No. 19-1392

In the Supreme Court of the United States

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

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

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

BRIEF OF EQUAL PROTECTION CONSTITUTIONAL LAW SCHOLARS SERENA MAYERI, MELISSA MURRAY, AND REVA SIEGEL AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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September 20, 2021

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INTEREST OF *AMICI CURIAE*

Amici Serena Mayeri, Melissa Murray, and Reva Siegel are professors of constitutional law and equality law. They submit this brief to identify and explain the equal protection principles that support Respondents' position and afford an independent basis on which to affirm the judgment below.[1]

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SUMMARY OF ARGUMENT

The fundamental right at stake in this case matters to millions of Americans—not only to those who choose to end their pregnancies, but also to those who make life decisions secure in the understanding that they *could* make that choice if necessary. One in four women of child-bearing age in this country will have an abortion. They represent every race, religion,

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

[2] *Amici* join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of the positions advocated in this brief.

socioeconomic background, and more.[3] They often are already raising children themselves. And because our society provides such inadequate infrastructure for families and so little support for caregivers, increasingly, those who decide to end their pregnancies are living in poverty.[4]

HB 1510 impermissibly burdens the constitutional right to liberty and bodily autonomy—in direct violation of this Court's precedent in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *See* Resp. Br. 2-3, 12-15. But HB 1510 also violates another fundamental constitutional guarantee—the right to equal protection under the law. *See id.* at 36-41. As *amici* explain in this brief, the Equal Protection Clause supplies an additional, independent basis for the constitutional right to an abortion, and it forbids states like Mississippi from trampling on that right by passing laws like HB 1510.

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[3] *See* Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 AM. J. PUB. HEALTH 1904, 1907 (2017) (finding that "an estimated 23.7% of women aged 15 to 44 years in 2014 will have an abortion by age 45"); *see also* Patrick T. Brown, *Catholics Are Just as Likely to Get an Abortion as Other U.S. Women. Why?*, AMERICA (Jan. 24, 2018), https://www.americamagazine.org/politics-society/2018/01/24/catholics-are-just-likely-get-abortion-other-us-women-why.

[4] *See, e.g.*, Sabrina Tavernise, *Why Women Getting Abortions Now Are More Likely to Be Poor*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/09/us/abortion-access-inequality.html ("Half of all women who got an abortion in 2014 lived in poverty, double the share from 1994 … .").

Under this Court's equal protection jurisprudence, laws that classify on the basis of sex—including laws that regulate pregnancy—are subject to heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) ("*Virginia*"); *see also Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 728-34 (2003). To survive heightened scrutiny, the State of Mississippi must offer an "exceedingly persuasive justification" for its sex-based classification: specifically, it must show that its decision to regulate by sex-discriminatory means is substantially related to the achievement of important governmental objectives. *Virginia*, 518 U.S. at 531-33. In making that showing, the State may "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females," nor may sex classifications "be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 533-34 (internal citation omitted). HB 1510 does not pass constitutional muster under this standard.

Mississippi has enacted HB 1510 to "protect[] the life of the unborn" and to "protect[] the health of women." *See* H.B. 1510 § 1(2)(b)(i)-(v), 2018 Leg., Reg. Sess. (Miss. 2018) (citations omitted). With certain narrow exceptions, the statute prohibits physicians from performing "an abortion" on a "maternal patient" after 15 weeks—singling out a pregnant woman and imposing on her the role of mother. *See id.* § 1(4). But the State denies the enormity of this imposition by expressly claiming that coercing motherhood, over a woman's objection, protects the woman in addition to any fetal life she may carry. *See id.* § 1(2)(b)(ii)-(v). The statute's paternalist justifications derive from "overbroad generalizations," *Virginia*, 518 U.S. at 533,

about women as destined for motherhood that date back to nineteenth-century anti-abortion campaigns.

Relying on these antiquated sex-role stereotypes, Mississippi assumed it could fulfill *both* of its important objectives (protecting fetal life and women's health) by prohibiting abortion after 15 weeks. Because the State relied so heavily on sex-role stereotypes to achieve its two ends, it failed to explore the many less discriminatory and noncoercive ways to reduce abortion and to protect the life and health of women and future generations—such as by providing appropriate and effective sex education or assisting those who wish to bear children.

For these reasons, Mississippi has failed to offer an "exceedingly persuasive justification" for forcing a woman to continue pregnancy. *Id*. at 531. HB 1510 instead enforces a sex-based and coercive classification that "perpetuate[s] the legal, social, and economic inferiority of women." *Id*. at 534. Although people of all gender identities may become pregnant, seek abortions, or bear children, *see* Resp. Br. 13 n.3, this brief focuses on the constitutionally impermissible sex-role judgments about women that historically undergird laws regulating abortion, *see infra* Part II, including HB 1510. *See, e.g.*, Miss. H.B. 1510 § 1(2) (using language such as "maternal patient" and "women"); *see also infra* n.13 (reporting on debate among State legislators about the Mississippi women on whom the State's abortion regulations focus).[5]

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[5] Laws that discriminate on the basis of pregnancy can involve various forms of sex-based discrimination, as this Court has

This brief proceeds in four parts. *First*, *amici* demonstrate that, under this Court's existing precedent, laws that regulate pregnancy, like HB 1510, are sex classifications subject to heightened scrutiny. *Second*, *amici* explain how HB 1510's attempt to protect both women's health and fetal life violates settled equal protection principles by relying on archaic notions about a woman's social role. *Third*, *amici* show that Mississippi relied on these impermissible assumptions to enact HB 1510's regulation on abortion and, in fact, rejected numerous other less discriminatory means of protecting women's health and fetal life. And *fourth*, *amici* explain why attempts to justify HB 1510 on equality grounds are meritless.

