting a cursory tally of foreign abortion law time limits, Petitioners present a grossly misleading narrative that the scope of abortion rights in the United States is at odds with most other nations. This analysis wholly ignores the reality of abortion laws worldwide: that comparable liberal states provide broad legal access to abortion up to or around viability, that other jurisdictions with earlier time limits actually extend abortion access later into pregnancy through broad legal exceptions that apply in a range of circumstances, and that the broad global trend is towards liberalizing access to abortion.

2. An instructive comparative law analysis considers foreign abortion laws and regulations in the context of the jurisdiction's legal, political, and social systems.

A comparative law analysis that provides instructive guidance to this Court does not divorce legal rules from the broader legal, political, and social systems in which they apply.[5] Instead, it requires "consider[ing] rules in context, *i.e.*, at least within existent procedural and institutional frameworks,"

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[5] *See* Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 207 U. Ill. L. Rev. 637, 653–54 (2007).

their "institutional origin[s]" and their "socio-economic and cultural environments."[6] The comparison must also look to "the application and interpretation of rules and their true force and effect, including perhaps, their impotence,"[7] in order to identify suitable comparators.

A rudimentary tally of time limits on abortion access that only looks to one aspect of a law, of the kind cited by Petitioners, ignores the structures that animate the lived experience of that law, and which determine the realization of the rights or interests underlying that law.

In the context of abortion rights in particular, a state's "constitutional provisions and criminal prohibitions do not exclusively define [the] 'law.'"[8] On-the-ground practices and "how these rules are enacted every day," beyond the formal laws themselves, shape the substantive content of abortion law.[9] For

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[6] *See, e.g.*, Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 Am. J. Comp. L. 671, 679–80 (2002); P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 Tul. L. Rev. 165, 168 (1994) (comparison requires an understanding of "how [laws] function . . . and more broadly, the social and economic structures and the ethical and political values that support them"); Jackson, *supra*, at 125 ("[T]he persuasive value of a foreign source will depend on a combination of its reasoning, the comparability of contexts, and its institutional origin.").

[7] *See* Reimann, *supra*, at 679.

[8] *See, e.g.*, Rachel Rebouché, *A Functionalist Approach to Comparative Abortion Law*, *in Abortion Law in Transnational Perspective: Cases and Controversies* 98, 113 (Rebecca J. Cook et al. eds., 2014).

[9] *Id.* at 113.

example, two statutes providing for abortion up to viability are not identical if one jurisdiction provides robust financial and structural support for reproductive healthcare and the other does not. Conversely, two statutes establishing different time limits for abortion access can provide similar support for reproductive choice if the nominally more restrictive statute includes broad and accessible exceptions beyond that time limit.

Indeed, looking beyond the mere time limits in a particular jurisdiction's abortion laws demonstrates that many countries that have shorter time limits than the U.S. viability standard allow liberal exceptions after those time limits pass; consequently, access to abortion in those jurisdictions is much broader than the time limits suggest. Moreover, many of these countries also provide greater support for access to abortion care through government-funded reproductive healthcare, greater access to abortion clinics, and universal coverage for contraceptives.

B. Petitioners' Request to Overturn *Roe v. Wade* and *Planned Parenthood v. Casey* Is Inconsistent with Abortion Laws in Comparable Liberal States with Similar Legal Traditions and Political Systems

A comparative law analysis that prioritizes nations with similar legal traditions and political systems that protect "human rights, democracy, and the rule of law" demonstrates that those jurisdictions broadly respect the right to access of abortion in line

with the viability standard well established under U.S. constitutional jurisprudence.[10]

Furthermore, courts and legislatures in these comparable jurisdictions have invoked principles common to our own understanding of the Fourteenth Amendment to support their abortion laws: among them, the individual liberties to privacy and reproductive autonomy of the pregnant person. This recognition mirrors the concerns this Court considered when deciding *Roe*, *Casey*, and the long line of cases establishing the constitutional right to abortion in the United States.

1. Jurisdictions with legal traditions similar to the United States provide broad legal access to abortion at or around viability.

Jurisdictions with legal traditions similar to the United States—such as Canada, the United Kingdom, New South Wales in Australia, and New Zealand—permit abortion up to or around viability. Beyond their broadly permissive laws, these countries also support abortion rights and reproductive decision-making through universal healthcare, access to abortion services, and access to contraception.

a. Canada

Canada has broadly legalized abortion under the constitutional right to the security of the person. In

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[10] Jackson, *supra*, at 125–26.

