No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,

Respondents.

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

BRIEF FOR *AMICI CURIAE* AMERICAN SOCIETY FOR LEGAL HISTORY AND OTHER SCHOLARS WITH EXPERTISE IN THE LAW, HISTORY AND POLITICS OF REPRODUCTION IN THE UNITED STATES IN SUPPORT OF RESPONDENTS

CATHERINE M. FOTI
Counsel of Record
KAREN R. KING
NICOLE L. BUSEMAN
BRONWYN C. ROANTREE
MORVILLO ABRAMOWITZ GRAND IASON & ANELLO PC
565 Fifth Avenue
New York, NY 10017
(212) 856-9600
cfoti@maglaw.com

Counsel for Amici Curiae

307504

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INTERESTS OF AMICI CURIAE[1]

Amicus American Society for Legal History is the preeminent professional organization in the United States dedicated to interdisciplinary scholarship and teaching in the broad field of legal history. The Society was founded in 1957 and is comprised of historians, academics, authors, and lawyers with expertise in the history of legal jurisprudence, including the history and historical impact of laws regulating reproduction from the founding of this country to today.

Individual *amici* are historians and academics with expertise in the law, history, and politics of reproduction in the United States.[2]

Laura Briggs, Professor, Women, Gender, Sexuality Studies & History, University of Massachusetts Amherst.

Gene Burns, Professor of Social Relations & Policy, James Madison College, Michigan State University.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] Individuals' institutional affiliations are included for identification purposes only and do not constitute or reflect institutional endorsement.

Sara Dubow, Professor of History, Williams College.

Gillian A. Frank, PhD.

Michele Bratcher Goodwin, Chancellor's Professor, University of California, Irvine, elected member American Law Institute.

Linda Gordon, Professor Emerita of History, New York University.

Karissa Haugeberg, Associate Professor of History and Adjunct Faculty in the Program in Medical Ethics and Human Values, Tulane University.

Jennifer L. Holland, Associate Professor of History, University of Oklahoma.

Dr. Felicia Kornbluh, Professor of History and Gender, Sexuality, and Women's Studies, University of Vermont.

Kevin M. Kruse, Professor of History, Princeton University.

Dr. Laura Lovett, Professor of History, University of Pittsburgh.

Kristin Luker, Elizabeth Boalt Professor of Law, Emerita and Professor of Sociology, Emerita, University of California, Berkely.

Rick Perlstein, freelance writer and historian.

Leslie J. Reagan, Professor of History and Law, University of Illinois at Champaign Urbana.

Deana A. Rohlinger, Professor of Sociology, Florida State University.

Carol Sanger, Barbara Aronstein Black Professor of Law, Columbia Law School.

Reuel Schiller, Hon. Roger J. Traynor Chair and Professor of Law, UC-Hastings School of Law.

Johanna Schoen, Professor of History, Rutgers University.

Rickie Solinger, Historian.

Suzanne Staggenborg, Professor of Sociology, University of Pittsburgh.

Dr. Stacie Taranto, Associate Professor of History, Ramapo College of New Jersey.

Neil J. Young, Affiliated Research Scholar, Schar School of Policy and Government, George Mason University.

Mary Ziegler, Stearns Weaver Miller Professor, Florida State University.

Amici take issue with certain statements made by Petitioners in their brief about the history of the abortion debate in the United States because they are factually

inaccurate. *Amici* therefore submit this brief to clarify the historical record.

Introduction and Summary of the Argument

For several centuries, conflicts over abortion in the United States have reflected deeply held beliefs about the nature of life between conception and birth, the role and rights of women in modern society, and the ethical commitments of physicians and society at large. These beliefs—some of the most profound and important in individuals' lives—have long inflamed conversations about the legality and morality of abortion. Political, economic, and social shifts over time all have contributed to the nation's abortion divide. These shifts include the debates around the regulation of the practice of medicine in the nineteenth century, the evolving positions of faith communities vis-à-vis abortion in the twentieth century, the realignment of political parties in the 1980s, and the increasing politicization of Supreme Court nominations in the last few decades. Nevertheless, a review of the historical record underscores that profound convictions about abortion predated *Roe* and stood in the way of straightforward compromise, as the country oscillated between more and less permissive stances on abortion. After *Roe*, the issue remained an important topic in American political discourse, but some of the polarization we now associate with abortion came later and for reasons beyond this Court's decision.

Petitioners and amici argue that the Court's decisions in *Roe* and *Casey* damaged the democratic process, poisoned our national discourse, and fanned the

flames of conflict between pro-choice and pro-life forces to make abortion the controversial issue it is today.[3]

Claims that *Roe* drove the division and polarization around abortion are historically inaccurate and rest upon a misunderstanding of the history of the debate over abortion in the United States. Contrary to the Petitioners' suggestion, contemporary controversy surrounding abortion cannot be laid at the feet of *Roe* and *Casey*, and overturning *Roe/Casey* will not cool the debate.