ARGUMENT

I. HB 1510 VIOLATES THE EQUAL PROTECTION CLAUSE

A. This Court's Precedents Recognize That Equality Principles Underlie the Constitutional Right to an Abortion

The right to make decisions about whether to end a pregnancy is grounded in both the Due Process and Equal Protection Clauses. In *Casey*, this Court acknowledged that women's talent, capacity, and right "to participate equally in the economic and social life

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acknowledged. *Cf. Bostock v. Clayton County*, 140 S. Ct. 1731, 1744 (2020) ("In *Phillips*, the employer could have accurately spoken of its policy as one based on 'motherhood.' In much the same way, today's employers might describe their actions as motivated by their employees' homosexuality or transgender status.").

of the Nation" is dependent on "their ability to control their reproductive lives." 505 U.S. at 856. Indeed, because of the physical, emotional, spiritual, economic, and social stakes of pregnancy and motherhood, the State cannot "insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and of our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Id.* at 852; *see also Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures … center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship … .").[6]

And just last Term, Justice Sotomayor recognized the equality interests at stake in accessing abortion. Justice Sotomayor observed that "[t]his country's laws have long singled out abortions for more onerous treatment than other medical procedures that carry similar or greater risks," imposing "an unnecessary, irrational, and unjustifiable undue burden on women seeking to exercise their right to choose." *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 585 (2021) (Sotomayor, J., dissenting) (citing *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting)).

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[6] *Cf. Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

Those undue burdens are often most severe for low-income women and women of color. *Id.* at 582.

Accordingly, Justices of this Court have long acknowledged the fundamental equality principles that underlie the constitutional right to an abortion. Similarly, and over time, the Court has applied its prohibition on discriminatory sex-based classifications to laws regulating pregnancy. As *amici* explain in further detail below, HB 1510 violates those equality principles by imposing an unjustified and profoundly dangerous sex-based restriction on a woman's right to control her own reproductive life.[7]

B. Pregnancy Regulations Are Sex-Based Classifications Subject to Heightened Scrutiny

Throughout much of American history, belief in traditional gender roles has shaped the Nation's laws, including the assumptions that "a woman is, and should remain, 'the center of home and family life,'" and that "'a proper discharge of [a woman's] maternal

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[7] Even before *Casey*, prominent legal scholars recognized that the abortion right is also protected by the Constitution's equality guarantees. *See Casey*, 505 U.S. at 928 & n.4 (Blackmun, J., concurring in part) (observing that the "assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause" and citing scholarship); *see also* Serena Mayeri, *Undue-ing Roe: Constitutional Conflict and Political Polarization in* Planned Parenthood v. Casey, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 150-52 (Melissa Murray, Katherine Shaw & Reva B. Siegel, eds. 2019) (describing role of sex equality principles in academic and judicial discourse leading up to *Casey*).

functions … justif[ies] [protective] legislation,'" *Hibbs*, 538 U.S. at 729 (third alteration added) (citing *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), and *Muller v. Oregon*, 208 U.S. 412, 422 (1908)). Those sex-role stereotypes led three members of this Court to insist that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment) (upholding a state's denial of a law license to a woman because of her sex).

Fifty years ago, this Court changed course and began to strike down sex-based state action that enforced these traditional gender stereotypes as unconstitutional under the Equal Protection Clause. *See Reed v. Reed*, 404 U.S. 71, 76 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) (plurality opinion) (citing *Bradwell* as evidence of the Nation's "long and unfortunate history of sex discrimination"). The Court did not initially give a clear account of how pregnancy-based regulations perpetuate these stereotypes. *See Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). But as the Court gained experience interpreting the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2018), it began to explain how certain laws regulating pregnancy could be based on impermissible sex-role stereotypes, *see Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289-90 (1987) (Marshall, J.) (upholding a state law mandating a reasonable, unpaid pregnancy disability leave as consistent with the Pregnancy Discrimination Act and Title VII because it "promotes equal employment opportunity" and "does not reflect archaic

or stereotypic notions about pregnancy and the abilities of pregnant workers").

The Court thereafter made clear that equal protection principles apply with equal force to pregnancy-based classifications. Justice Ginsburg's landmark decision in *United States v. Virginia* recognized that pregnancy-based regulations, too, are sex classifications subject to scrutiny under the Equal Protection Clause. *See Virginia*, 518 U.S. at 533-34 (citing *Cal. Fed.*, 479 U.S. at 289). In *Virginia*, the Court held that sex classifications cannot be justified by physical differences between men and women. The Court affirmed that the Constitution's equality guarantees extend to women as men's equals, regardless of any "inherent differences" between the sexes. Those "[i]nherent differences," the Court explained, "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.*

Not every sex classification, the Court reasoned, was constitutionally infirm. Sex classifications that "promot[e] equal employment opportunity" or "advance [the] full development of the talent and capacities of our Nation's people"—like the state law establishing unpaid pregnancy disability leave at issue in *Cal. Fed.*—are permissible. *Id.* at 533 (quoting *Cal. Fed.*, 479 U.S. at 289 (first alteration in original)). But the Court in *Virginia* held that the Constitution's guarantee of equal protection means that sex "classifications may not be used, as they once were … to create or perpetuate the legal, social, and economic

inferiority of women." *Id.* at 534 (internal citation omitted).