R. v. Morgentaler, [1988] 1 SCR 30, the Canadian Supreme Court found that a Criminal Code provision, which prohibited abortion but for one exception[11], violated the right to life, liberty, and security of the person provided for in section 7 of the Canadian Charter of Rights and Freedoms. Because the law "[f]orc[ed]" a pregnant person, "by threat of criminal sanction, to carry a foetus to term" unless certain medical criteria unrelated to the person's "own priorities and aspirations" are met, it "profound[ly] interfere[d]" with the individual right to security of the person and non-interference with bodily autonomy. Moreover, the Supreme Court found that certain additional procedural barriers to abortion access in the Criminal Code unconstitutionally and unjustifiably increased the risk of physical and psychological harm to the pregnant person.

Post-*Morgentaler*, there are no criminal law restrictions on abortion in Canada.

In addition to its unrestricted legal framework supporting the right to abortion, Canada provides robust support for reproductive healthcare. Abortion, including medication abortion, is fully funded through universal health care. Medication abortion is widely available and can be dispensed directly to patients by prescribing health professionals who do

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[11] A doctor could perform an abortion in an accredited hospital if the procedure was approved by the institution's therapeutic abortion committee.

not have to be doctors, including pharmacists and nurse practitioners.[12]

b. United Kingdom

In the United Kingdom (except Northern Ireland[13], which is discussed in further detail in Section D.1, below), the Abortion Act of 1967 provides that patients may obtain abortions up to the 24th week of pregnancy if continuation of the pregnancy involves "injury to the physical or mental health" of the patient or any of her existing children, taking into account the pregnant person's "actual or reasonably foreseeable environment," and after 24 weeks if there is potential for "rare permanent injury" to the patient's physical or mental health.

The risk assessment process required for abortions up to 24 weeks of pregnancy requires authorization from two doctors. This assessment is a "legal duty," but in practice, doctors have broad discretion to interpret risk of injury to the physical or mental health to the patient, provided that the determination is independent and made in good faith.[14] More-

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[12] *See Health Canada Eases Restrictions on Abortion Pill Mifegymiso*, CTV News (Nov. 7, 2017, 2:34 PM), https://www.ctvnews.ca/mobile/health/health-canada-eases-restrictions-on-abortion-pill-mifegymiso-1.3667422.

[13] The Abortion Act of 1967 was never extended to Northern Ireland.

[14] *See Abortion and Your Rights: Understanding the UK Laws on Abortion, and Your Rights*, MSI Reproductive Choices UK, https://www.msichoices.org.uk/abortion-services/abortion-and-your-rights/ (last visited Sept. 18, 2021); *Britain's Abortion*

over, the provision in the Abortion Act providing for consideration of the pregnant person's "actual or reasonably foreseeable environment" gives doctors significant latitude to consider the person's wider social circumstances—including income, housing situation, and support network—in their assessment.[15] There is no legal requirement for doctors to see or examine a patient in person prior to certifying that they meet the legal requirements for abortion.[16] Although data on risk assessments up to 24 weeks is unavailable, studies have found that first trimester abortions are almost always permitted.[17]

Notably, in 2008 the U.K. Parliament soundly rejected efforts to reduce the 24-week limit to 22 or 20 weeks. *See* 476 Parl Deb HC (20 May 2008) col. 272–74 (UK).

In addition to this legal framework, the United Kingdom also provides support for access to reproductive healthcare, enabling deeper realization of reproductive choice. Health care in England and Wales is universal. In 2020, 99% of all abortions in England and Wales were fully funded by the Nation-

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Law: What it Says, and Why, British Pregnancy Advisory Service, 6–7 (May 2013), http://www.reproductivereview.org/images/uploads/Britains_abortion_law.pdf.

15 British Pregnancy Advisory Service, *supra*, at 7.

16 *Id.* at 9.

17 *See Access and Procedure*, House of Commons Select Comm. on Sci. & Tech., 2006–07 (Oct. 29, 2007), https://publications.parliament.uk/pa/cm200607/cmselect/cmsctech/1045/104507.htm#note107.

al Health Service ("NHS").[18] The U.K. government also funds abortions for residents of Northern Ireland and covers travel costs in cases of hardship.[19] Contraception is fully subsidized for most people in the United Kingdom.[20]

c. New South Wales, Australia

Recent changes to abortion laws in New South Wales, Australia reinforce the trend towards greater access to abortion care, including at the sub-national level.[21] In 2019, the New South Wales Abortion Law Reform Act removed abortion from the Crimes Act (1900), to broadly permit abortion without restrictions up to the 22nd week of pregnancy, joining other Australian states, such as Victoria, Queensland, and the Northern Territory in liberalizing access to abortion.[22] The First Reading introducing the bill to the New South Wales Parliament recognized that achieving the "best outcomes" in reproductive

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18 *See Abortion Statistics, England and Wales: 2020*, U.K. Dep't of Health & Social Care (Aug. 31, 2021), https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2020/abortion-statistics-england-and-wales-2020.

19 *Id.*

20 *See Getting Contraception*, NHS, https://www.nhs.uk/live-well/sexual-health/getting-contraception/ (last visited Sept. 18, 2021).