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[3] *See* Ethics and Public Policy Center, as Amici Curiae Supporting Petitioners, Thomas E. Dobbs, State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org., et al., (No. 19-1392) (arguing *Roe* should not be entitled to any "special precedential force" because it "supercharge[d]" the national debate instead of resolving it). Other *Amicus* briefs expand upon this theme: Priests For Life, as Amici Curiae Supporting Petitioners, Thomas E. Dobbs, State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org., et al., (No. 19-1392) (by removing abortion from the democratic process, *Roe* fueled controversy); The Becket Fund, as Amici Curiae Supporting Petitioners, Thomas E. Dobbs, State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org., et al., (No. 19-1392) (*Roe* has made religious liberty disputes more divisive such that "allowing the political process to address abortion would likely decrease the amount of religious liberty conflict"); Christian Legal Society, as Amici Curiae Supporting Petitioners, Thomas E. Dobbs, State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org., et al., (No. 19-1392) (*Roe* has turned the Court into a partisan "superweapon").

ARGUMENT

I. Deep Convictions About Abortion Complicated Legislative Compromise Well Before *Roe*

Divergent beliefs about abortion have exposed foundational questions about the nature of life, human rights, sexual and reproductive freedom, the authority of doctors, and family planning. Positions have evolved over time, but the existence of passionate debate has long stood in the way of lasting legislative compromise.

A. Before *Roe*, Differing Views About Abortion Existed in the Medical Community

While disagreements about abortion have been a persistent feature of the United States since its founding[4], the second half of the nineteenth century saw the emergence of an aggressive movement to restrict abortion spearheaded by the newly established American Medical Association ("AMA") and animated by medical, moral, and professional concerns, along with nativist beliefs and traditionalist views about women's role in society. This movement, which is explored in greater depth by other *Amici*[5], resulted in the passage of laws restricting abortion except where licensed physicians judged that the abortion was necessary to save the mother's life (and, in some states, where the pregnancy

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[4] Brief of American Historical Association and Organization of American Historians, as Amici Curiae Supporting Respondents, Thomas E. Dobbs, State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org., et al., (No. 19-1392).

[5] *Id.*

was the result of rape or incest). Abortions continued, with the pace accelerating during the Great Depression.

As more patients ended pregnancies, hospitals treated more patients for post-abortion complications. Embarrassed by the frequency of abortions and concerned about legal exposure, some non-Catholic hospitals in the 1940s and 1950s introduced therapeutic abortion committees to systemize the reasons that abortions should be allowed. While initially reducing hospital-based abortions, therapeutic hospital committees destabilized an already contentious status quo.

In the 1940s and 1950s, the widespread availability of antibiotics and the use of proper sterilization techniques made the death of a woman during a medically supervised pregnancy or delivery relatively rare. This greatly diminished the need for abortion to save a woman's life, which in turn rendered physicians providing abortions more vulnerable to prosecution under the laws governing abortion in many states. And while law enforcement had previously targeted primarily those doctors who killed or injured those seeking an abortion, prosecutors in the decades immediately after World War II took aim at a broader group of practitioners, increasing some physicians' concerns about the state of the law.

By the 1960s, then, many medical doctors began to advocate for a loosening of existing abortion restrictions. Those doctors increasingly framed abortion as a humanitarian medical intervention, portraying women seeking abortions not as morally suspect but rather as objects of sympathy in deeply regrettable

circumstances.[6] These physicians also suggested that abortion regulations prevented them from delivering their patients the highest quality of care. But even within the medical profession, the idea of reform remained contentious, with some Catholic physicians and some of their colleagues strongly opposing any legalization of abortion.

B. Debates over Abortion Reform Expose the Difficulty of Compromise

The movement to loosen abortion restrictions found expression in a series of recommendations issued by the American Law Institute (the "ALI") in draft form in 1959 with the final version coming out in 1962. Designed to command widespread support, the framers of the ALI model statute hoped that they had struck a compromise: making abortion legal only when, in the judgment of a medical professional, pregnancy threatened the physical or mental health of the mother, resulted from rape or incest, or could result in the birth of a physically or mentally impaired child.

Encouraged by physicians, grassroots activists, and some clergy and national leadership bodies from Methodist, Presbyterian, Congregational, Episcopalian, Unitarian, and American Baptist churches, as well as some leaders from the Reform and Conservative Jewish denominations, states began gradually to adopt the ALI's recommendations. In just four years, abortion reforms modeled on the ALI proposed legislation passed in more than a dozen states, including Colorado (1967),

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[6] Gene Burns, *The Moral Veto* 165 (2005).

North Carolina (1967), California (1967), Maryland (1968), Georgia (1968), Arkansas (1969), New Mexico (1969), Kansas (1969), Oregon (1969), Delaware (1969), South Carolina (1970), and Virginia (1970). The diversity of the states that adopted the ALI recommendations is notable. Not only were they geographically diverse, but they were also religiously diverse. Maryland, for example, home to a large Catholic population, joined other states, such as Mississippi, whose populations were overwhelmingly Protestant. The bills passed easily in some states (by a margin of 81-16 in the Kansas House and 38-1 in the Kansas Senate), and more closely in others (by a margin of 48-30 in the California House and 21-17 in the California Senate, while passing the Senate unanimously in South Carolina but encountering a vigorous filibuster in the South Carolina House before ultimately passing 67-37). Republican as well as Democratic governors and legislatures also passed reforms consonant with the ALI model, with Republican governors in Delaware, California, Oregon, Maryland, and New Mexico signing ALI-style bills into law.[7]

But those with deeply held beliefs about the wrongness of abortion objected that the bills did not treat the fetus or unborn child as a rights-holding person and therefore were unacceptable. In states as diverse as Florida, Maine, Michigan, and Arizona, bills modeled on the ALI proposal were defeated by those with objections to abortion rooted in the Constitution, international human rights law, morality, and religious faith.[8] Well

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[7] *Id.* at 176-79.