Seven years later, Chief Justice Rehnquist elaborated on *Virginia*'s logic, further confirming that the Equal Protection Clause applied to laws regulating pregnancy. In *Hibbs*, the Court held that Congress could enact the Family and Medical Leave Act to remedy and prevent inequality in the provision of family leave because historically, "ideology about women's roles" had been used to justify discrimination against women particularly when they were "mothers or mothers-to-be." 538 U.S. at 736 (citation omitted).

Hibbs made clear that pregnancy-based regulations anchored in archaic stereotypes about gender roles can violate the Equal Protection Clause. As Chief Justice Rehnquist put it, the "differential [maternity and paternity] leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work." *Id.* at 731. Laws perpetuating such sex-role stereotypes injured women *and* men. And "[t]hese mutually reinforcing stereotypes," the Chief Justice recognized, "created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver." *Id.* at 736 ("Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave.").

Taken together, *Virginia* and *Hibbs* establish that laws regulating pregnancy are sex-based classifications that violate the Equal Protection

Clause when they are rooted in sex-role stereotypes that injure or subordinate. *See* Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 19TH AMENDMENT SPECIAL EDITION GEO. L.J. 167, 189-211 (2020); *see also id.* at 208 & n.229 (explaining *Geduldig*'s status after *Virginia* and *Hibbs*).

C. Because HB 1510 Regulates Pregnancy, It Must Satisfy Heightened Scrutiny

HB 1510 singles out pregnant women for coercive regulation. By its terms, the law is designed to deprive women, and not men, of their right to make choices about whether or not to have children.

Because Mississippi has chosen "discriminatory means" to protect health and life, the State must satisfy heightened scrutiny by offering an "exceedingly persuasive" justification for its choice of means that does not rely on "overbroad generalizations" about the differences between sexes. *Virginia*, 518 U.S. at 533. In scrutinizing sex-based state action for impermissible sex stereotyping, the *Virginia* standard examines the law's historical context and the State's decision-making in a larger policy context to ascertain whether the State's sex-based classification is being used "to create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 534.[8]

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[8] *See Virginia*, 518 U.S. at 535-40 (determining from historical context that stereotyped beliefs about sex roles originating in nineteenth-century ideas about women's physical and reproductive fragility underpinned the exclusion of women from VMI); *id.* at 539 (determining from policy context that VMI's

HB 1510 does not satisfy heightened scrutiny for at least two reasons. First, considered in historical context, the State's legislative findings reflect "ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited." *Gonzales*, 550 U.S. at 185 (Ginsburg, J., dissenting). *See infra* Part II. Second, relying on these traditional sex roles, the State assumed it could protect fetal life *and* the health of women by prohibiting abortion after 15 weeks. But gripped by those stereotyped beliefs, Mississippi failed to adopt many alternative, less discriminatory means of reducing abortion and supporting those who seek to raise children. *See infra* Part III.

II. MISSISSIPPI'S JUSTIFICATIONS FOR HB 1510 ARE INEXTRICABLY INTERTWINED WITH OUTDATED STEREOTYPES ABOUT WOMEN

Petitioners insist that *Roe* and *Casey* "shackle States to a view of the facts that is decades out of date." Pet. Br. 4. To the contrary, Mississippi's own logic and its laws are anchored in the past.

Today, as in the past, advocates of laws like HB 1510 argue that restricting abortion will protect fetal life *and* protect women—all while denying that limiting abortion access risks hurting women.[9] *See*

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rejection of coeducation in 1986 did not reflect "any Commonwealth policy evenhandedly to advance diverse educational options").

[9] In the 1990s, in response to public unease with arguments against abortion that ignored or attacked women, advocates

Miss. H.B. 1510 § 1(2)(b)(i) (finding that banning abortion protects fetal life); *id.* § 1(2)(b)(ii)-(v) (finding that banning abortion protects women).

These justifications are not new. The nineteenth-century anti-abortion campaign, too, claimed that regulating abortion would protect women's physical and psychological health. The anti-abortion campaign shows how a call to protect a pregnant woman's health can function as an effort to enforce a woman's role as mother. Most importantly, the campaign demonstrates how seemingly benign concerns can be deeply entangled with wholly unconstitutional reasons for compelling a woman to bear a child. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 280-323 (1992) (showing how nineteenth-century doctors argued that banning abortion would protect fetal life, protect a woman's health, enforce wives' marital duties, and control the relative birthrates of "native" and immigrant populations, in order to preserve the demographic character of the nation); *see also infra* Part IV.

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began to emphasize that restricting abortion not only protects fetal life, but also protects women's psychological and physical health. *See* Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical, 2020 SUP. CT. REV. (forthcoming 2021) (manuscript at 20-33), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3799645 (explaining how anti-abortion movement's "pro-woman and pro-life" claims implicitly and expressly appeal to the sex role-based belief that what is best for children is best for the mother's health).

A. Historical Context Illustrates That Sex Stereotypes Are Interwoven into Abortion Restrictions Like HB 1510

In the nineteenth century, the physician who led the campaign to ban abortion, Dr. Horatio Storer, claimed that childbearing was "the end for which [married women] are physiologically constituted and for which they are destined by nature." *See* HORATIO STORER, WHY NOT? A BOOK FOR EVERY WOMAN 75-76 (1866); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, 78, 89, 148 (1978) (recounting Storer's role in persuading Americans to ban abortion). According to Storer, avoiding this pre-ordained biological and social role would lead to a woman's physical and social ruin. *See* STORER, *supra*, at 37 ("[A]ny infringement of [natural laws] must necessarily cause derangement, disaster, or ruin."); H.S. POMEROY, THE ETHICS OF MARRIAGE 97 (1888) ("Interference with Nature so that she may not accomplish the production of healthy human beings is a physiological sin of the most heinous sort … ."). The American Medical Association's 1871 *Report on Criminal Abortion* denounced a woman who ended a pregnancy: "She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract." D.A. O'Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 TRANSACTIONS AM. MED. ASS'N 239, 241 (1871).