21 *See Principle 4: Federalism*, Australian Constitution Centre, http://www.australianconstitutioncentre.org.au/federalism.html (last visited Sept. 18, 2021).

22 In March 2021, South Australia also legalized abortion up to 22 weeks and 6 days of pregnancy. *See Termination of Pregnancy Act 2021* (SA) s 5(1)(a).

healthcare requires that the pregnant person's "right to privacy and autonomy in decisions . . . are protected."[23] In line with this sentiment, the Act also preserves the right to seek abortion after 22 weeks, subject to certain conditions such as consultation with two medical practitioners who are required to offer counseling, obtaining informed consent, and determining whether there are "sufficient grounds" for the abortion.

Abortions are also available at many public hospitals, as well as private clinics and clinics run by NGOs in New South Wales, and no referral is necessary.

d. New Zealand

In 2020, New Zealand liberalized access to abortion through the Abortion Legislation Act, acknowledging that the prior criminal law was "inconsistent" with "respect [for individual] autonomy" and affirming the need for reform that recognized the rights to life and privacy, among others.[24] Under the Abortion Legislation Act, abortion is broadly legal in New Zealand without restriction until 20 weeks of pregnancy and afterwards if a health practitioner "reasonably believes" that abortion is "clinically appropriate,"

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[23] *See* Legislative Assembly Hansard (31 July 2019), Reproductive Health Care Reform Bill 2019, First Reading (Mr. Alex Greenwich, Sydney, 10:26).

[24] *See* Contraception, Sterilisation, and Abortion Act (1977), ss 29–33 (referring to Crimes Act 1961, s 187A, subs 1, 3); Law Comm'n, *Alternative Approaches to Abortion Law* (NZLC MB4, 2018) at 51–56, 94.

considering the pregnant person's "physical . . . and mental health" and "overall well-being" and consults with at least one other qualified practitioner. Abortion Legislation Act (2020), pt 1, ss 10–11. The law forbids abortion providers from requiring a referral or counseling. *Id.* ss 12–13.

In addition to legalizing abortion access, the Abortion Legislation Act also mandates that the Minister of Health take "reasonable steps" to ensure that abortion services "are available throughout New Zealand." Pt 1, s 16. The Parliament's implementation directive reinforces an already-supportive system of reproductive healthcare in New Zealand. Health coverage in New Zealand is universal, under regionally administered plans.[25] Abortion is free for any pregnant person eligible for publicly funded healthcare, and certain contraceptives are also fully funded.

2. Other liberal democratic states also provide access to abortion at or around viability.

In addition to the liberal states with which the United States shares a legal tradition, other liberal states with which the United States shares a "socie-

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[25] *See International Health Care System Profiles: New Zealand*, The Commonwealth Fund (Jun. 5, 2020), https://www.commonwealthfund.org/international-health-policy-center/countries/new-zealand.

tal affinity" also provide broad access to abortion at or around viability.[26]

a. The Netherlands

Abortion in the Netherlands is broadly legal, subject to certain prerequisites, up to the point where the fetus has reasonable potential to survive outside the pregnant person's body, generally understood to be up to 24 weeks of pregnancy. Termination of Pregnancy Act (1981); *see also* Criminal Code §§ 82a, 296. Prior to the passage of the Act, abortion was only legal in the Netherlands if the life of the woman was in danger. The legislative history of the Act reveals that the Dutch Parliament explicitly recognized the importance of "utmost care and . . . awareness" for pregnant people.[27]

Furthermore, healthcare is provided under a mandatory insurance scheme which is primarily publicly funded,[28] and abortion is fully funded under ei-

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[26] *See* Rex D. Glensy, *Which Countries Count? Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 Va. J. Int'l L. 357, 430 (2005).

[27] *See* Sjef Gevers, *Joint Committee on the Eighth Amendment of the Constitution Presentation – Abortion in the Netherlands: Law and Practice* (Nov. 22, 2017), https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_the_eighth_amendment_of_the_constitution/submissions/2017/2017-11-23_opening-statement-professor-sjef-gevers-and-professor-eva-pajkrt_en.pdf.

[28] *See International Health Care System Profiles: Netherlands*, The Commonwealth Fund (June 5, 2020), https://www.commonwealthfund.org/international-health-policy-center/countries/Netherlands.

ther the Exceptional Medical Expenses Act or by health insurance.[29]

b. Iceland

In 2019, Iceland passed the Termination of Pregnancy Act with the stated legislative purpose to "ensure the right to self-determination" of pregnant women. Termination of Pregnancy Act No. 43/2019 (2019), art. 1, Greinargerð [Summary] § 6. The law guarantees the right to abortion without restrictions until 22 weeks of pregnancy. *Id.* art. 4. Abortion is also available after 22 weeks if the life of the woman is in danger or if the fetus is not considered viable. *Id.* The Act provides for certain measures to "ensure" that the pregnant person can exercise her right to abortion and mandates that information and counseling provided to women seeking abortions "respect human rights and human dignity." *Id.* art. 8.