[8] *Id.* at 196-205.

before *Roe*, compromise on abortion remained hard to reach for those who opposed measures like the ALI model law as antithetical to their most foundational beliefs.

It was not only opponents of abortion who opposed ALI-style bills. While pro-life groups saw abortion law reform as a denial of the rights of the unborn, some reformers thought that the ALI did not go far enough to protect the right to abortion. Mainline Protestant and Jewish leaders, feminists, public health reformers, and those with concerns about welfare costs, Cold War politics, or environmental preservation demanded the repeal of any abortion restriction and argued that patients should be able to terminate a pregnancy for any reason or no reason at all. Four states—Alaska, Hawaii, New York, and Washington—passed laws that went further than the ALI recommendations by repealing entirely restrictions for abortions performed before viability.[9] Much as was the case with reform legislation, debates about the repeal of abortion restrictions exposed deep disagreements about the beginning of life, the role of women, and the ethical obligations of physicians and other community members.

Conflict around abortion reform in the states intensified in the years before this Court decided *Roe* and for reasons largely unrelated to judicial intervention. The more politicians, activists, judges, lawyers, and community members debated abortion, the clearer it

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[9] *Id.* at 216-17.

became that the issue touched on many individuals' most fundamental and personal convictions.

C. Religious Groups Were Involved in Both Sides of the Abortion Debate in the 1960s and early 1970s

Some of the most heated debates about legal abortion in the pre-*Roe* years touched on questions of faith, with religious communities falling on both sides of the issue. While many Catholic activists had opposed abortion on religious grounds in the 1960s and early 1970s, many Jewish and mainline Protestant groups supported abortion reform, with some clergy from these communities actively aiding people seeking abortions. Indeed, in 1964, over 1,100 Protestant and Jewish religious leaders signed a letter supporting a bill that would relax abortion restrictions in California.[10] Likewise, in 1967, a group of Protestant ministers and Jewish rabbis founded a nationwide network known as the Clergy Consultation Service on Abortion whose mission was to provide reliable information to women seeking an abortion in states where the procedure was illegal. A statement that appeared in *The New York Times* on May 22, 1967 proclaimed that it was their "pastoral responsibility and religious duty to give aid and assistance to all women with problem pregnancies," and as such they would provide "referral to the best available medical advice and aid to women in need."[11] Moreover, while Catholic Bishops remained staunchly opposed to abortion, more broadly, within the Church, some parish

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[10] Daniel K. Williams, *Defenders of the Unborn* 56 (2016).

[11] Edward B. Fiske, *21 Clergymen Offer Abortion Advice*, N.Y. Times, May 22, 1967, at A1.

priests and many within the laity supported abortion law reform, with approximately one-third of the women counseled by the Clergy Consultation Service identifying as Catholic.[12] Within Reform Judaism, the Women of Reform Judaism passed a resolution in 1965 calling for the liberalization of abortion restrictions, while within Conservative Judaism, starting in 1970 the Women's League for Conservative Judaism championed legal abortion.[13] Support for loosening abortion restrictions was not, however, univocal or unreserved: in 1972, the Rabbinical Council of America, the largest Orthodox rabbinical organization, announced that it was concerned with "permissive abortion" and called for the repeal of state laws that had liberalized the grounds for abortion.[14]

Although Catholics had dominated the pro-life movement in the early twentieth century, advancing arguments rooted in natural law and Church teaching, beginning in the mid twentieth century, Catholic groups began to adopt the human rights language that permeated post-World War II society. That teaching revolved around the argument that the unborn had human rights, including the right to life. Indeed, many

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[12] Gillian A. Frank, *Making Choice Sacred: Liberal Religion and the Struggle for Reproductive Rights Before Roe* (forthcoming).

[13] Rachel Kranson, *From Women's Rights to Religious Freedom: The Women's League for Conservative Judaism and the Politics of Abortion, 1970-1982,* in Devotions and Desires: Histories of Sexuality and Religion in the Twentieth-Century United States, 170 (Gillian A. Frank et al., eds., 2018).

[14] Linda Greenhouse and Reva B. Siegel, *Before Roe v. Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling* 69 (2012).

American Catholic Bishops actively participated in the debates around the drafting of the Universal Declaration of Human Rights (the "Universal Declaration"), advocating for the Universal Declaration to recognize a right to life and bodily integrity from the moment of conception. While the effort to enshrine a right to life in the Universal Declaration was ultimately unsuccessful, the framing of abortion in the language of human rights attracted a more religiously diverse group of supporters to the pro-life cause.

