

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS E. DOBBS, STATE HEALTH)
OFFICER OF THE MISSISSIPPI)
DEPARTMENT OF HEALTH, ET AL.,)
) Petitioners,)
) v.) No. 19-1392
JACKSON WOMEN'S HEALTH)
ORGANIZATION, ET AL.,)
) Respondents.)

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12
13 Washington, D.C.
14 Wednesday, December 1, 2021

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16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 10:00 a.m.

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1 APPEARANCES:
2 SCOTT G. STEWART, Solicitor General, Jackson,
3 Mississippi; on behalf of the Petitioners.
4 JULIE RIKELMAN, ESQUIRE, New York, New York; on behalf
5 of the Respondents.
6 GEN. ELIZABETH B. PRELOGAR, Solicitor General,
7 Department of Justice, Washington, D.C.; for the
8 United States, as amicus curiae, supporting the
9 Respondents.
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 19-1392, Dobbs versus Jackson Women's Health Organization.

General Stewart.

ORAL ARGUMENT OF SCOTT G. STEWART

ON BEHALF OF THE PETITIONERS

MR. STEWART: Mr. Chief Justice, and may it please the Court:

Roe versus Wade and Planned Parenthood versus Casey haunt our country. They have no basis in the Constitution. They have no home in our history or traditions. They've damaged the democratic process. They've poisoned the law. They've choked off compromise.

For 50 years, they've kept this Court at the center of a political battle that it can never resolve. And 50 years on, they stand alone. Nowhere else does this Court recognize a right to end a human life.

Consider this case: The Mississippi law here prohibits abortions after 15 weeks. The law includes robust exceptions for a woman's life and health. It leaves months to obtain an

1 abortion. Yet, the courts below struck the law
2 down. It didn't matter that the law apply --
3 that the law applies when an unborn child is
4 undeniably human, when risks to women surge, and
5 when the common abortion procedure is brutal.
6 The lower courts held that because the law
7 prohibits abortions before viability, it is
8 unconstitutional no matter what.

9 Roe and Casey's core holding,
10 according to those courts, is that the people
11 can protect an unborn girl's life when she just
12 barely can survive outside the womb but not any
13 earlier when she needs a little more help. That
14 is the world under Roe and Casey.

15 That is not the world the Constitution
16 promises. The Constitution places its trust in
17 the people. On hard issue after hard issue, the
18 people make this country work. Abortion is a
19 hard issue. It demands the best from all of us,
20 not a judgment by just a few of us. When an
21 issue affects everyone and when the Constitution
22 does not take sides on it, it belongs to the
23 people.

24 Roe and Casey have failed, but the
25 people, if given the chance, will succeed. This

1 Court should overrule Roe and Casey and uphold
2 the state's law.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: General Stewart, you
5 focus on the right to abortion, but our
6 jurisprudence seems to -- seem to focus on, in
7 Casey, autonomy; in Roe, privacy. Does it make
8 a difference that we focus on privacy or
9 autonomy or more specifically on abortion?

10 MR. STEWART: I think whichever one of
11 those you're focusing on, Your Honor,
12 particularly if you're focusing on -- on the
13 right to abortion, each of those starts to
14 become a step removed for what's provided in the
15 Constitution. Yes, the Constitution does
16 provide certain -- protect certain aspects of
17 privacy, of autonomy, and the like. But, as
18 this Court said in Glucksberg, going directly
19 from general concepts of autonomy, of privacy,
20 of bodily integrity, to -- to a right is not how
21 we traditionally, this Court traditionally, does
22 due process analysis.

23 So I think it just confirms, whichever
24 one of those you look at, Your Honor, a right to
25 abortion is -- is not grounded in the text, and

1 it's grounded on abstract concepts that this
2 Court has rejected in -- in other contexts as
3 supplying a substantive right.

4 JUSTICE THOMAS: You say that this is
5 the only constitutional right that involves the
6 taking of a life. What difference does that
7 make in your analysis?

8 MR. STEWART: Sure, Your Honor. I --
9 I -- I think it -- it makes a -- a number of
10 differences. One, I -- I'd mention two in
11 particular.

12 One is it -- it really does mark out
13 the unbelievably profound ramifications of this
14 area, which, in many other areas, assisted
15 suicide, a whole host of important areas that
16 are important to dignity, autonomy, freedom, and
17 important to matters of conscience, it -- it
18 marks it out as one of the unique areas where
19 this Court has taken that important issue to the
20 people, and it's -- it's something that
21 implicates life, and it just, I think, marks
22 off, Justice Thomas, how problematic and unusual
23 and how much of a break the Court's abortion
24 jurisprudence is from those other cases.

25 JUSTICE THOMAS: If we don't overrule

1 Casey or Roe, do you have a standard that you
2 propose other than the viability standard?

3 MR. STEWART: It would be, Your Honor,
4 a clarified version of the undue burden
5 standard. I -- I -- I would -- I would
6 emphasize, I -- I think, as Your Honor is
7 alluding to, that no standard other than the
8 rational basis review that applies to all laws
9 will promote an administrable, workable,
10 practicable, consistent jurisprudence that put
11 -- puts matters back with the people. I think
12 anything heightened here is going to be
13 problematic.

14 But I would say, if the Court were not
15 inclined to -- to overrule Casey, the -- the
16 choice would be undue burden standard,
17 untethered from any bright-line viability rule.

18 JUSTICE THOMAS: Thank you.

19 JUSTICE BREYER: Well, I'd -- I'd like
20 to go to a different topic, back to Casey.

21 MR. STEWART: Yes, Your Honor.

22 JUSTICE BREYER: I assume you've read
23 Casey pretty thoroughly.

24 MR. STEWART: Yes, Your Honor.

25 JUSTICE BREYER: And there are two

1 parts. One is they reaffirm Roe. Put that to
2 the side. The second is an opinion for the
3 Court, not for three people but for the Court,
4 and that second part is about what stare decisis
5 principles should be used to overrule a case
6 like Roe.

7 And they say Roe is special. What's
8 special about it? They say it's rare. They
9 call it a watershed. Why? Because the country
10 is divided. Because feelings run high. And yet
11 the country, for better or for worse, decided to
12 resolve their differences by this Court laying
13 down a constitutional principle, in this case,
14 women's choice. All right. That's what makes
15 it rare.