The Termination of Pregnancy Act also ensures that "[a]ccess to healthcare services in relation to [abortions] shall be guaranteed in . . . Iceland . . . at least up to the end of the 12th week of pregnancy." *Id.* art. 6. Furthermore, Iceland's national health insurance program provides

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[29] *See I Am Thinking About Getting an Abortion. What Should I do?*, Government of the Netherlands, https://www.government.nl/topics/abortion/question-and-answer/i-am-thinking-about-getting-an-abortion-what-should-i-do (last visited Sept. 18, 2021).

universal health care, which includes full coverage for abortion. *Id*. art. 9.

3. Countries with complete or near-complete abortion bans should not be considered in a comparative analysis to inform American abortion law.

Not all foreign jurisdictions' abortion laws provide suitable comparative models that should be considered in a comparative law analysis in the United States. *See* Cleveland, *supra*, at 81–85 (noting that the Supreme Court has traditionally looked only to the practices of "free" societies, whose values are consistent with American constitutional law).

Countries that completely ban abortions or only permit abortions under very limited circumstances are invalid comparators because their laws conflict with the fundamental right to liberty and abortion recognized under American constitutional law pursuant to *Roe* and *Casey*. *See* Honduras Penal Code (2017), arts. 126, 127, 128, 132 (prohibiting abortion in all circumstances, with no exceptions, even cases of pregnancies endangering the life of the woman, those resulting from rape or incest, or those involving fetal impairment); Philippines Revised Penal Code, Act. No. 3815 (1930), arts. 265–59 (same). Moreover, these laws result in outcomes which are fundamentally inconsistent with American social and political values. *See* Cleveland, *supra*, at 80–81 (the Supreme Court's substantive due process analysis has prioritized "international opinion for *common*

standards of liberty") (emphasis added). In many of these countries, pregnant people routinely die or suffer lifelong disabilities from unsafe abortions.[30] In some countries, women and healthcare providers are imprisoned for miscarriages and illegal abortions.[31]

Other countries have laws on abortion grounded on religion, which are incompatible with American constitutional law. *See, e.g.*, Somalia, Saudi Arabia, Yemen, Andorra, El Salvador.[32] Laws from these nations are antithetical to our constitution and are invalid comparators or "anti-models," which produce outcomes that this Court should consciously reject.[33]

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[30] *See, e.g.*, A.J. Adler et al., *Incidence of severe acute maternal morbidity associated with abortion: a systematic review*, 17 Tropical Med. & Int'l Health 177 (2012).

[31] *See, e.g.*, Int'l Campaign for Women's Right to Safe Abortion, *Submission to the OHCHR International Working Group on Deprivation of Liberty of Women and Girls Related to Abortion* (2018).

[32] Somalia Provisional Constitution (2012), arts. 2, 14 (establishing Islam as the state religion and banning abortion on that basis); Saudi Arabia Basic Law of Governance No. A/90 (1992), art. 1; Yemen Republican Decree Concerning Crimes and Penalties, Law No. 12 (1994), art. 240; Meg Bernhard, *Andorra's Abortion Rights Revolution*, Politico (Oct. 22, 2019), https://www.politico.eu/article/andorras-abortion-rights-revolution/; El Salvador Criminal Code, Decree No. 1030 (1997), arts. 133–37.

[33] *See* Heinz Klug, *Model and Anti-Model: The United States Constitution and the Rise of World Constitutionalism,* 2000 Wis. L. Rev. 597 (2000).

C. Countries with Shorter Abortion Access Time Limits Than the United States Often Have Broad Exceptions After Those Limits Expire, Legally Providing For Abortion Access Later in Pregnancy.

Engaging in a superficial "tallying" of abortion law time limits provides a misleading picture of those laws. A nuanced comparison of foreign abortion laws reveals that many countries that ostensibly have shorter time limits to abortion access than the United States provide for liberal exceptions after those limits expire, allowing for increased access to abortions *later* in pregnancy. Many of these countries also provide greater support for access to abortion care through government-funded reproductive healthcare, access to abortion clinics, and universal coverage for contraceptives. In contrast, the Mississippi Act imposes a ban on abortions after 15 weeks and only allows exceptions beyond that limit in very rare circumstances—effectively foreclosing the legal availability of nearly all later pregnancy abortions.