By the 1970s, some Evangelical Protestants had overcome their hesitation about working alongside Catholics and began to join the pro-life movement. However, many of the earliest Evangelical pro-life activists—including Billy Graham's father-in-law, the physician L. Nelson Bell—remained open to abortion in so-called extreme cases, including rape, incest, or when the mother's life was in danger. Southern evangelicals were particularly willing to countenance abortion in extreme cases, though they opposed "abortion on demand." Indeed, the Southern Baptist Convention, among the most powerful bodies in Evangelical Christianity, issued a Resolution on Abortion in 1971, calling on Southern Baptists to "work for legislation that will allow the possibility of abortion" where there was "carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother."[15] This resolution was essentially an endorsement of the ALI's proposed legislation.

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[15] *Id.* at 72.

Religious groups in the pre-*Roe* years took widely different views on the morality and legality of abortion. While some embraced the ALI proposal, religious and moral values tended to deepen, rather than heal, the nation's abortion divide.

D. The Abortion Debate Was Transformed by the Social Movements and Events of the 1960s and Early 1970s

Although religious groups figured prominently in both the pro-life and pro-choice movements in the decades before *Roe*, a number of other groups also entered the abortion debate in the years prior to 1972. Public health advocates became involved because of concerns about injuries and deaths attributable to illegal abortions. Some members of a complex and divided population control movement likewise endorsed the repeal of abortion restriction. This movement, which expressed concerns about demographic growth in the United States and across the world, included some who had supported eugenics measures earlier in the twentieth century. However, others not identified with eugenics found population control arguments attractive, including those who saw reduced population growth as a help to the United States in the Cold War, and others who saw it as a way to reduce demand on scarce environmental resources. Moreover, many of the most extreme population control advocates did not support the legalization of abortion or take a stand on the issue. Women's groups also entered the debate, with both pro-life and pro-choice feminists figuring prominently. While pro-choice feminists argued that the repeal of restrictions on abortion was crucial to ensure equality and autonomy for women, pro-life feminists argued that

the key to equality for women was a defense against sexual exploitation rather than sexual liberation. The stance of some prominent Black feminists highlighted the complexity of the abortion debate.[16] Certain prominent Black women, including Dr. Mildred Jefferson and Erma Clardy Craven, spoke out against legal abortion. Others, such as attorney Florynce Kennedy and Representative Shirley Chisolm, welcomed government efforts to lift abortion restrictions that had disproportionately affected their communities. This latter group included Black feminists who were deeply skeptical about government efforts to limit Black procreation.

While the debates around abortion from the nineteenth century through the 1960s were largely cast in medical, moral, or religious terms, by the early 1970s both pro-life and pro-choice groups began advancing arguments rooted in the Constitution. Pro-choice feminists, for example, argued that women's constitutional interests in dignity, equality, and autonomy required recognition of a right to choose abortion, while pro-life supporters emphasized the constitutional rights of the unborn. This moment marked a significant shift in the American discourse around abortion: what had been an intensely private decision between a woman, her doctor, and sometimes her clergyman or -woman, was transformed into a claim about the nature of a just political community. In the years before *Roe*, supporters of abortion rights argued in court that the constitutional right to privacy extended to the decision to end a pregnancy, while abortion foes

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[16] *Id.* at 50-54.

argued that the unborn child was a person under the Fourteenth Amendment and so was entitled to all its protections. Indeed, as additional evidence of the conflicts that emerged over abortion prior to *Roe*, in the wake of New York State's 1970 decriminalization of abortion through week twenty-four of a pregnancy, a pro-life activist and law professor made a federal constitutional claim of fetal personhood and sought to be appointed as guardian representing the interests of all fetuses scheduled for abortion in the State.[17]

In the late 1960s and early 1970s, political parties also began to use the issue to get voters to the polls. Prior to the 1970s, abortion had not played a significant role in national party politics, partly because both parties were divided on the issue. Sensing how deeply the abortion issue resonated with voters, however, Richard Nixon began treating abortion as a wedge issue, seeing in it a tool for realigning the Republican party by winning over Catholic Democrats. Pursuing what some have termed a "Catholic strategy," Nixon made opposition to abortion and support for parochial schools centerpieces of his 1972 reelection campaign.[18]

Although Nixon sought to use abortion as a wedge issue, both parties were internally divided on the question of abortion access. A Gallup poll released on the eve of the *Roe* decision revealed that 64 percent of Americans agreed that the decision whether to have an

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[17] Judy Klemesrud, *He's the Legal Guardian for the Fetus About to Be Aborted*, N.Y. Times, Dec. 17, 1971, at A48.