During this same time, doctors further justified controlling women's roles by asserting women's incompetence to make their own decisions about sex and childbearing. Because they understood

childbearing as the "end for which [women] are psychologically constituted and for which they are destined by nature," anti-abortion advocates claimed that termination of pregnancy is "disastrous to a woman's mental, moral, and physical well-being." STORER, *supra*, at 75-76. The notion that interrupting a pregnancy produced feminine hysteria followed neatly from the premise that women lack decisional capacity to choose to avoid motherhood. *See* E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DETROIT REV. MED. & PHARMACY 145, 146 (1867) (noting that "violence against the physiological laws of gestation" would cause a "severe and grievous penalty" because of "the intimate relation between the nervous and uterine systems manifested in the various and frequent nervous disorders arising from uterine derangements"). Further, the choice to avoid motherhood was believed to confer "a moral as well as a physical taint" that "stamps its effects indelibly on the constitution of the female." J.J. Mulheron, *Foeticide: A Paper Read Before the Wayne County Medical Society*, 10 PENINSULAR J. MED. 385, 390 (1874).

And just as women's minds were supposedly irrevocably and deleteriously affected by abortion, so too were their bodies. Physicians claimed that abortion would "insidiously undermine[]" women's reproductive organs, and "permanently incapacitate[] [women] for conception." STORER, *supra*, at 50. A woman who has an abortion "destroys her health … [and] sooner or later comes upon the hands of the physician suffering with uterine disease." O.S. Phelps, *Criminal Abortion: Read Before the Calhoun County Medical Society,* 1 DETROIT LANCET 725, 728 (1878).

According to anti-abortion advocates, these and other health issues were a "direct result of this interference with *nature's* laws." L.D. Griswold et al., *Additional Report from the Select Committee to Whom Was Referred S.B. No. 285*, 1867 OHIO SENATE J. APPENDIX 233, 234 (emphasis added). It should come as little surprise that "[s]tatements hostile to the woman's rights movement appeared in many of the anti-abortion tracts penned by America's doctors and their supporters." Siegel, *Reasoning from the Body*, *supra*, at 303; *see generally id.* at 302-14.[10]

B. HB 1510 Rests on Modern Expressions of Outdated Sex-Role Stereotypes

HB 1510 recites Mississippi's interests in banning abortion to protect fetal life and women's health. *See* Miss. H.B. 1510 § 1(2)(b)(i)-(ii). Although the State does not employ nineteenth-century rhetoric in its legislative findings, its asserted justifications for HB 1510 are a modern twist on the same old sex-role

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[10] Emphasizing the importance of a woman's right to "voluntary motherhood" (that is, to oppose her husband's sexual advances), abolitionist and suffragist Lucy Stone remarked, "[i]t is very little to me to have the right to vote, to own property, … if I may not keep my body, and its uses, in my absolute right." *Id.* at 305 (quoting Letter from Lucy Stone to Antoinette Brown (Blackwell) (July 11, 1855), *quoted in* ELIZABETH CAZDEN, ANTOINETTE BROWN BLACKWELL: A BIOGRAPHY 100 (1983)). Doctors leading the nineteenth-century campaign against abortion attacked arguments for voluntary motherhood on the grounds that recognizing a wife's right to refuse her husband's sexual advances would make marriage a relation of "legalized prostitution." *See id.* at 308-14. This debate over women's sexual and reproductive autonomy offered competing perspectives on the practice of abortion.

stereotypes that animated anti-abortion campaigners in centuries past.

Like nineteenth-century physicians, Mississippi assumes that women are incapable of deciding for themselves how to balance the comparative health risks and emotional burdens of continued pregnancy, childbirth, and abortion. For instance, the legislative findings in HB 1510 declare that "[a]bortion carries significant physical and psychological risks to the maternal patient," including "depression; anxiety; substance abuse; and other emotional or psychological problems." *Id.* § 1(2)(b)(ii), (iv). The State Legislature further asserts that the "medical, emotional, and psychological consequences of abortion are serious and can be lasting." *Id.* § 1(2)(b)(v) (internal quotation marks omitted); *see* Pet. Br. 8.

That unsupported assertion reflects the same stereotypical view of women's fragile, maternal psyche espoused by nineteenth-century anti-abortion advocates. Meanwhile, the mental and emotional stress of pregnancy, childbirth, and caring for children—in an economy that discriminates against mothers and pregnant people—go entirely unmentioned. *See* Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1359-61 (2008). Rather than leave judgments about how to balance these risks to *women*, Mississippi has decided to make the decision for itself, banning abortions after 15 weeks on the ground that doing so is in the psychological best interests of the "maternal patient." Miss. H.B. 1510 § 1(2)(b)(ii).