This is not the case in many foreign jurisdictions that appear to provide shorter time limits for abortion access than the viability standard in the United States. For example, although Danish law nominally restricts abortion after 12 weeks of pregnancy, it provides flexible exceptions for physical and mental health, taking into account the burden on the pregnant person with reference to social and economic factors such as the person's interests, household, age, occupation, housing, and income. Other exceptions

relate to grave risks to the pregnant person's life or their physical or mental health, fetal health, and situations where pregnancy is related to a criminal offense, such as rape, statutory rape, or incest. Law No. 350 on the Interruption of Pregnancy (1973), Part A, pp. 993–95; Consolidated Act No. 903 (2019), pp. 92–104.

France has amended its abortion laws over the past few years, removing many previous obstacles to abortion care. Today, abortions in France are widely available up to the 12th week of pregnancy, and are permissible after 12 weeks if two physicians certify that the abortion is necessary to prevent grave permanent injury to the physical or mental health of the pregnant person, if there is risk to life of the person, or in cases where the fetus suffers from severe incurable illness. Public Health Code (2011).

France fully funds all abortions through the country's social security system.[34] Its public health law was also expanded in 2016 to allow midwives to perform certain kinds of abortions, further increasing access to abortion care. Law on the Modernization of the Health System No. 2016-41 (2016). Recently, France fully funded birth control for all women up to 25 years old.[35]

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[34] *See The Policy on Gender Equality in France*, European Parliament Directorate-General for Internal Policies, Policy Department: Citizen's Rights and Constitutional Affairs (2015), https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/510024/IPOL_IDA(2015)510024_EN.pdf.

[35] *See France Extends Free Contraception Benefits to Women up to 25 Years of Age*, France 24 (Sep. 9, 2021),

Germany[36] allows abortions up to the 12th week of pregnancy, but provides for a number of exceptions under which abortion is legal up to the 22nd week of pregnancy. These exceptions include when—"*from the [pregnant person's] point of view*"—abortion is "necessary to avert a danger to the life or . . . grave injury to the mental or physical health of the pregnant [person]," taking into account her "*present and future* living conditions." Penal Code, § 218(a) (emphasis added).

Other countries such as Switzerland, Estonia, Armenia, Georgia, Kazakhstan, and Tajikistan impose a similar 12-week limit but provide exceptions for the risks to the pregnant person's life, physical or mental health of the pregnant person, or other social reasons. Switzerland Criminal Code, art. 119; Estonia Termination of Pregnancy and Sterilization Act (1998), 2.6; Armenia Law on Reproductive Health and Rights to Reproduction No. 474 (2002), art. 10.1.2; Georgia Law on Health Care (2000), ch. XXVIII, arts. 139-40; Kazakhstan Law on Reproductive Rights No. 565-II (2004); Tajikistan Law on Reproductive Health and Reproductive Rights (2002).

An analysis that looks to the entirety of many countries' abortion laws reveals that access to abortion is broader than the nominal time limits in those

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https://www.france24.com/en/france/20210909-france-extends-free-contraception-benefits-to-women-up-to-25-years-of-age.

[36] West Germany's abortion laws, which were shaped during World War II, were more restrictive than East Germany's, and became the standard after reunification in 1990.

laws alone suggest. Although these jurisdictions establish shorter time limits for accessing abortion care than the United States, all of these jurisdictions provide for broad exceptions—which recognize and expand access to critical abortion needs after 12 weeks gestation—that do not exist under Mississippi law.

D. Overturning *Roe v. Wade* and *Planned Parenthood v. Casey* Would Put the United States at Odds with the Global Trend Towards Liberalization of Abortion Laws and International Human Rights Law.

Petitioners' cursory "analysis" also masks the reality that there is an overwhelming global trend towards *greater* liberalization of abortion laws and increased access to abortion care. This global progress towards liberalization conforms with international human rights protections for sexual and reproductive autonomy.

States and international bodies increasingly recognize that reproductive rights are human rights. International human rights bodies have repeatedly found that ensuring access to abortion and reproductive healthcare, and promoting reproductive autonomy are critical to fulfilling fundamental human rights obligations and ensuring women's rights to non-discrimination and equal participation.[37] States

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[37] The treaty bodies charged with implementing international human rights conventions—including the ICCPR, CEDAW, ICESCR, CAT—have determined that access to abortion and reproductive autonomy are critical to ensuring the right to

in turn fulfill their human rights obligations by protecting sexual and reproductive health services for women through legislation and judicial decisions. Many countries also promote sustainable development goals on gender equality and the empowerment of women and girls, which include universal access to sexual and reproductive health. *See Women's Access to Safe Abortion in the 2030 Agenda for Sustainable Development: Advancing Maternal Health, Gender Equality, and Reproductive Rights*, Ipas (2015), https://www.ipas.org/wp-content/uploads/2020/07/SDAFCTE15-2030AgendaforSustainableDevelopment.pdf.