[18] Williams, *supra* note 10, at 183-89.

abortion should be made solely by a woman and her doctor, with 68 percent of Republicans endorsing the statement compared with only 59 percent of Democrats.[19]

E. The Argument That This Court Derailed Promising Compromises About Abortion Laws Is Not Supported

By the early 1970s, both the right-to-life and the abortion rights movement had rejected the compromise embodied in the ALI-inspired legislation as a betrayal of their fundamental beliefs. Right-to-life leaders argued that the ALI ignored the rights and personhood of the unborn child by allowing for exceptions for rape and incest, while supporters of abortion rights insisted that the ALI did little to make abortion accessible, and ignored the fact that women had a right to an abortion regardless of their reasons for choosing to end a pregnancy. The history of state-level abortion statutes in the late 1960s and early 1970s thus yields three lessons: first, the processes of democratic, legislative compromise that produced abortion law reform did not mark an end to deep social, religious, and political divisions over this issue. Rather, legislation to reform or partially repeal statutory controls on abortion access led to greater contestation as both pro-life and pro-choice citizens reacted to new circumstances. Second, the history of these laws indicates that while abortion was not always controversial everywhere, it was always controversial somewhere. Third, this history reveals

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[19] Greenhouse & Siegel, *supra* note 14, at 209.

that the constituencies for strengthening or loosening abortion restrictions were—as they remain—fluid.

Indeed, by the early 1970s, the prospect of a compromise that would satisfy both pro-life and pro-choice groups seemed remote. The abortion issue touched on individuals' most deeply held beliefs about themselves, their communities, and their families. For those with such profound commitments, legislative compromise appeared increasingly to be a betrayal of principle.

II. The Polarization of American Politics, More than the *Roe* Decision, Has Contributed to the Nation's Divide on Abortion

Although compromise on abortion had seemed impossible before this Court intervened, the *Roe* decision did not immediately polarize debates about related issues from pregnancy discrimination laws to contraceptive policy. Instead, some pro-life and pro-choice groups collaborated in lobbying to strengthen federal protections against pregnancy discrimination at work (the Pregnancy Discrimination Act of 1978), expand options for adolescent mothers (the Adolescent Health, Services, and Pregnancy Prevention and Care Act of 1978), and reduce the stigma surrounding out-of-wedlock births. Deeply different beliefs about abortion continued to define those on either side of the abortion issue, but political party realignment, together with the changing positions of some faith communities, made the conflict even more bitter. It took nearly as long for abortion to become a polarizing issue in judicial confirmations, and unanimous or nearly unanimous confirmations remained

the rule for decades after *Roe*, with other forces helping to politicize the selection of federal judges.

This Court's decision in *Roe* certainly did not put an end to the abortion conflict, much less convince some Americans to set aside their deeply held beliefs. But neither did *Roe* give rise to those beliefs. And while conflict surrounding abortion rights certainly has escalated since *Roe* was decided, the bitterness and apparent intractability of the discussion stems from a multitude of other factors, including political party polarization, negative partisanship, and the transformation of the politics of Supreme Court nominations.

A. Aftermath of *Roe* Ushers in Compromise on Issues Related to Abortion

While compromise on abortion itself had already proven difficult in the lead-up to *Roe*, for much of the 1970s, pro-choice and pro-life groups sought common ground on other gender issues that they viewed as likely to make abortion less necessary. The Court's decision in *Roe* did not create such immediate divisions that precluded groups seeking unity and compromise on topics from the Equal Rights Amendment ("ERA"), to pregnancy discrimination, to contraceptive funding.

Throughout the 1970s, some pro-life groups continued to fight for policies they believed would decrease the need for abortions, including those that would provide access to contraception, ensure financial support for new mothers, and guarantee the right to childcare. While remaining steadfastly opposed to abortion, they called on the government to provide a

different type of "choice" to women by ensuring they could afford to have children without sacrificing their careers, educations, or economic security.[20] One group, Feminists for Life, went so far as to advocate for passage of the ERA, believing it was critical to treat women as equal citizens and that equal rights would best allow them to "protect and nourish the lives of their children."[21] Although the ERA campaign was ultimately unsuccessful, pro-life groups continued the broader strategy of providing greater women's rights in other areas. Even members of the National Right to Life Committee, the largest national pro-life organization, focused on legislation to protect new mothers and reduce the number of abortions performed.

Many pro-life activists believed that reproductive freedom would only be a reality if the government could guarantee that women could afford to bear and raise children. One such group, American Citizens Concerned for Life ("ACCL"), founded in 1973, advocated for a greater social safety net as a guarantee that fewer women would seek abortions. The ACCL spent the 1970s pushing for legislation that would support vulnerable women, including an unsuccessful 1975 push for legislation that would have provided a comprehensive aid program for unwed mothers.[22] The ACCL also joined with Planned Parenthood to lobby for a 1978 law funding family planning and contraceptive services, sex education, and childcare for teenagers. In these efforts,

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[20] Mary Ziegler, *After Roe* 190 (2015).

[21] *Id.* at 190-91.

[22] *Id.* at 193-94.

pro-life activists and feminists agreed that true reproductive freedom required far more than access to legal abortions.