There is a second, even more fundamental, sex-role assumption underlying HB 1510. As the Court in

Virginia recounted, it was commonplace for nineteenth-century doctors to argue that women who violated sex roles (*e.g.*, by pursuing higher education) risked jeopardizing their reproductive physiology. *See Virginia*, 518 U.S. at 536-37 & n.9. The physicians in Storer's campaign repeatedly warned of the litany of health harms that would attend a woman's deviation from her reproductive destiny. *See supra* Part II.A. The reasoning Mississippi offers for banning abortion after 15 weeks—to protect the health of the "maternal patient," Miss. H.B. 1510 § 1(2)(b)(ii), (iii), echoes the sex-role assumptions of the nineteenth-century anti-abortion campaign: a pregnant woman's "health" will suffer if she deviates from her natural maternal role. But whatever health risks may be associated with abortion (on one hand) and bearing children in Mississippi (on the other), the choice of whether to assume those risks and how to weigh them belongs to women and not the State.

Moreover, when Mississippi claims that abortion in the second trimester is more dangerous than childbirth, *id.* § 1(2)(b)(iii), it appears to be making an empirical claim. In fact, Mississippi is appealing to the traditional sex-role assumption that a woman will suffer if she chooses to avoid her natural maternal role. If its claim were genuinely based in science, the State would address the scientific finding that childbirth is many times more dangerous than abortion—as this Court and others have recognized. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016) (observing that "[n]ationwide, childbirth is 14 times more likely than abortion to result in death"); Siegel, *Why Restrict Abortion?*, *supra* (manuscript at 49-50 & n.259) (describing Judge

Richard Posner and others criticizing an anti-abortion expert for persistently, and falsely, claiming that abortion is more dangerous than pregnancy). *See generally* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215 (2012) (concluding that the risk of death associated with childbirth is approximately 14 times higher than with abortion). *See infra* Part III.

While the justifications undergirding HB 1510 may superficially be couched in the language of health and science, even a cursory examination of the relevant historical context reveals that the State's justifications are just re-packaged versions of the same sex-role stereotypes used by nineteenth-century anti-abortion advocates. Thus, HB 1510 carries forth a long and unfortunate tradition of state-sponsored paternalism, in which the coercive control of a woman is justified as an act of benign solicitude. *See Frontiero*, 411 U.S. at 684 (explaining that traditional forms of sex discrimination were "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage").

To be clear, Mississippi may surely protect the health of women and the next generation, but in seeking to achieve these important ends, the State may "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. Those are precisely the assumptions about women on which HB 1510 relies in presenting coercion as protection. These well-worn sex-role stereotypes may be archaic, but they are anything but quaint: when these sex-role

stereotypes are enforced through a law restricting abortion, they can deprive a woman of her autonomy, her job, her health, and even her life.

III. RELIANCE ON IMPERMISSIBLE SEX STEREOTYPES LED MISSISSIPPI TO FOREGO LESS DISCRIMINATORY MEANS TO ACHIEVE ITS GOALS OF PROTECTING WOMEN'S HEALTH AND FETAL LIFE

Mississippi employed sex-discriminatory means to achieve its goals of protecting women's health and protecting fetal life. *Virginia* requires the State to demonstrate that its choice of sex-discriminatory means is "substantially related to the achievement of" important government ends, by advancing an "exceedingly persuasive justification" that does not rely on sex-role stereotypes. *See Virginia*, 518 U.S. at 533-34. It cannot make that showing here.

Mississippi could have employed *many* policy means to reduce abortion and protect the health of women and children. Relying on available federal funds, it could have provided appropriate and effective sex education and expanded access to contraception; it could have expanded access to health insurance and provided assistance to needy families. But instead, Mississippi has restricted abortion access.

In its belief that banning abortions at 15 weeks would protect both the fetus *and* the health of the pregnant woman—a belief that is itself rooted in stereotypes about women's roles as child bearers before all else—Mississippi pushed women who seek to end pregnancies into harm's way by compelling

pregnancy and childbirth, when the State could have pursued its ends by alternate, less discriminatory means. The State singled out women who sought to end pregnancy instead of pursuing its ends by aiding those who want to avoid parenthood and supporting those who want to raise children.

Because Mississippi so heavily relied on sex-role stereotypes to enact a law that singled out and harmed women, the State has not demonstrated that its ban on abortion after 15 weeks is "substantially related" to important ends. Instead, the State's reliance on sex-role stereotypes led it to protect through coercion, which in turn "perpetuate[s] the legal, social, and economic inferiority of women." *Id.*

A. Abortion Restrictions Like HB 1510 Do Not Protect Women But Rather Expose Them to Harm

Mississippi seeks to protect women and fetal life by banning abortion after 15 weeks. But the ban it has adopted to achieve those ends actually jeopardizes, rather than protects, the health of women.

Not only does HB 1510 take from women control over their life decisions, as nineteenth-century doctors preached, it subjects women to myriad health harms in a State where the social safety net makes grossly inadequate provision for women or children. *See* Michele Goodwin, *Banning Abortion Doesn't Protect Women's Health*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/opinion/roe-abortion-supreme-court.html.

The risks of compelled pregnancy are considerable, in a state where the maternal mortality rate is

alarmingly high, averaging 33.2 deaths for every 100,000 live births. MISS. STATE DEP'T OF HEALTH, MISS. MATERNAL MORTALITY REPORT 10 (2019), https://msdh.ms.gov/msdhsite/index.cfm/31,8127,299,pdf/Maternal_Mortality_2019_amended.pdf.

Pregnancy in Mississippi presents particular risks for Black women, who accounted for "nearly 80 percent of pregnancy-related cardiac deaths" between 2013 and 2016. *Id.* at 16. The pregnancy-related mortality rate for Black women was nearly three times the rate for white women. *Id.* at 12 (ranging from 51.9 to 61.4 deaths per 100,000 live births compared to 18.9 to 36.7 deaths per 100,000 live births).