16 That's not what I'm asking about. I
17 want your reaction to what they said follows
18 from that. What the Court said follows from
19 that is that it should be more unwilling to
20 overrule a prior case, far more unwilling we
21 should be, whether that case is right or wrong,
22 than the ordinary case.

23 And why? Well, they have a lot of
24 words there, but I'll give you about 10 or 20.
25 There will be "inevitable efforts to overturn

1 it." Of course, there will. Feelings run high.
2 And it is particularly important to show what we
3 do in overturning a case is grounded in
4 principle and not social pressure, not political
5 pressure.

6 "Only the most convincing
7 justification can show that a later decision
8 overruling," if that's what we did, "was
9 anything but a surrender to political pressures
10 or new members." And that is an unjustified
11 repudiation of principles on which the Court
12 stakes its authority.

13 And then there are two sentences I'd
14 like to read because they say they really mean
15 this, the -- the Court, not just three: "To
16 overrule under fire in the absence of the most
17 compelling reason to reexamine a watershed
18 decision would subvert the Court's legitimacy
19 beyond any serious question."

20 And the last sentence, after they
21 quote Potter Stewart on the same point, they
22 say: "Overruling unnecessarily and under
23 pressure" would lead to "condemnation," "the
24 Court's loss of confidence in the judiciary,"
25 the ability of the Court "to exercise the

1 judicial power and to function as the Supreme
2 Court of a nation dedicated to the rule of law."

3 Now that's the opinion of the Court,
4 all right? And it's about stare decisis and how
5 we approach it, and I hope everybody reads this.
6 It's at 505 U.S. 854 to 869.

7 All right. What do you say to that?

8 MR. STEWART: Sure, Your -- sure
9 Justice Breyer. I -- I would say a couple
10 things. I would say we have very closely gone
11 through the factors that the Casey court itself
12 went through in stare decisis. More than half
13 of our brief is devoted to stare decisis. We
14 now have 30 years in the wake of Casey to see
15 what Casey has done and what it hasn't done.

16 JUSTICE BREYER: Well, it's caused
17 some bad things and -- in the eyes of some
18 people and some good things in the eyes of some
19 people. Okay?

20 MR. STEWART: Your Honor --

21 JUSTICE BREYER: All right. All
22 right. Go ahead. You --

23 MR. STEWART: I'm -- I'm sorry, Your
24 Honor. What I'd emphasize, Your Honor, is that
25 to the extent that -- that the -- I would not

1 say it was the people that -- that called this
2 Court to end the controversy. The people -- you
3 know, many, many people vocally really just
4 wanted to have the matter returned to them so
5 that they could decide it -- decide it locally,
6 deal with it the way they thought best and at
7 least have a fighting chance to have their view
8 prevail, which was not given to them under Roe
9 and then, as a result, under Casey.

10 And -- and I'd also emphasize, Your
11 Honor, that on -- on stare decisis, just -- as I
12 said, the last 30 years, workability,
13 developments in the law, factual developments
14 that states can't account for. I think the
15 workability, the undue burden standard alone,
16 many problems.

17 On all the metrics that Casey was
18 describing or the vast bulk of them, Casey
19 fails. And I'd also emphasize this as well,
20 Justice Breyer, that Casey was not -- was -- was
21 not a -- a great example of simply letting
22 precedents stand. It -- it recast Roe's
23 reasoning. It overruled two of the Court's most
24 important abortion decisions. It jettisoned the
25 trimester framework of Roe itself and adopted a

1 new standard unknown to other parts of the law.

2 Those are not the hallmarks of
3 precedent, and they failed under this Court's
4 stare decisis factors.

5 JUSTICE BREYER: Okay. Can I take it
6 that your answer is, yes, you accept the way the
7 special rule, the rule for the rare watershed,
8 the stare decisis principles for deciding
9 whether to overturn such a case as Roe, you
10 accept that and you think it's met?

11 MR. STEWART: I would --

12 JUSTICE BREYER: Is that right?

13 MR. STEWART: -- I would say yes in
14 part, Your -- Justice Breyer, and here's what
15 I'd emphasize, is that I -- I do think,
16 particularly when Casey looked outward and
17 looked to what it see -- saw as pressure, there
18 were pressure on all sides. As -- as Your Honor
19 noted, this is a hot, difficult issue for
20 everyone. It's -- that's why it belongs to the
21 people.

22 And I think the conclusion the Court
23 drew from that, that it couldn't provide a -- a
24 good enough example, that it would look on
25 principle, those conclusions were, with respect,

1 Justice Breyer, mistaken, and the -- the last 30
2 years has -- has not seen any calming of that.
3 It's been very different than some of the
4 others -- the Court's other controversial
5 decisions that -- that have seen --

6 JUSTICE SOTOMAYOR: Counsel --

7 MR. STEWART: -- much more calm --

8 JUSTICE SOTOMAYOR: -- what hasn't
9 been at issue in the last 30 years is the line
10 that Casey drew of viability. There has been
11 some difference of opinion with respect to undue
12 burden, but the right of a woman to choose, the
13 right to control her own body, has been clearly
14 set for -- since Casey and never challenged.

15 You want us to reject that line of
16 viability and adopt something different.
17 Fifteen justices over 50 years have -- or I
18 should say 30 since Casey have reaffirmed that
19 basic viability line. Four have said no, two of
20 them members of this Court. But 15 justices
21 have said yes, of varying political backgrounds.

22 Now the sponsors of this bill, the
23 House bill, in Mississippi, said we're doing it
24 because we have new justices. The newest ban
25 that Mississippi has put in place, the six-week

1 ban, the Senate sponsors said we're doing it
2 because we have new justices on the Supreme
3 Court.

4 Will this institution survive the
5 stench that this creates in the public
6 perception that the Constitution and its reading
7 are just political acts?

8 MR. STEWART: I --

9 JUSTICE SOTOMAYOR: I -- I -- I don't
10 see how it is possible. It's what Casey talked
11 about when it talked about watershed decisions.
12 Some of them, Brown versus Board of Education it
13 mentioned, and this one have such an entrenched
14 set of expectations in our society that this is
15 what the Court decided, this is what we will
16 follow, that the -- that we won't be able to
17 survive if people believe that everything,
18 including New York versus Sullivan -- I could
19 name any other set of rights, including the
20 Second Amendment, by the way. There are many
21 political people who believe the Court erred in
22 seeing this as a personal right as -- as opposed
23 to a militia right. If people actually believe
24 that it's all political, how will we survive?
25 How will the Court survive?