In the late 1970s, members from both sides of the abortion debate found common cause in supporting legislation prohibiting pregnancy discrimination. In advocating for the eventual passage of the Pregnancy Discrimination Act of 1978 ("PDA"), which amended Title VII of the Civil Rights Act of 1964 to define pregnancy discrimination as unlawful sex discrimination, both anti-abortion activists and feminists looked for ways to protect pregnant women and new mothers.[23] For the members of pro-life organizations such as the ACCL who believed that supporting pregnant women would reduce the number of abortions, the Supreme Court's earlier decision in *General Electric Co. v. Gilbert*¸ 429 U.S. 125 (1976), holding that pregnancy discrimination is not protected under Title VII's prohibition on sex discrimination, denied "economic equality" to pregnant employees because it made the decision to terminate a pregnancy not "the product of free choice but of economic coercion."[24] While anti-abortion groups fought for protections for pregnant women and fetuses, feminists emphasized the value of pregnancy as a form of

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[23] Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law,* 91 Wash U. L. Rev. 453, 498 (2014).

[24] *Id.* at 500 (citing *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Comm. on Human Resources*, Statement of Jacqueline M. Nolan-Haley, Special Counsel, Am. Citizens Concerned for Life, Inc., 95th Cong. 301 (1977).

socially productive labor.[25] These arguments emphasized that pregnancy was not a "woman's disease" but a societal good whose cost should be shared, rather than allowing pregnancy discrimination to reinforce women's economic inequality.

The immediate post-*Roe* period saw activists on both sides of the abortion debate seeking to ensure that women had the resources to choose to raise children and the legal protections to remain employed while parenting if they so wanted. Their unanimity of purpose belies the argument that *Roe* itself caused polarization.

B. Neither Political Party Staked Out A Clear Position On Abortion for Over A Decade After *Roe*

While the Republicans and Democrats have now staked out clear positions on abortion, the polarization of the two parties on abortion rights took shape many years after *Roe*.[26] Neither party had a unified position on abortion in the aftermath of *Roe*. In the 1976 election, both Jimmy Carter and Gerald Ford tried to find middle-ground positions on abortion, alienating activists on both sides. Ford, who assumed the presidency in the year following *Roe*, chose Nelson Rockefeller as his vice president—a moderate Republican who supported abortion rights and had signed New York State's liberalization law in 1970. Yet Ford also supported a constitutional amendment to allow individual states to

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[25] *Id.* at 454.

[26] Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2068 (2011).

regulate abortion policy, while opposing the solution universally favored by the right-to-life movement—an amendment criminalizing all abortions except when a woman's life would be at risk. Meanwhile, Carter, who made clear his personal opposition to abortion, expressed only tepid support for *Roe* during the campaign by staking out a position that *Roe* should not be legislatively overturned. During his term in office, Carter supported both Medicaid-funding bans on abortion and greater funding for sex education and family planning, especially for juveniles.[27]

Throughout the 1970s, both parties continued to include prominent opponents and supporters of legal abortion. The Republicans' 1976 convention platform explicitly recognized the diversity of opinion within the party, acknowledging that "there are those in our party who favor complete support for [*Roe*]," and "there are those who share sincere convictions that the Supreme Court's decision be changed by a constitutional amendment prohibiting all abortions."[28] It was not until the late 1980s that Congress became extremely polarized on abortion. Similarly, only after 1988 did polling data begin reliably to show that more Democratic voters than Republicans supported access to abortion.[29] While in the resulting years the parties certainly have become politically polarized on abortion, it took over a decade

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[27] Ziegler, *supra* note 20, at 194.

[28] Donald T. Critchlow, *Intended Consequences: Birth Control, Abortion, and the Federal Government in Modern America* 203 (1999).

[29] Greenhouse & Siegel, *supra* note 26, at 2068-69.

after *Roe* for these lines fully to coalesce. It thus makes little sense to believe that *Roe* alone produced the contemporary politics of abortion.

C. Faith Communities Have Continued to Take Fluid Positions on Abortion

Shortly after *Roe,* news reports reflected the degree to which "churches [were] not united on [the] question of abortions."[30] Evangelicals and other members of various Protestant denominations continued to view abortion as a "Catholic issue," as Catholicism had a long history of opposing abortion. Individual people of faith at times held beliefs in tension with those taken by the religious institutions to which they belonged. Even within the Evangelical community, there were regional divisions, with northern Evangelicals having much stronger pro-life convictions around the time of *Roe* than those in the South. Initial news reports in the South about the *Roe* decision ranged from positive to neutral and often identified opponents of *Roe* as Catholic or clergy.[31]

The changing position of Southern Baptists in the decade after *Roe* demonstrates that abortion remained a fluid question for many religious groups. In the years following *Roe*, several Southern Baptist leaders took clear positions favoring abortion rights, arguing that laws prohibiting abortion violated the separation of church and state and that abortion itself was often the

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[30] Neil J. Young, *We Gather Together* 155-56 (2016).

[31] Greenhouse & Siegel, *supra* note 26, at 2063-64.

"lesser of the available evils."[32] Throughout the 1970s, the official position of the Southern Baptist Conference ("SBC") allowed for a right to abortion, and the SBC supported a limited rights approach that balanced common morality with individual rights. By the late 1970s, however, momentum among Evangelicals started to move clearly towards pro-life views. Other denominations, including members of the Church of Latter-day Saints and non-SBC Evangelicals, began to join the pro-life stand championed by Catholic Bishops. Against this backdrop, the SBC's membership grew rapidly, including in areas outside the South where pro-life views were more dominant. Within the SBC, more conservative members began taking positions in leadership, and by 1980, the SBC's Convention Resolution included its first wholly pro-life statement. While the SBC is today one of the most ardently pro-life groups, this was the result of a long period of change that occurred over a period of years following *Roe*.