1. There is a global trend towards liberalizing abortion laws.

While many of the appropriate comparator jurisdictions discussed above have permitted broad access to abortion for much of the latter half of the 20th century, over 50 countries have liberalized their abortion laws in the past 25 years, including Angola, Argentina, Australia, Benin, Bhutan, Central African Republic, Chad, Chile, Columbia, Cyprus, Democratic Republic of Congo, Ecuador, Eritrea, Iceland, India, Iran, Ireland, Kenya, Lesotho, Luxemburg,

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equality and nondiscrimination, the right to privacy, the right to life, the right to health, and the right to freedom from torture and cruel, inhuman and degrading treatment. *See* Brief of United Nations Mandate Holders as *Amici Curiae* in Support of Respondents § II.

Mali, Mauritius, Mexico, Micronesia, Monaco, Mozambique, Nepal, Niger, North Macedonia, Portugal, Rwanda, Sao Tome and Principe, Somalia, South Africa, South Korea, Spain, St. Lucia, Swaziland, Switzerland, Thailand, Togo, the United Kingdom (Northern Ireland), and Uruguay.[38] At least "15 of these countries reformed their laws to allow abortion on request," and at least "18 countries overturned complete bans on abortion, permitting abortions in specific circumstances."[39] Moreover, there is "significant geographic diversity in abortion law reform," with nearly half the countries that liberalized their laws located in Africa, and others in Asia, Europe, and Latin America.[40]

In addition to greater liberalization of abortion laws, a survey of abortion policies undertaken by the United Nations Department of Economic and Social Affairs found that many countries have also implemented measures to improve access to safe abortion services.[41] The same report also found that countries increased access to comprehensive sexual and repro-

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[38] *See Accelerating Progress: Liberalization of Abortion Laws Since ICPD*, Center for Reproductive Rights (Dec. 2020), https://reproductiverights.org/wp-content/uploads/2020/12/World-Abortion-Map-AcceleratingProgress.pdf.

[39] *Id*.

[40] *Id*.

[41] *See Abortion Policies and Reproductive Health Around the World*, U.N. Department of Economic and Social Affairs (2014), https://www.un.org/en/development/desa/population/publications/pdf/policy/AbortionPoliciesReproductiveHealth.pdf.

ductive health services, regardless of marital status and age.[42]

While progress in some states has been incremental, the overwhelming trend has been to allow pregnant individuals greater legal access to abortions. The following jurisdictions are four examples of liberal democracies which have increased access to abortion in recent years.

a. Ireland

Ireland overturned its restrictive abortion laws pursuant to a 2018 referendum, the result of changing public opinion on abortion and prominent condemnation from the European Court of Human Rights ("ECtHR") and the United Nations Human Rights Committee ("UNHRC"), which found that Ireland's restrictions on abortion violated human rights protections.

Previously, Ireland banned abortion in almost all circumstances. Pursuant to a constitutional amendment passed in 1983, abortion was legally permitted only in cases where the woman's life was in danger. Constitution (1937), art. 40.3.3 (amended 2018). In 2010, the ECtHR found that Ireland's failure to provide an "accessible and effective procedure" for availing of this limited right to abortion violated Article 8 of the European Convention on Human Rights ("ECHR"), which provides for the right to respect for private and family life. *A, B & C v. Ireland*,

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42 *Id.*

2010-VI Eur. Ct. H.R. 185. Following that ruling, the legislature passed the Protection of Life During Pregnancy Act 2013, which clarified that abortion was lawful where there was "real and substantial risk of loss of the woman's life from physical illness" that could only be averted by an abortion.[43] However, the UNHRC found that notwithstanding this amendment, Ireland's abortion law *still* violated international human rights law, which was one of the factors that led to the 2018 referendum. *See* UNHRC, Comm. No. 2425/2014, *Whelan v. Ireland*, U.N. Doc. CCPR/ C/119/D/2425/2014 (2017); UNHRC, Comm. No. 2324/2013, *Mellet v. Ireland*, U.N. Doc. CCPR/ C/116/D/2324/2013 (2016).

b. Northern Ireland

Abortion was also recently legalized in Northern Ireland. Prior to 2019, abortions were permitted only if the pregnant person's life was at risk, or if there was risk of permanent or serious damage to the pregnant person's mental or physical health. This law gave rise to years of litigation undertaken by the Northern Ireland Human Rights Commission, as well as one pregnant individual impacted by the law. *See In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27 (appeal taken from Northern Ireland) (dismissed on standing

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[43] Protection of Life During Pregnancy Act No. 35/P.2 S.7/2013 (2013).

grounds, but acknowledging that existing law was incompatible with the United Kingdom's international human rights obligations); *see also In re Sarah Jane Ewart Application for Judicial Review* [2019] NIQB 88 (finding that the ban on abortion was unlawful because it breached the United Kingdom's human rights commitments).