1 MR. STEWART: Justice Sotomayor, I --
2 I think the concern about appearing political
3 makes it absolutely imperative that the Court
4 reach a decision well-grounded in the
5 Constitution, in text, structure, history, and
6 tradition, and that carefully goes through the
7 stare decisis factors that we've laid out.

8 JUSTICE SOTOMAYOR: Casey did that.

9 MR. STEWART: No, it didn't, Your
10 Honor, respectfully.

11 JUSTICE SOTOMAYOR: Casey went through
12 every one of them. You think it did it wrong.
13 That's your belief. But Casey did that.

14 MR. STEWART: Well, Your --

15 JUSTICE SOTOMAYOR: And you haven't
16 added --

17 MR. STEWART: Sorry, Your Honor.

18 JUSTICE SOTOMAYOR: -- much to the
19 discussion in your papers as to the errors that
20 Casey made, other than "I disagree with Casey."

21 MR. STEWART: Well, Justice Sotomayor,
22 maybe I can -- I can highlight two.

23 Casey gave one paragraph to the
24 workability of Roe. It then adopted the undue
25 burden standard, which is perhaps the most

1 unworkable standard in American law. It gave
2 about three paragraphs, if memory serves, to
3 reliance, which doesn't account for the last 30
4 years and the changes that have occurred since
5 Casey. It did -- it -- it gave a brief factual
6 view to things that have changed since Roe.
7 Those, of course, are not going to take account
8 of the last 30 years of advancements in
9 medicine, science, all of those things.

10 JUSTICE SOTOMAYOR: What are the --

11 JUSTICE ALITO: What is --

12 JUSTICE SOTOMAYOR: -- advancements in
13 medicine?

14 MR. STEWART: I think it's an
15 advancement in -- in knowledge and concern about
16 such things as fetal pain, what we know the
17 child is doing and looks like and is fully
18 human from a very early --

19 JUSTICE SOTOMAYOR: You know --

20 MR. STEWART: I'm sorry.

21 JUSTICE SOTOMAYOR: -- in -- in
22 regular cases, courts decide whether science
23 fits the Daubert standard. Obviously, the --
24 under the Daubert standard, the minority of
25 people, a -- a gross minority of doctors who

1 believe fetal pain exists before 24, 25 weeks --
2 it's a huge minority and one not well founded in
3 science at all. So I don't see how that really
4 adds anything to the discussion.

5 MR. STEWART: Well --

6 JUSTICE SOTOMAYOR: That a small
7 fringe of doctors believe that pain could be
8 experienced between -- before a cortex is formed
9 --

10 MR. STEWART: Well, I --

11 JUSTICE SOTOMAYOR: -- doesn't mean
12 that there's been that much of a difference
13 since Casey.

14 MR. STEWART: We -- we pointed out as
15 an example, Your Honor, of where Roe and Casey
16 improperly preclude states from taking account
17 for these things. And they should be able to be
18 concerned about the -- about a fact of a -- a --
19 an unborn life being poked and then recoiling in
20 the way one of us would recoil.

21 JUSTICE SOTOMAYOR: Sir, I -- I don't
22 --

23 CHIEF JUSTICE ROBERTS: General, does
24 -- was -- I know what it said about viability in
25 Roe. But was viability an issue in the case? I

1 know it wasn't briefed or argued.

2 MR. STEWART: It -- it was -- it was
3 not issue -- an issue certainly the way it is an
4 issue here, Your Honor. I think it was -- to
5 the extent that the Court had to over -- had to
6 reaffirm Roe, the way to read that as something
7 other than dicta would be to under --

8 CHIEF JUSTICE ROBERTS: I'm -- I'm
9 sorry, I don't know whether that's at -- I said,
10 was it an issue in Roe?

11 MR. STEWART: Oh, in Roe?

12 CHIEF JUSTICE ROBERTS: Yeah.

13 MR. STEWART: I'm sorry, Your Honor.
14 My understanding is no. The law there was --
15 didn't have a viability tag. That was inserted
16 by --

17 CHIEF JUSTICE ROBERTS: In fact, if I
18 remember correctly, and I -- it's an unfortunate
19 source, but it's there -- in his papers, Justice
20 Blackmun said that the viability line was --
21 actually was dicta. And, presumably, he had
22 some insight on the question.

23 MR. STEWART: I -- I think -- and I'd
24 -- I'd add, Your Honor, Justice Blackmun in --
25 in, I think, as well his papers pointed out the

1 arbitrary nature of it and -- and the
2 line-drawing problems --

3 CHIEF JUSTICE ROBERTS: And then --

4 MR. STEWART: -- in there too.

5 CHIEF JUSTICE ROBERTS: -- and then,
6 in Casey, Casey said that that was the core
7 principle or central principle in Roe,
8 viability. It said that after tossing out the
9 trimester formula, which many people thought was
10 the core -- core principle. But was viability
11 at issue in Casey?

12 MR. STEWART: I don't think it was
13 squarely at issue, Your Honor. Again, it's --
14 it's a little hard not to take the Court at its
15 word when it emphasized that viability -- the --
16 the viability is -- is the central part of Roe
17 -- Roe's holding and saying that it is
18 reaffirming that, so we kind of take that as it
19 -- as it stands. But the Court has not -- it
20 did not face a law like this certainly,
21 Mr. Chief Justice.

22 JUSTICE SOTOMAYOR: May I finish my
23 inquiry?

24 MR. STEWART: I -- of course, Justice
25 Sotomayor.

1 JUSTICE SOTOMAYOR: Virtually every
2 state defines a brain death as death. Yet, the
3 literature is filled with episodes of people who
4 are completely and utterly brain dead responding
5 to stimuli. There's about 40 percent of dead
6 people who, if you touch their feet, the foot
7 will recoil. There are spontaneous acts by dead
8 brain people. So I don't think that a response
9 to -- by a fetus necessarily proves that there's
10 a sensation of pain or that there's
11 consciousness.