Faith communities remain divided on abortion rights today. While some religious institutions oppose all abortions, others support either limited or more robust

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[32] Andrew Lewis, *The Rights Turn in Conservative Christian Politics: How Abortion Transformed the Culture Wars* 18 (2017).

rights to abortion, with members of many faith communities internally divided on the issue.[33]

D. *Roe* Did Not Poison the Process of Judicial Nominations

Amici for Petitioner argue that *Roe* has "poison[ed] . . . the process" of judicial nominations by making them increasingly divisive.[34] In truth, the politicization of the judicial nominations process began before, and continued well after, the Court's decision in *Roe*. By the 1960s, Supreme Court nominations had already become more divisive and political, as both President Johnson and President Nixon attempted to use Supreme Court nominations to consolidate political support. Both presidents reacted to the Warren Court's expansive decisions on civil rights and civil liberties by seeking greater clarity about what their own nominees might do on the court, thereby encouraging politicians to score political points during Supreme Court nomination hearings.

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[33] *See* David Masci, *Where Major Religious Groups Stand On Abortion*, Pew Research Center (June 21, 2016), available at https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/.

[34] Ethics and Public Policy Center, as Amici Curiae Supporting Petitioners, Thomas E. Dobbs, State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org., et al., 29-30 (No. 19-1392); *see also* Ethics and Public Policy Center, as Amici Curiae Supporting Petitioners, Thomas E. Dobbs, State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org., et al., 22-23 (No. 19-1392).

In response, the Senate treated judicial nominations as an opportunity to play to voters, modeling the more political and controversial relationship seen in more recent times. The nomination fights that occurred between 1967 and 1971 proved "exceptionally contentious,"[35] and both Presidents faced mixed results: Johnson had two successful and two unsuccessful Supreme Court nominations, while Nixon had four successful and two unsuccessful nominations (the Senate defeated the nomination of one of Nixon's selections, Clement Haynsworth, by a vote of 55 to 45, and even one of his successful nominees, William Rehnquist, had 26 members of the Senate vote against his confirmation).

Polarization was thus not new to judicial nominations, and *Roe* did not immediately become a flashpoint of Supreme Court confirmation hearings. Indeed, Supreme Court nominations were largely above the political fray for some time after the Court's decision. During John Paul Stevens' 1975 confirmation hearings—the first hearings to occur after *Roe*—Stevens was not asked a single question about *Roe* or abortion rights and received unanimous confirmation. While the following nominee, Sandra Day O'Connor, faced some questions about *Roe*, she still was confirmed unanimously.

To the extent that *Roe* subsequently rose to prominence as a divisive issue for judicial nominees, it occurred only sporadically in the decades following *Roe.* While Reagan put forward multiple Supreme Court nominees during 1986 and 1987, both Justices Scalia and

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[35] Laura Kalman, *The Long Reach of the Sixties* xi (2017).

Kennedy received unanimous votes, despite their nominations coming more than a decade after *Roe*.[36]

Moreover, while Robert Bork's failed confirmation in 1987 fundamentally changed the tone of Supreme Court nominations, *Roe* alone cannot explain the controversy surrounding his nomination. Justice Scalia and Judge Bork shared a commitment to originalism, yet Scalia received a unanimous confirmation vote in 1986. Nor can the controversy surrounding Judge Bork be attributed solely to his perceived role as the swing vote on *Roe*, as the next nominee who was thought to hold that position, Anthony Kennedy, also received a unanimous confirmation vote despite being nominated as Bork's replacement. Further, David Souter, who replaced William Brennan, a justice with a markedly different judicial philosophy, was confirmed by a margin of 90-9.

While a ratcheting up of tensions occurred with Justice Thomas's confirmation hearing, abortion was not at the center of the proceedings, and later confirmations remained less intense. Many successive nomination processes, including those for Justices Ginsburg, Breyer, Roberts, Sotomayor, and Kagan, were relatively smooth and the justices emerged with significant bipartisan support.

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[36] United States Senate, *Supreme Court Nominations (1789-Present)*, available at https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm.

To the extent that polarization of the Court's nomination process has occurred, it came as a more gradual change in the decades after *Roe* and has not uniformly led to partisanship. Instead, much of the division is due not to *Roe* specifically, but to the increased emphasis by social movements and politicians, on both sides of the ideological spectrum, on using the prospect of "controlling" the Supreme Court as a way to turn out voters—as well as to the nation's growing partisan divide.

E. Negative Partisanship—and the Deepening of Political Divides—Have Contributed to the Escalation of the Abortion Conflict

The polarization of views on the legal status of abortion also reflects broader trends towards negative partisanship, where each party's supporters perceive those on the other side as having very different (and often undesirable) social characteristics and fundamental values.[37] Recent research demonstrates that partisanship has been rising since the 1980s and has occurred within both parties.[38] The past few national election cycles have also witnessed some of the highest levels of party loyalty and straight- ticket voting of any period since 1952. Today, Democrats and Republicans view themselves as further apart ideologically on most issues, and much larger proportions of members of both

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[37] Alan Abramowitz, *All Politics is National: The Rise of Negative Partisanship and the Nationalization of U.S. House and Senate Elections in the 21st Century*, Presented at Annual Meeting of the Midwest Political Science Association 5-6 (April 16-19, 2015).