Forcing pregnancy and childbirth onto women against their will places their health and lives at risk. HB 1510, therefore, does not promote—let alone substantially relate to—Mississippi's claimed goal of promoting women's health.

B. Mississippi Repeatedly Rejected Nondiscriminatory Alternatives That Would Protect the Health of Women and Families

Mississippi had many policy alternatives for protecting the health of women and families. But in considering the many options before it, the State has consistently rejected noncoercive opportunities to improve the health of mothers and infants, even declining federal monies available to support these ends. The consequences are especially dire for Black mothers and infants. Despite the increased risks they face in Mississippi, the State has repeatedly declined

to enact policies that could improve their health and wellbeing.

1. Access to regular health care and checkups could reduce maternal deaths by up to 60%. Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, 68 MORBIDITY AND MORTALITY WEEKLY REPORT 423 (May 10, 2019). Lack of care can be deadly for newborns—the U.S. Department of Health and Human Services found that newborns whose mothers had no early prenatal care are almost five times more likely to die. *See* Dep't of Health & Hum. Servs. Off. on Women's Health, PRENATAL CARE, https://www.womenshealth.gov/a-z-topics/prenatal-care (Apr. 1, 2019).

Yet ensuring access to health care is largely dependent on income and insurance coverage, and Medicaid expansion under the Affordable Care Act (ACA) has been shown to reliably improve insurance access. Jamie R. Daw et al., *Medicaid Expansion Improved Perinatal Insurance Continuity for Low-Income Women*, 39 HEALTH AFFS. 1531 (Sept. 2020). Increasing access to Medicaid could not only reduce maternal and infant deaths, but could also give a pregnant person lacking alternative health insurance the security to continue an unplanned pregnancy and to cope with delivery and postpartum care.

Mississippi, however, has refused to expand Medicaid under the ACA, compromising health care access for under-resourced Mississippians. Sarah Varney, *How Obamacare Went South in Mississippi*, THE ATLANTIC (Nov. 4, 2014), https://www.theatlantic.com/health/archive/2014/11/how-obamacare-went-

south-in-mississippi/382313/. This policy decision left an estimated 138,000 otherwise eligible people without health coverage and deprived the state of an estimated $1.2 billion in federal funds.

Ironically, after signing HB 1510, then-Governor Phil Bryant announced that he was "committed to making Mississippi the safest place in America for an unborn child, and this bill will help us achieve that goal." Jenny Gathright, *Mississippi Governor Signs Nation's Toughest Abortion Ban into Law*, NAT'L PUB. RADIO (Mar. 19, 2018), https://www.npr.org/sections/thetwo-way/2018/03/19/595045249/mississippi-governor-signs-nations-toughest-abortion-ban-into-law. But, in reality, Mississippi's refusal to accept federal funding to provide health care for its residents directly contributes to its startlingly high infant and maternal mortality rates, especially in communities of color.[11]

2. Lack of financial resources is among the most common reasons that women provide for ending a pregnancy. *See* M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN'S HEALTH 29 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3729671. The Temporary Assistance for Needy Families (TANF) program, which provides grants to support low-income families with children, enables Mississippi to channel

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[11] In 2018, the State ranked worst in the nation for infant mortality, with a rate of 8.43 infant deaths per 1,000 live births. MISS. STATE DEP'T OF HEALTH, INFANT MORTALITY REPORT 1 (2019), https://msdh.ms.gov/msdhsite/_static/resources/8431.pdf. Black infants constitute most infant deaths in Mississippi and are almost twice as likely to die as white infants. *Id.* at 8.

federal monies to its low-income residents. Participating in TANF offers a clear, noncoercive means of empowering people to choose to continue pregnancy with resources to support dependent family members.

Remarkably, despite this opportunity to support at least some women in choosing to continue pregnancies and to reduce the nation's highest child poverty rate, in 2019, Mississippi spent only about five percent of its TANF funds on direct assistance to families. Ali Safawi, *Mississippi Raises TANF Benefits but More Improvements Needed, Especially in South*, CTR. FOR BUDGET & POL'Y PRIORITIES (May 4, 2021), https://www.cbpp.org/blog/mississippi-raises-tanf-benefits-but-more-improvements-needed-especially-in-south. And the number of poor families receiving TANF has declined precipitously: less than 3,000 families received the maximum benefit of $170 per month by 2021, down from 23,700 families in 1999. *See* Anna Wolfe, *Mississippi Found 'Absurd' Ways to Spend Welfare on Anything but the Poor. These Bills Would Put More Money into Families' Pockets*, MISS. TODAY (Jan. 29, 2021), https://mississippitoday.org/2021/01/29/mississippi-found-absurd-ways-to-spend-welfare-on-anything-but-the-poor-these-bills-would-put-more-money-into-families-pockets. [12] Until 2021,

[12] TANF money has also been blatantly wasted in the State. Beginning in 2016, the director of the Mississippi Department of Human Services spearheaded the "largest public embezzlement scheme in state history." Anna Wolfe, *Embattled Welfare Group Paid $5 Million for New USM Volleyball Center*, MISS. TODAY (Feb. 27, 2020), https://mississippitoday.org/2020/02/27/welfare-program-paid-5-million-for-new-volleyball-center/. Millions of

Mississippi maintained the lowest TANF benefit levels in the nation, refusing for decades even to adjust for inflation. *Id.*

Moreover, many women who decide to end a pregnancy are poor and low-income mothers who fear that having another child will compromise their ability to provide for the children they already have. Mississippi preserves policies that reinforce those genuine concerns. For instance, the State maintains a family cap, limiting TANF benefits for additional children born into families that receive public assistance. Mississippi's family cap survives despite evidence that these policies "harm children's health" and "deepen poverty," evidence that has prompted their repeal in many states. Teresa Wiltz, *Family Welfare Caps Lose Favor in More States*, PEW STATELINE (May 3, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/05/03/family-welfare-caps-lose-favor-in-more-states.