12 So I go back to my question of, what
13 has changed in science to show that the
14 viability line is not a real line, that a fetus
15 cannot survive? And I think that's what both
16 courts below said, that you had no expert say
17 that there is any viability before 23 to 24
18 months.

19 MR. STEWART: And what I'd say -- say
20 is this, Justice Sotomayor, is that the
21 fundamental problem with viability, it's not
22 really something that rests on -- on science so
23 much. It's that viability is not tethered to
24 anything in the Constitution, in history, or
25 tradition. It's a quintessentially legislative

1 line.

2 A legislature could think that
3 viability makes sense as -- as a place to draw
4 the line, but it's quite reasonable for a
5 legislature to draw the line elsewhere.

6 JUSTICE SOTOMAYOR: Counsel, there's
7 so much that's not in the Constitution,
8 including the fact that we have the last word.
9 Marbury versus Madison. There is not anything
10 in the Constitution that says that the Court,
11 the Supreme Court, is the last word on what the
12 Constitution means. It was totally novel at
13 that time. And yet, what the Court did was
14 reason from the structure of the Constitution
15 that that's what was intended.

16 And, here, in Casey and in Roe, the
17 Court said there is inherent in our structure
18 that there are certain personal decisions that
19 belong to individuals and the states can't
20 intrude on them. We've recognized them in terms
21 of the religion parents will teach their
22 children. We've recognized it in -- in their
23 ability to educate at home if they choose. They
24 just have to educate them. We have recognized
25 that sense of privacy in people's choices about

1 whether to use contraception or not. We've
2 recognized it in their right to choose who
3 they're going to marry.

4 I fear none of those things are
5 written in the Constitution. They have all,
6 like Marbury versus Madison, been discerned from
7 the structure of the Constitution.

8 Why do we now say that somehow Roe
9 versus Casey is -- Roe and Casey are so unusual
10 that they must be overturned?

11 MR. STEWART: Well, Your -- Justice
12 Sotomayor, I would -- I would emphasize two
13 things. When you're going beyond the
14 Constitution, this Court has looked closely
15 to --

16 JUSTICE SOTOMAYOR: No, what I'm
17 saying is they didn't go beyond the
18 Constitution.

19 MR. STEWART: Your Honor, they did not
20 deduce those from the structure of the
21 Constitution. They -- they pointed to the
22 Fourteenth Amendment and -- and reasoned that
23 privacy in Roe, autonomy and similar values in
24 Casey led to a right to abortion.

25 That's not how this Court

1 traditionally does things, including in the vast
2 run of cases that Your Honor ran through. The
3 Court looks to history and tradition. And,
4 here, those decisively reject the proposition
5 that states cannot legislate comprehensively on
6 abortion before, after viability, and all
7 throughout. So it's -- it's history and
8 tradition, Your Honor.

9 And I would also add, Your -- Your
10 Honor, that those -- those decisions, a great
11 many of them, draw -- you know, not just draw
12 from text -- text, history, and tradition, but
13 they draw often clear lines, very workable, have
14 not led to the many negative stare decisis
15 factors that we identify here.

16 JUSTICE KAGAN: General --

17 JUSTICE BARRETT: General, would -- go
18 ahead. Go ahead.

19 JUSTICE KAGAN: Go ahead, Justice
20 Barrett.

21 JUSTICE BARRETT: Would a decision in
22 your favor call any of the questions -- any of
23 the cases, sorry, that Justice Sotomayor is
24 identifying into question?

25 MR. STEWART: No, Your Honor, I -- I

1 think for a couple reasons.

2 First of all, I think the vast run of
3 those cases -- and some mentioned from time to
4 time are things -- you know, Griswold, Lawrence,
5 Obergefell -- these are -- these are cases that
6 draw clear rules: can't ban contraception,
7 can't ban intimate romantic relationships
8 between consenting adults, can't ban marriage of
9 people of the same sex, clear rules that have
10 engendered strong reliance interests and that
11 have not produced negative consequences or all
12 the many other negative stare decisis
13 considerations we pointed out, Your Honor.

14 Also, I -- I'd add none of them
15 involve the purposeful termination of a human
16 life. So those two -- those two features, stare
17 decisis and termination of a human life, Your
18 Honor, puts all of those safely out of reach if
19 the Court overrules here.

20 JUSTICE BREYER: Okay. So we -- I'm
21 sorry to interrupt again, but we really might be
22 making progress. I mean, in the part that --
23 that I read, you know, of Casey --

24 MR. STEWART: Yes, Your Honor.

25 JUSTICE BREYER: -- I think they think

1 go back 150 years, maybe now we can go back 200.
2 They think there have only been two cases which
3 were what they call the watershed and where the
4 special tough overruling rules apply.

5 You want this to be the third, or do
6 you think there were more? And, if so, what
7 were they?

8 MR. STEWART: Well, Your Honor, I --
9 I -- I think there's quite a bit of difference.
10 I -- I think the question is never is it bad to
11 overrule, period. You know, surely, stare --

12 JUSTICE BREYER: No, no, no, I'm
13 asking you to think -- think in their terms.
14 There were two they mentioned, you see.

15 MR. STEWART: But I --

16 JUSTICE BREYER: And they don't want
17 Casey -- they don't want Roe to be the third.

18 Now, in your opinion, you just
19 answered Justice Barrett, or -- hey, all these
20 are not rising to that level. Okay?

21 MR. STEWART: Right, Your Honor.

22 JUSTICE BREYER: Are there any that do
23 rise to the level in your opinion?

24 MR. STEWART: I think -- and I -- and
25 I'm not sure that I necessarily agree with the

1 watershed characterization, Your Honor. What
2 I'd say, though, I -- I can't think of another
3 that kind of hits the radar. But -- but I'd
4 emphasize that the -- a problem here is we're --
5 we're dealing with a right that doesn't have a
6 basis in constitutional text and, again, very
7 much in conflict with those -- with those
8 values, Justice Breyer. Thank you.

9 JUSTICE SOTOMAYOR: I'm not sure how
10 your answer makes any sense. All of those other
11 cases -- Griswold, Lawrence, Obergefell -- they
12 all rely on substantive due process. You're
13 saying there's no substantive due process in the
14 Constitution, so they're just as wrong according
15 to your theater.