In 2019, the U.K. Parliament voted to extend access to abortion to Northern Ireland, bringing the region into line with the rest of the United Kingdom, but with a more limited gestational time frame. Executive Formulation etc. Act (2019), c. 22, § 9. Notably, the legislative history for this Act cites to a report by CEDAW which had specifically called on the United Kingdom to extend abortion access to Northern Ireland, again demonstrating the importance of international human rights obligations in the abortion context.

c. Nepal

Nepal has been rapidly moving towards greater liberalization, in part to reduce maternal deaths from unsafe abortions. These efforts follow Nepal's involvement in the World Health Organization's Safe Motherhood Initiative, which seeks to save women's lives and reduce maternal deaths and morbidity internationally. *See* Shyam Thapa, *Abortion Law in Nepal: The Road to Reform*, Reprod. Health Matters, 12 Supp. 24, at 85–94 (2004). Previously, abortion was prohibited without exception, but in 2002, Nepal's Parliament amended its national law to legalize

abortion up to the 12th week of pregnancy, or 18 weeks for pregnancies due to rape or incest.[44]

In 2009, the Supreme Court of Nepal decided *Lakshmi Dhikta v. Nepal*, which found that the government had failed to ensure the affordability of abortion services, and instructed the government to take steps to guarantee that no woman is denied an abortion solely on financial grounds. The case cited to the interim Nepalese Constitution which guaranteed that "every woman shall have the right to reproductive health and rights relating to reproduction" and interpreted access to abortion as an integral part of that constitutional right.

The decision catalyzed the passage of Nepal's current abortion law, the 2018 Right to Safe Motherhood and Reproductive Health Act.[45] The Act recognizes a woman's right to an abortion as a reproductive right and provides—free of charge—reproductive healthcare services at all government

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[44] In 2017, the "Muluki Ain" or Country Code of containing the amended law legalizing abortion was replaced by separate Civil, Penal, and Procedural Codes. The abortion-related provisions of the Country Code are now contained within the Penal Code, part 1.2, ch. 13, sec. 188. *See Decriminalization of Abortion in Nepal: Imperative to Uphold Women's Rights*, Center for Reproductive Rights (June 2021), https://reproductiverights.org/wp-content/uploads/2021/06/Decriminalization-of-Abortion-in-Nepal_02June021_-Final-Version-1.pdf.

[45] Safe Motherhood and Reproductive Health Rights Act, 2018 (Nepal) (translation available at https://reproductiverights.org/sites/default/files/2020-01/Safe%20Motherhood%20and%20Reproductive%20Health%20Rights%20Act%20in%20English.pdf).

health facilities. Ch. 2, ¶ 3; ch. 8, ¶ 32. Under this law, a woman may obtain an abortion for any reason up to 12 weeks and up to 28 weeks if a medical practitioner determines that one of several available exceptions, including risks to the pregnant person's physical or mental health, is present. *Id.* ch. 4, ¶¶ 15–19.

d. South Africa

South Africa has had permissive abortion laws since 1996, when the right to abortion was written into its Constitution. S. Afr. Const. 1996, Bill of Rights, ch. 2, § 12.2 (establishing the right to bodily integrity and reproductive autonomy); Choice on Termination of Pregnancy Act 92 (1996); *see also Christian Lawyers' Association v. National Minister of Health and Others* 2004 (10) BCLR 1086 (T) (affirming that the "Constitution guarantee[s] the right of every [pregnant person] to determine the fate of [their] pregnancy"). Additionally, the Constitution guarantees the right to reproductive health care. Afr. Const. 1996, Bill of Rights, ch. 2, § 27(1)(a). Recognizing that these rights are meaningless without access to safe abortion care, South Africa's National Department of Health, which administers publicly-funded abortions, published a comprehensive set of guidelines in 2019 and 2020 that expand access to abortions in South Africa.[46] The South African

[46] National Guideline for Implementation of Choice on Termination of Pregnancy Act 2019, https://abortion-policies.srhr.org/documents/countries/11-South-Africa-National-

National Department of Health partnered with the World Health Organization and other sexual and reproductive health partners to publish these guidelines "with the goal of making sure South Africa's access and commitment to reproductive rights is in line with the U.N.'s Sustainable Development Goals and the . . . Family Planning 2020 framework, as well as South Africa's obligations under the International Conference on Population and Development (1994), the Maputo Plan of Action (2006), and the U.N.'s Sustainable Development Goals for 2030."[47]

South Africa thus illustrates the global trend not only to increase legal access to abortion, but also to ensure that women across the socioeconomic and geographic spectrum have access to safe abortion services.

E. Overruling *Roe* and *Casey* Regresses the Right to Abortion Care in the United States, Placing It in the Company of "Anti-Models."

In contrast to the global trend towards liberalization, upholding Mississippi's 15-week ban, and thus overruling *Roe* and *Casey*, would constitute a significant *regression* in the right to abortion care. Instead of "normalizing" U.S. abortion laws compared to in-

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Guideline-for-Implementation-of-Choice-on-Termination-of-Pregnancy-Act-2019.pdf.