[38] *Id.* at 9-10.

parties hold strongly negative views of those in the opposing party than in the past.[39]

As the nation's political leanings increasingly reflect religious and racial differences, partisan hostility has only grown. Political realignment over recent decades has led to better "sorting" of voters into political parties that reflect their views, and closer alignment of political and ideological identities has itself increased partisanship and polarization.[40] With the hardening of partisan identities and increase in negative partisanship, views on abortion have become further entrenched.

The rise of partisan media, which has proliferated in recent decades, also amplified negative partisanship. Partisan media outlets offer completely different views on questions of fact, from the possibility of reversing medication abortion, to the role played by eugenics in the legalization of abortion, to the safety of specific abortion techniques. So too does the partisan media amplify outrage at specific decisions by this Court, not least on the abortion issue. Today's "heated, zero-sum disputes about abortion" (Pet. Br. at 24) is more a result of negative partisanship than a cause of it.

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[39] *Id.* at 10.

[40] Lilliana Mason, *"I Disrespectfully Agree": The Differential Effects of Partisan on Social and Issue Polarization*, 59 AM. J. POLI. SCI. 128, 128 (Jan. 2015).

III. Overturning *Roe* Will Not Resolve Deeply Held Convictions About Abortion

The suggestion that overturning *Roe* and *Casey* will calm the contemporary controversy surrounding abortion is belied by many of Petitioners' *Amici*, as well as by the historical record discussed above. Should this Court reverse *Roe*, both pro-life and pro-choice groups will continue to seek the Court's intervention in support of their deeply held convictions. As many of Petitioners' *Amici* make clear, the elimination of *Roe* is but one step towards the ultimate goal of securing the recognition of fetal personhood under the Fourteenth Amendment.[41] Versions of this argument are advanced by *Amici* writing from a variety of perspectives, including religious, legal and medical. For example, some *Amici* writing from a religious perspective maintain that the

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[41] *See, e.g.,* Foundation for Moral Law & Lutherans for Life, as Amici Curiae Supporting Petitioners, Thomas E. Dobbs, State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org., et al., (No. 19-1392) (arguing that "[t]he Bible treats the preborn child as a living human being," and preborn children are entitled to the right to life protected by the Fifth and Fourteenth Amendments); Jonathan English, as Amici Curiae Supporting Petitioners, Thomas E. Dobbs, State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org., et al., (No. 19-1392) (arguing that human life "is detectable at the beginning of the heartbeat" and "where life can be shown to exist, legal personhood exists"); Scholars of Jurisprudence John M. Finnis and Robert P. George, as Amici Curiae Supporting Petitioners, Thomas E. Dobbs, State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org., et al., (No. 19-1392) (arguing that "[u]nborn children are constitutional persons entitled to equal protection of the laws").

Bible dictates that unborn children be treated as living human beings and that therefore fetal personhood must be recognized and protected by the state. *Amici* also argue that human life begins at fertilization or shortly thereafter, and that where life exists, so does personhood, which is deserving of state protection. Finally, some legal scholars among the *Amici* contend that the Fourteenth Amendment properly extends to fetuses and that fetuses are therefore entitled to equal protection of the laws. From its inception, the right-to-life movement has championed what it sees as the fundamental rights of the unborn child at the national as well as state level. Reversing *Roe* will not change this objective or discourage *Amici* from seeking this Court's recognition of fetal personhood.

Likewise, pro-choice advocates are advancing alternate legal and political frameworks to ensure a right to choose should *Roe* be overturned. Kathryn Kolbert and Julie Kay, for instance, have argued that legislative reform is necessary, as well might be a legal strategy for pro-choice advocates that frames abortion in human rights terms—a strategy that has proven successful internationally.[42]

As this Court has long recognized, "[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy." To suggest that the Court in *Roe* created our abortion divide ignores a complex history of polarization in America and

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[42] Kathryn Kolbert and Julie F. Kay, *Controlling Women: What We Must Do Now to Save Reproductive Freedom* 181, 187-90 (2021).

insults the beliefs of Americans for whom abortion has been a defining issue. This Court will not convince Americans to set aside their deep convictions by overruling *Roe*.

CONCLUSION

Petitioner's argument that this Court's attention to abortion disputes "poisoned the national discourse" and created today's "heated, zero-sum disputes about abortion," is historically inaccurate and should not be the basis for revisiting *Roe*.

Respectfully submitted.

Catherine M. Foti
Counsel of Record
Karen R. King
Nicole L. Buseman
Bronwyn C. Roantree
MORVILLO ABRAMOWITZ
GRAND IASON & ANELLO P.C.
565 Fifth Avenue
New York, NY 10017
(212) 856-9600
cfoti@maglaw.com

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