3. Information about and access to contraception lowers rates of unplanned pregnancies. But rather than provide effective sex education and contraceptive access, Mississippi continues to promote abstinence-only sex education. Chris Elkins, *More Than 'Just Say No' Needed in Sex Ed*, DAILY J. (Dec. 13, 2012), https://www.djournal.com/opinion/other-opinion-more-than-just-say-no-needed-in-sex-ed/article_

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dollars meant for TANF instead were diverted to "a new volleyball stadium, a horse ranch for a famous athlete, multi-million dollar celebrity speaking engagements, high-tech virtual reality equipment, luxury vehicles, steakhouse dinners and even a speeding ticket." Wolfe, *Mississippi Found 'Absurd' Ways to Spend Welfare on Anything but the Poor*, *supra.*

db4f2969-e2b8-5950-8fd7-f46d551cb742.html. For example, instead of using federal monies to implement comprehensive sex education at no cost to the state, Mississippi funded a "Teen Pregnancy Prevention Summit" featuring pamphlets discouraging the use of contraceptives because they supposedly harm girls' "physical[,] emotional and spiritual well-being." Andy Kopsa, *Sex Ed Without Condoms? Welcome to Mississippi*, THE ATLANTIC (Mar. 7, 2013), https://www.theatlantic.com/national/archive/2013/03/sex-ed-without-condoms-welcome-to-mississippi/273802; *see also* Alana Semuels, *Sex Education Stumbles in Mississippi*, L.A. TIMES (Apr. 2, 2014) (recounting a public school sex education curriculum which instructed students to unwrap a piece of chocolate, pass it around the class, and observe how dirty it became to "show that a girl is no longer clean or valuable after she's had sex").

The consequences of these policies for women's and children's health are severe: Mississippi boasts some of the nation's highest rates of teen pregnancy, gonorrhea, chlamydia, and syphilis. Sarah Fowler, *Mississippi Has the Highest Rate of this STD, Ranks 3rd for Two Others*, MISS. CLARION LEDGER (Oct. 15, 2019), https://www.clarionledger.com/story/news/local/2019/10/15/gonorrhea-std-rate-mississippi-highest-chlamydia-syphillis-access-to-care-factor/3932140002/. Nevertheless, Mississippi continues to rely on a mode of protecting women's health and fetal life that is rooted in impermissible sex stereotypes, and does so by restricting access to reproductive health care.

Mississippi objects that *Casey*'s protections for women's decision-making "prevent[] States from providing health benefits and protections that they can provide in other contexts." Pet. Br. 41-42. But Mississippi has a wealth of policy options for reducing the incidence of abortion in the state and protecting women's health. *See* Emily Wax-Thibodeaux & Ariana Eunjung Cha, *The Mississippi Clinic at the Center of the Fight to End Abortion in America*, THE WASH. POST (Aug. 24, 2021) (recounting story of a young woman receiving follow up care after abortion in the state's only remaining clinic who said "that because Mississippi teaches only abstinence in public schools, no one explained to her how to prevent pregnancy if she had sex").

In short, Mississippi could provide care and support for individuals who wish: to avoid pregnancy, to bear children who will not languish in poverty, to preserve their own or their children's health, or to safeguard their ability to provide for existing children. Instead, Mississippi chooses to prevent women from making the most intimate, consequential decisions for themselves and to coerce women into giving birth under dangerous, demeaning conditions.[13] HB 1510 thus functions more as a tool of control than as an

[13] For a debate among white and Black Mississippi lawmakers about the women regulated by the State's abortion restrictions, including remarks by Republican Sen. Joey Fillingane, co-sponsor of HB 1510, *see* Emily Wagster Pettus, *Mississippi Considers Abortion Ban After Fetal Heartbeat*, ABC NEWS, (Feb. 5, 2019), https://abcnews.go.com/us/wirestory/mississippi-considers-abortion-ban-fetal-heartbeat-60864978.

expression of care for Mississippi's women and children. *See* Pet. App. 46a n.22.

IV. HB 1510 DOES NOT ADVANCE EQUALITY INTERESTS

Increasingly, those who support abortion restrictions take the extraordinary position that laws like HB 1510 actually *promote* equality under the law by preventing abortion from being used for eugenic purposes. In his separate concurrence in the judgment below, Judge Ho, drawing on a concurrence by Justice Thomas, asserts "that abortion 'has proved to be a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics'" and notes that "the current 'abortion ratio … among black women is nearly 3.5 times the ratio for white women.'" Pet. App. 35a (quoting *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1790-91 (2019) (Thomas, J., concurring)).

Such efforts to link abortion to eugenics ignore the fundamental differences between a state-sponsored program of eugenic regulation designed to control the demographic character of the community and a law protecting an individual's decision to terminate a pregnancy. In the former, decisional authority rests with the state. In the latter, the state protects the authority of an individual to make reproductive decisions consistent with her individual beliefs and circumstances.