16 MR. STEWART: No, Your Honor, we're
17 quite comfortable with Washington versus
18 Glucksberg and how it analyzes substantive due
19 process and it looks to text, history -- it
20 looks to history and tradition to discipline the
21 inquiry --

22 JUSTICE SOTOMAYOR: Well, I mean --

23 MR. STEWART: -- and make sure --

24 JUSTICE SOTOMAYOR: -- in Obergefell,
25 there was no history of -- of -- of same-sex

1 marriage.

2 MR. STEWART: And I think the Court --
3 the -- the Court pointed out, look, when we --
4 when we were facing Loving versus Virginia --

5 JUSTICE SOTOMAYOR: I -- I'm not
6 trying to argue that we should overturn those
7 cases. I just think you're dissimilating when
8 you say that any ruling here wouldn't have an
9 effect on those.

10 MR. STEWART: Respectfully, I -- I --
11 that's -- that's -- I respectfully --

12 JUSTICE SOTOMAYOR: Do you think no --
13 that no state is going to think otherwise, that
14 no people in the population aren't going to
15 channel -- challenge those cases in court?

16 MR. STEWART: I mean, Your -- Your
17 Honor, we'll always have a diversity of views,
18 but I think -- I think --

19 JUSTICE SOTOMAYOR: That's the point.

20 MR. STEWART: -- I think -- I think
21 that's one --

22 JUSTICE SOTOMAYOR: That -- isn't that
23 the -- isn't --

24 MR. STEWART: -- of the benefits of
25 our society.

1 JUSTICE SOTOMAYOR: -- isn't that the
2 point?

3 MR. STEWART: That there -- that
4 there's a diversity of views and people
5 can vigorously debate and make --

6 JUSTICE SOTOMAYOR: Exactly.

7 MR. STEWART: -- decisions for
8 themselves?

9 JUSTICE SOTOMAYOR: And that's what
10 we're still doing --

11 MR. STEWART: I think that's a good
12 thing, Your Honor.

13 JUSTICE SOTOMAYOR: -- and that's what
14 we're doing under undue burden, but we haven't
15 been doing it on the viability line.

16 MR. STEWART: And -- and neither one
17 has worked well. The -- the viability line
18 discounts and disregards state interests, and
19 the undue burden standard has all -- all of the
20 problems that we've emphasized.

21 JUSTICE SOTOMAYOR: How is your
22 interest anything but a religious view? The
23 issue of when life begins has been hotly debated
24 by philosophers since the beginning of time.
25 It's still debated in religions.

1 So, when you say this is the only
2 right that takes away from the state the ability
3 to protect a life, that's a religious view,
4 isn't it --

5 MR. STEWART: Respectfully --

6 JUSTICE SOTOMAYOR: -- because it
7 assumes that a fetus is life at -- when? You're
8 not drawing -- you're -- when do you suggest we
9 begin that life?

10 MR. STEWART: Your Honor, I -- aside
11 from --

12 JUSTICE SOTOMAYOR: Putting it aside
13 from religion.

14 MR. STEWART: I -- I'll -- I'll try to
15 -- I think there might be more than one question
16 and I'll do my very best, Justice Sotomayor.

17 I -- I think this Court in Gonzales
18 pretty clearly recognized that before viability,
19 we are talking, with unborn life, with a human
20 organism. And I think the philosophical
21 questions Your Honor mentioned, all those
22 reasons, that they're hard, they've been
23 debated, they're -- they're -- they're
24 important, they're -- those are all reasons to
25 return this to the people because the people

1 should get to debate these hard issues, and this
2 Court does not in that kind of a circumstance --

3 JUSTICE SOTOMAYOR: So when does the
4 life of a woman and putting her at risk enter
5 the calculus? Meaning, right now, forcing women
6 who are poor -- and that's 75 percent of the
7 population and much higher percentage of those
8 women in Mississippi who elect abortions before
9 viability -- they are put at a tremendously
10 greater risk of medical complications and ending
11 their life, 14 times greater to give birth to a
12 child full term than it is to have an abortion
13 before viability.

14 And now the state is saying to these
15 women, we can choose not only to physically
16 complicate your existence, put you at medical
17 risk, make you poorer by the choice because we
18 believe what? That --

19 MR. STEWART: Sure, Your Honor. I --
20 I think, to -- to answer, I think, the -- the
21 question I think you -- you led with and -- and
22 then I think expanded on but is still on the
23 same issue is as to when does a woman's interest
24 enter, as far as we're concerned, it's there the
25 entire time. Our point is that all of the

1 interests are there the entire time, and Roe and
2 Casey improperly prevent states from taking
3 account and weighing those interests however
4 they think best.

5 We're not saying --

6 JUSTICE KAGAN: General --

7 JUSTICE ALITO: General, are there --
8 are there secular philosophers and bioethicists
9 who take the position that the rights of
10 personhood begin at conception or at some point
11 other than viability?

12 MR. STEWART: I -- I believe so. I
13 mean, I think that there's a wide array, I mean,
14 of -- of -- of people of kind of all different
15 views and -- and of no faith views who -- who
16 would reasonably have that view, Your Honor.

17 It's -- it's -- it's not tied to a
18 religious view, and I don't think -- were it
19 otherwise, this Court's jurisprudence would --
20 on this issue would run right into some of its
21 religious exercise jurisprudence.

22 JUSTICE KAGAN: General, Justice
23 Breyer started with stare decisis, an important
24 principle in any case, and, here, for the
25 reasons that Casey mentioned, especially so, to

1 prevent people from thinking that this Court is
2 a political institution that will go back and
3 forth depending on what part of the public yells
4 loudest and -- and -- and preventing people from
5 thinking that the Court will go back and forth
6 depending on changes to the Court's membership.

7 And what strikes me about this case --
8 and -- and -- and you come here very honestly
9 saying, you know, we want you to discard the
10 entire setup and then, even if you don't do
11 that, we want you to discard the viability line,
12 which you've acknowledged again today Casey says
13 is the -- the heart, the central principle of
14 Roe.

15 And so, usually, there has to be a
16 justification, a strong justification in a case
17 like this beyond the fact that you think the
18 case is wrong. And I guess what strikes me when
19 I look at this case is that, you know, not much
20 has changed since Roe and Casey, that people
21 think it's right or wrong based on the things
22 that they have always thought it was right and
23 wrong for.