[47] *Id.* at 3.

ternational peers, overturning *Roe* and *Casey* would put the United States in the company of countries like Poland and Nicaragua, as one of only a few countries moving towards greater restrictions on legal access to abortion in the past twenty years.

In Poland, restrictions to legal abortions have appeared alongside increased limitations on democratic freedoms, as well as concerns regarding judicial independence and a breakdown in the rule of law. *See* Diego García-Sayán (Special Rapporteur on the Independence of Judges and Lawyers), *Rep. on His Mission to Poland*, U.N. Doc. A/HRC/38/38/Add. 1 (Apr. 5, 2018).

The ECtHR has repeatedly held Poland accountable for its failures to ensure access to legal abortion and other reproductive health services, finding that its laws violate the right to private life in Article 8 of the ECHR. *See P. & S. v. Poland*, App. No. 57375/08 Eur. Ct. H.R. (2013); *R.R. v. Poland*, 2011-III Eur. Ct. H.R. 209; *Tysiąc v. Poland*, 2007-I Eur. Ct. H.R. 219.

In these cases, the court reiterated that states that have signed and ratified the ECHR have positive obligations under Article 8 of the Convention to adopt measures to secure respect for an individual's private life. *See P. & S.* ¶ 99; *R.R.* ¶ 200; *Tysiąc* ¶ 116 ("[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it"); *P. & S.* ¶¶ 95–99; *R.R.* ¶ 200; *Tysiąc* ¶ 17 (states have "a positive obligation to create a procedural framework enabling a pregnant woman to exercise her

right of access to lawful abortion"). In each case, the court concluded that Poland's failure to ensure practical and enforceable access to legal abortion and prenatal diagnostic testing amounted to violations of the state's positive obligations under Article 8 of the Convention.[48]

In 2006, Nicaragua's National Assembly voted to approve a bill that outlawed abortion without any exceptions pursuant to a campaign led by the Catholic Church, which was supported by current President Daniel Ortega Saavedra during his presidential campaign.[49] Previously, Nicaragua had permitted "therapeutic abortions." The revised Penal Code now subjects individuals who perform or obtain an abortion to lengthy prison terms.

Since 2006, human rights organizations and international legal bodies like the Inter-American Commission on Human Rights have called for Nicaragua to liberalize its abortion laws, finding that its laws "continu[ally] violat[ed] women's sexual and reproductive rights," preventing Nicaragua from

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[48] *See generally* Brief of European Law Professors as *Amici Curiae* in Support of Respondents § I; *see also P. & S.* ¶ 99; *R.R.* ¶ 200; *Tysią* ¶ 116–24; *see also Grimmark v. Sweden*, No. 43726/17 Eur. Ct. H.R. (2020).

[49] *See Nicaragua: Abortion Ban Threatens Health and Lives*, Human Rights Watch (July 31, 2017 8:55 AM), https://www.hrw.org/news/2017/07/31/nicaragua-abortion-ban-threatens-health-and-lives#.

complying with international human rights obligations.[50]

The U.S. Department of State has also recognized "significant human rights issues" in Nicaragua under the Ortega presidency, which functions as a "highly centralized, authoritarian political system dominated by [President Ortega]." U.S. Dep't of State, Nicaragua 2020 Human Rights Report, *supra*, at 1. Ortega's Sandinista National Liberation Front party exerts total control over Nicaragua's executive, legislative, judicial, and electoral functions. *Id*. In 2015, a "citizens' initiative" submitted to the National Assembly sought to liberalize abortion when a pregnant person's health was at risk, including in the case of rape. The initiative was signed by over 6,000 people, but was rejected by the National Assembly without debate in 2017.[51]

The United States was "one of the first countries to liberalize its abortion laws." Rachel Govelstein & Rebecca Turkington, *Abortion Law: Global Comparisons*, Council on Foreign Relations (Oct. 28, 2019, 8:00 AM), https://www.cfr.org/article/abortion-law-global-comparisons. However, regressive state legislation like the Mississippi Act, and other efforts to erode and overturn *Roe* and *Casey* have led to the United States being recognized as one of the few

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[50] *See Commission on Human Rights Reprimands Nicaragua for Continued Abortion Ban*, Ipas (Nov. 12, 2015), https://www.ipas.org/news/commission-on-human-rights-reprimands-nicaragua-for-continued-abortion-ban/.

[51] Human Rights Watch, *supra*, note 49.

countries whose abortion laws have become more restrictive in the last few decades. *See id*.

Further movement in this direction will negate the progress that the United States has made with respect to abortion care—and the rights of women to autonomy, self-determination and equality which access to abortion underpins.

In short, finding in favor of Petitioners by upholding the Act, and overruling *Roe* and *Casey*, would truly make the United States a global outlier.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

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