Without acknowledging these differences, abortion opponents insist that, today, *Roe* and the constitutional law of abortion rights are being used as a tool of eugenic manipulation. There is a certain irony

here: If there is any historical association between abortion law and projects of demographic control, it lies in the nineteenth-century campaign to criminalize abortion itself.

The nineteenth-century campaign unfolded during an era of nativist, anti-immigrant, anti-Catholic feeling. *See* ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES 42-44 (2019). Storer and others blamed abortion for the differences in birth rate between "native" (*i.e.*, Protestant) women and "foreign" women. *See* STORER, *supra*, at 62-63; *id.* at 64-65 (observing that "abortions are infinitely more frequent among Protestant women than among Catholic [women]"); *see also, e.g.*, William McCollom, *Criminal Abortion*, TRANSACTIONS VT. MED. SOC'Y 40, 42 (1865) ("Our own population seem to have a greater aversion to the rearing of families than … the French, the Irish and the Germans."); L.C. Butler, *The Decadence of the American Race,* 77 BOS. MED. & SURGICAL J. 89, 93-94 (Sept. 5, 1867) (comparing Protestant and Catholic doctrine on abortion with attention to the relevant reproductive rates of Protestants and Catholics). Storer tied Protestant families' declining size to Protestant women exercising reproductive autonomy; he thus sought abortion bans to increase the number of Protestants. He questioned whether "the great territories of the far West, just opening to civilization, and the fertile savannas of the South" would be filled by "our own children, or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation." STORER, *supra*, at 85. His words resonated with at least some state lawmakers enacting abortion

restrictions. *See* L.D. Griswold et al., *supra*, at 235 ("Shall we permit our broad and fertile prairies to be settled only by the children of aliens?"). Doctors leading the campaign to criminalize abortion sought to wrest control of the reproductive decisions of "our own women" to protect fetal life, to enforce marital roles, and to preserve the demographic character of the nation. Siegel, *Reasoning from the Body*, *supra*, at 297-300.

Interest in eugenics—"'the science of improving stock' by giving 'the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable'"—became more popular in the nineteenth and early twentieth century. DOROTHY ROBERTS, KILLING THE BLACK BODY 24, 59 (2d ed. 2017). Eugenicists argued that "society should encourage the procreation of those of superior lineage, while discouraging procreation among—and public support for—those of inferior lineage." Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2036-37 (2021).

But the twentieth century eugenics movement did not focus on abortion as a way to control the population. It turned to laws permitting sterilization of the "feebleminded" and "habitual criminals," as well as laws criminalizing miscegenation and interracial marriage. *Id.* at 2037. By the mid-twentieth century, policies of reproductive control primarily targeted impoverished communities of color perceived as threats to the public fisc by *curtailing* individuals' ability to make decisions about their reproductive lives. *Id.* at 2047.

Mississippi's own history is instructive. In the 1950s and 1960s, state lawmakers prescribed sterilization as a punishment for nonmarital childbearing. *See id.* at 2042 (describing 1964 Student Nonviolent Coordinating Committee pamphlet *Genocide in Mississippi*). Civil rights leader Fannie Lou Hamer famously estimated that six in ten Black women who gave birth in Sunflower County Hospital during this period underwent post-partum sterilization without their consent, and often without their knowledge, a practice so common it was colloquially called a "Mississippi appendectomy." CHANA KAI LEE, FOR FREEDOM'S SAKE: THE LIFE OF FANNIE LOU HAMER 21-22, 80 (1999); REBECCA M. KLUCHIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950-1980 at 93-94 (2009). As history makes clear, there is simply no comparison between state policies of reproductive control aimed at limiting birth among marginalized groups and the individual right to make reproductive decisions free from state coercion.

Further, when abortion opponents point to the incidence of abortion among minority communities as evidence that abortion is rife with "eugenic potential," they ignore the "structural impediments communities of color face in reproductive decisionmaking." Murray, *supra*, at 2090-91. For many people of color, "the decision to terminate a pregnancy is shot through with concerns about economic and financial insecurity, limited employment options, diminution of educational opportunities, and lack of access to health care and affordable quality childcare." *Id.* at 2090-91. Efforts to associate abortion with eugenics obscure how Mississippi's own policy choices, by failing to

support families, perpetuate the conditions that lead increasing numbers of poor women and women of color to decide to end their pregnancies. *See supra* Part III. Rather than link abortion rates to the policy choices that perpetuate poverty, opponents shift blame on to women who make decisions about abortion in a nation that provides scarcely any support for those who conceive, bear, and raise children.

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For a half century, this Court has affirmed that the Equal Protection Clause forbids the State from imposing traditional gender roles. *See also* Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143-44 (1978). HB 1510 does just that. It discriminates on the basis of sex, enforcing nineteenth-century sex-role stereotypes that compel a woman to continue pregnancy while the State foregoes alternative nondiscriminatory means to achieve the same ends.

In *Casey*, the Court explained that a pregnant woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Casey*, 505 U.S. at 852. Mississippi has banned abortion after 15 weeks to protect the life and health of the fetus and the "maternal patient." Miss. H.B. 1510 § 1(2)(b)(ii)-(v). The statute addresses a pregnant woman as a mother, but in the same breath, it deprives her of control over whether to become a mother—all while claiming to act in the name of her "physical and psychological" "health." *See id.* Mississippi offers no persuasive justification for its

ready embrace of sex-based coercive means to protect life and health when less discriminatory means were available.

At the heart of both the Due Process Clause and the Equal Protection Clause is the individual's right to be free from state imposition of traditional gender roles. HB 1510 denies that fundamental constitutional guarantee.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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