24 So the -- the -- the -- the -- the
25 rationale behind those cases had something to do

1 with the autonomy and the freedom and the
2 dignity of women to pursue their lives as they
3 wish, to protect their bodily integrity, to make
4 the decisions that are most fundamental to the
5 course of their lives.

6 And -- and always, in those cases,
7 there was an understanding that there were
8 important interests on the other side in
9 protecting life or protecting the potential for
10 life, whether people saw it one way or the other
11 way, and that there was a difficult question
12 here and a balance to be made.

13 And, I mean, it strikes me that
14 people -- some people think those decisions made
15 the right balance and some people thought they
16 made the wrong balance, but, in the end, we are
17 in the same exact place as we were then, except
18 that we're not because there's been 50 years of
19 water under the bridge, 50 years of decisions
20 saying that this is part of our law, that this
21 is part of the fabric of women's existence in
22 this country, and that that places us in an
23 entirely different situation than if you had
24 come in 50 years ago and made the same
25 arguments.

1 So I guess I just wanted to hear you
2 react to that.

3 MR. STEWART: Of course, Justice
4 Kagan. Thank you. I -- I would emphasize a
5 couple things, Your Honor. The fact that so
6 much time has passed, let's say nothing had
7 changed, that's not a point in Roe and Casey's
8 favor. They have no basis in the Constitution.
9 They -- they adopt a right that purposefully
10 leads to the termination of now millions of
11 human lives. The -- if nothing had changed,
12 they'd be just as bad as they were 30 years ago,
13 50 years ago. And now we just have decades of
14 damage, and we have a situation where nearly 30
15 years after Casey, the Court unfortunately
16 divides over what Casey, the lead case on -- on
17 -- in the abortion area, even means.

18 The lower courts are left not knowing
19 what to do, as I think -- and I think kind of a
20 fundamental problem here is, I think, as Justice
21 Gorsuch mentioned, emphasized in his -- his
22 opinion in -- in June Medical, that the problem
23 for lower court judges is the Constitution
24 doesn't give them an answer to this. There's no
25 neutral rule of law, so judges unfortunately

1 have to look within themselves, and that's just
2 never going to solve this issue.

3 But, if the matter is returned to the
4 people, the people can deal with it, they can
5 work, they can compromise and reach different
6 solutions. But, if we don't do that, we're just
7 going to have all this sort of damage, and at
8 some point, it's appropriate for the Court to
9 say enough, as it has in some of its -- the
10 great overrulings in -- in Brown and in other
11 cases, where it said this is just enough.

12 Justice Harlan had it right in dissent
13 in Plessy when he recognized that -- that --
14 that, you know, all are -- all are equal. And,
15 here -- similarly, here, the state should be
16 able to recognize, hey, there are real values on
17 both sides here. We -- we -- we think that this
18 one slightly outweighs, we think that this one
19 slightly outweighs, or we think that there's
20 some balance to be drawn here.

21 But, if the Court doesn't do that,
22 Justice Kagan, it's just going to be continued
23 damage, and the Court will continue to plunge in
24 this political issue.

25 I apologize, Mr. Chief Justice. I've

1 gone over.

2 CHIEF JUSTICE ROBERTS: No, no, that's
3 all right. I have just a few little -- well,
4 not little, I hope -- questions, and the first
5 gets back to the issue of viability.

6 You know, in your petition for cert,
7 your first question and the only one on which we
8 granted review was whether all pre-viability
9 prohibitions on elective abortions are
10 unconstitutional. And then I think it's fair to
11 say that when you got to the brief on the
12 merits, you kind of shifted gears and talked a
13 lot more about whether or not Roe and Casey
14 should be overruled. And I wanted to give you a
15 chance to explain that.

16 MR. STEWART: Sure, Your Honor. So a
17 couple points. You know, at the petition stage,
18 we were, of course, identifying -- we'd
19 identified for the Court three questions. We
20 emphasized, as you do at the cert stage, hey,
21 this is important; only this Court can resolve
22 it. We emphasized, I believe it was five times,
23 that the Court was at the least going need --
24 going to need to reconsider, revisit, or
25 re-evaluate its precedents. And we asked the

1 Court to at least get rid of a viability line or
2 any suggestion of a viability line.

3 So we added, however -- and we had to
4 take account of the reality that this argument
5 has not fared well in the lower courts. It --
6 it -- it's lost in every court of appeals. So,
7 you know, we -- we raised the issue in addition,
8 but, once the Court granted only the first
9 question, we presented every argument as we, you
10 know, signaled we -- we would present the -- the
11 -- the full-blown constitutional merits argument
12 with that fundamental question.

13 So I -- I'd emphasize that, Your
14 Honor. It was kind of the shift you go from
15 cert state to merits stage. The Court granted
16 one question. That question fairly includes
17 what is the correct standard.

18 CHIEF JUSTICE ROBERTS: Well, it
19 fairly includes the broader arguments you
20 raised. I'm not suggesting that. But, on the
21 other hand, it presumably included the viability
22 question as well, because that's what you talked
23 about in that one sentence.

24 MR. STEWART: And -- and -- and we --
25 we've addressed that as well, Your Honor. I --

1 what I -- what I'd emphasize here is that the
2 merits arguments of, you know, the validity of
3 Roe and Casey as an original matter, is there a
4 viability rule based in the Constitution, those
5 are not that complicated or -- or -- or lengthy.

6 The harder questions are, you know,
7 should the Court overrule and -- and take that
8 momentous step? And that's why we devote a lot
9 of space to that very important issue. We
10 respect stare decisis and have walked through
11 all those points. But, again, focusing on the
12 question presented and arguing -- presenting our
13 best arguments for that, that's -- that's what
14 we've done, Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: On stare
16 decisis, I think the first issue you look at is
17 whether or not the decision at issue was wrongly
18 decided. I've actually never quite understood
19 how you evaluate that. Is it wrongly decided
20 based on the legal principles and doctrine when
21 it was decided or -- or in retrospect?

22 Because Roe -- I mean, there are a lot
23 of cases around the time of Roe, not of that
24 magnitude but the same type of analysis, that --
25 that went through exactly the sorts of things we

1 today would say were erroneous, but do we look
2 at it from today's -- if we look at it from
3 today -- today's perspective, it's going to be a
4 long list of cases that we're going to say are
5 -- were wrongly decided.

6 MR. STEWART: Well, I'd say -- I'd
7 say, Mr. Chief Justice, that you -- you look --
8 you can look both was it wrong at the time, has
9 it been unmasked as wrong by -- by new
10 understandings, new knowledge, any developments.

11 But I -- I don't think -- as I -- I
12 think the colloquy -- my colloquy with Justice
13 Barrett indicated, the Court won't have -- have
14 to be looking at -- at -- at much other -- many
15 other areas because this is an area that has a
16 uniquely problematic set of stare decisis
17 considerations. A lot of other controversial
18 areas or once controversial areas are -- are
19 quite settled, clear rules, and don't have those
20 considerations against them.

21 So, really, by -- by overruling Roe
22 and Casey, the Court won't have to go down that
23 road, and a lot of those decisions are quite
24 readily groundable in history, tradition, and
25 the Court's traditional factors, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Justice Thomas?

3 JUSTICE THOMAS: No questions.

4 CHIEF JUSTICE ROBERTS: Justice

5 Breyer?

6 Justice Alito?

7 Justice Sotomayor?

8 Justice Kagan?

9 JUSTICE KAGAN: General, I -- I just
10 wanted to get your quick sense of how your
11 intermediate positions would work, you know, if
12 basically the viability line was discarded and
13 undue burden became the standard overall, a
14 standard that, according to you, is an unclear
15 one, what that would leave the Court with going
16 forward.

17 You know, I'm just sort of thinking
18 about the great variety of different -- of
19 regulations that states could pass, so whether
20 one is 15 weeks and one is 12 weeks and one is 9
21 weeks or variation across a wide variety of
22 other dimensions. What would that look like
23 coming to the Court? How would we -- how -- how
24 do you think we should -- we would be able to
25 deal with that or -- or how would you counsel us

1 to deal with that if the Court were to go down
2 that road?

3 MR. STEWART: Well, I think I -- the
4 -- this is -- not to push back against the end
5 -- and I will -- will answer your question,
6 Justice Kagan, but part of why we've counseled
7 to overrule full scale is that that's the only
8 way to get rid of a number of the problems that
9 I think Your Honor's alluding to.

10 And that's that when you have the
11 undue burden standard, it's -- it's a very hard
12 standard to apply. It's not objective. The
13 Court looks to the record in each case and
14 what's going on. I mean, the Court in Casey
15 itself said, under this record, this is not an
16 undue burden. You -- you couldn't say
17 necessarily for certain that a certain number of
18 weeks one place would be an undue burden but
19 would be okay another place.

20 But, again, that is the world we have
21 under Casey. So, if the Court upholds this law
22 under the undue burden standard, it would be
23 carrying forward with those features, which I --
24 I -- and I hope I've answered your question, but
25 I think that's one of the very strong reasons to

1 just go all the way and overrule Roe and Casey,
2 Your Honor. I -- anyway.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch?

5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: I want to be clear
7 about what you're arguing and not arguing.

8 MR. STEWART: Yes, Your Honor.

9 JUSTICE KAVANAUGH: And to be clear,
10 you're not arguing that the Court somehow has
11 the authority to itself prohibit abortion or
12 that this Court has the authority to order the
13 states to prohibit abortion as I understand it,
14 correct?

15 MR. STEWART: Correct, Your Honor.

16 JUSTICE KAVANAUGH: And as I
17 understand it, you're arguing that the
18 Constitution's silent and, therefore, neutral on
19 the question of abortion? In other words, that
20 the Constitution's neither pro-life nor
21 pro-choice on the question of abortion but
22 leaves the issue for the people of the states or
23 perhaps Congress to resolve in the democratic
24 process? Is that accurate?

25 MR. STEWART: Right. We're -- we're

1 saying it's left to the people, Your Honor.

2 JUSTICE KAVANAUGH: And so, for the --
3 if you were to prevail, the states, a majority
4 of states or states still could or -- and
5 presumably would continue to freely allow
6 abortion, many states; some states would be able
7 to do that even if you prevail under your view,
8 is that correct?

9 MR. STEWART: That's consistent with
10 our view, Your Honor. It's -- it's one that
11 allows all interests to have full voice and --
12 and many of the abortions we see in certain
13 states that I don't think anybody would think
14 would be moving to change their laws in a more
15 restrictive direction.

16 JUSTICE KAVANAUGH: Thank you.

17 MR. STEWART: Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: General, I have a
21 question that is a little bit of a follow-up to
22 one that Justice Breyer was asking you. That's
23 about stare decisis. And I think a lot of the
24 colloquy you've had with all of us has been
25 about the benefits of stare decisis, which I

1 don't think anyone disputes, and, of course, no
2 one can dispute because it's part of our stare
3 decisis doctrine that it's not an inexorable
4 command and that there are some circumstances in
5 which overruling is possible. You know, we have
6 Plessy, Brown. We have Bowers versus Hardwick,
7 to Lawrence.

8 But, in thinking about stare decisis,
9 which is obviously the core of this case, how
10 should we be thinking about it -- I mean,
11 Justice Breyer pointed out that in Casey and in
12 some respects, well, it was a different
13 conception of stare decisis insofar as it very
14 explicitly took into account public reaction.
15 Is that a factor that you accept, or are you
16 arguing that we should minimize that factor?

17 And is there a different set of rules
18 -- it is true that Casey identified Brown and
19 West Coast Hotel as watershed decisions. But is
20 there a distinct set of stare decisis
21 considerations applicable to what the Court
22 might decide is a watershed distinction?

23 MR. STEWART: I don't think there
24 should be a distinct set of -- of -- of
25 considerations there, Your Honor. I think what

1 I'd -- what I'd emphasize, and just to make
2 sure, I -- on -- on the kind of legitimacy, the
3 Court looking outward, I -- I think Casey was
4 unusual in that regard. I think it was a
5 mistake. And I think it's something that is
6 kind of in conflict with this Court's structure
7 and approach as an independent branch looking to
8 the Constitution rather than looking without.

9 And I -- I think that's one reason why
10 traditionally the Court is -- is -- is -- in
11 some of its greatest overrulings, it's -- it's
12 not looking without. It's saying this was
13 wrong. It was wrong the day it was decided. We
14 know it's wrong today. And it's led to all
15 these terrible consequences. We should get --
16 we should get rid of it.

17 I -- so I -- I think that that was an
18 unfortunate break, and I think the Court -- even
19 if the Court were to -- were to still look at
20 legitimacy, though, Justice Barrett, I think the
21 Court could very, very powerfully say, look,
22 our -- our legitimacy really derives from our
23 willingness to stand strong and stand firm in
24 the face of whatever is going on and stand for
25 constitutional principle and follow our

1 traditional stare decisis factors to overrule
2 when it's appropriate.

3 Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 MR. STEWART: Thank you, Mr. Chief
7 Justice.

8 CHIEF JUSTICE ROBERTS: Ms. Rikelman.

9 ORAL ARGUMENT OF JULIE RIKELMAN
10 ON BEHALF OF THE RESPONDENTS

11 MS. RIKELMAN: Mr. Chief Justice, and
12 may it please the Court:

13 Mississippi's ban on abortion two
14 months before viability is flatly
15 unconstitutional under decades of precedent.
16 Mississippi asks the Court to dismantle this
17 precedent and allow states to force women to
18 remain pregnant and give birth against their
19 will.

20 The Court should refuse to do so for
21 at least three reasons.

22 First, stare decisis presents an
23 especially high bar here. In Casey, this Court
24 carefully examined and rejected every possible
25 reason for overruling Roe, holding that a

1 woman's right to end a pregnancy before
2 viability was a rule of law and a component of
3 liberty it could not renounce. The question
4 then is not whether Roe should be overturned but
5 whether Casey was egregiously wrong to adhere to
6 Roe's central holding.

7 Second, Casey and Roe were correct.
8 For a state to take control of a woman's body
9 and demand that she go through pregnancy and
10 childbirth with all the physical risks and
11 life-altering consequences that brings is a
12 fundamental deprivation of her liberty.
13 Preserving a woman's right to make this decision
14 until viability preserve -- protects her liberty
15 while logically balancing the other interests at
16 stake.

17 Third, eliminating or reducing the
18 right to abortion will propel women backwards.
19 Two generations have now relied on this right,
20 and one out of every four women makes the
21 decision to end a pregnancy.

22 Mississippi's ban would particularly
23 hurt women with a major health or life change
24 during the course of a pregnancy, poor women,
25 who are twice as likely to be delayed in

1 accessing care, and young people or those on
2 contraception, who take longer to recognize a
3 pregnancy.

4 To avoid profound damage to women's
5 liberty, equality, and the rule of law, the
6 Court should affirm.

7 JUSTICE THOMAS: Counsel, I just have
8 one question. I assume you -- from your brief,
9 you're relying on an autonomy theory?

10 MS. RIKELMAN: Both bodily integrity
11 and the ability to make decisions related to
12 family, marriage, and childbearing, Your Honor.

13 JUSTICE THOMAS: Shortly, some years
14 after we decided Casey, we had a case out of
15 South Carolina, I believe, involved a woman who
16 had been convicted of criminal child neglect
17 because she ingested cocaine during pregnancy,
18 and her case was post-viability, so it doesn't
19 fit in the facts of this case.

20 If she had ingested cocaine
21 pre-viability and had the same negative
22 consequences to her child, do you think the
23 state had an interest in enforcing that law
24 against her?

25 MS. RIKELMAN: The state may have,

1 Your Honor. The state can certainly regulate to
2 serve its interests in fetal life and in women's
3 health. Those particular laws tend to undermine
4 both of those interests because they deter women
5 from seeking prenatal care, which is
6 counterproductive to both their health.

7 JUSTICE THOMAS: But pre-viability as
8 well as post-viability?

9 MS. RIKELMAN: No, Your Honor. The --
10 the Court has been clear that after
11 viability states can prohibit abortion, except
12 to save a woman's --

13 JUSTICE THOMAS: No, I mean the -- in
14 my example of criminal child neglect. I
15 understand you -- your argument is about
16 abortion. I am trying to look at the issue of
17 bodily autonomy and whether or not she has a
18 right also to bodily autonomy in the case of
19 ingesting an illegal substance and causing harm
20 to a pre-viability fetus.

21 MS. RIKELMAN: Your Honor, of course,
22 those issues aren't posed in this case, and,
23 again, I would say that the states can certainly
24 regulate throughout pregnancy, both before and
25 after viability, to preserve fetal life and to

1 preserve the woman's health.

2 The Court has said, however, there
3 is -- there are other constitutional issues at
4 stake, for instance, in the Ferguson case, that
5 states still can't violate women's Fourth
6 Amendment rights. But, again, that's not what
7 this case is about.

8 This case is about a ban on abortion
9 that the state concedes is weeks before
10 viability, and the Court has been clear for 50
11 years that the one thing that states cannot do
12 is to take the decision completely away from the
13 woman until viability, that, until that point,
14 it is her decision to make given the unique
15 physical demands of pregnancy and the
16 life-altering consequences of pregnancy and
17 having a child.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: You -- the
20 point you made about the impact on -- on women
21 and their place in society, those -- those were
22 certainly made in Roe as well. What we have
23 before us, though, is a 15-week standard.

24 Are -- are you suggesting that the
25 difference between 15 weeks and viability are

1 going to have the same sort of impacts as you
2 were talking about -- or as we were talking
3 about in Roe?

4 MS. RIKELMAN: Yes, Your Honor, I
5 believe they would because people who need
6 abortion after 15 weeks are often in the most
7 challenging circumstances. As I mentioned,
8 they're people who have made -- perhaps had a
9 major health or life change, a family illness, a
10 job loss, a separation, young people or people
11 who are on contraception or pregnant for the
12 first time and who are delayed in recognizing
13 the signs of pregnancy, or poor women, who often
14 have much more trouble navigating access to
15 care, and if they're denied the ability to make
16 this decision because there's a ban after 15
17 weeks, they will suffer all of the consequences
18 that the Court has talked about in the past.

19 And, in fact, the data has been very
20 clear over the last 50 years that abortion has
21 been critical to women's equal participation in
22 society. It's been critical to their health, to
23 their lives, their ability to pursue --

24 CHIEF JUSTICE ROBERTS: I'm sorry,
25 what -- what kind of data is that?

1 MS. RIKELMAN: I would refer the Court
2 to the brief of the economists in this case,
3 Your Honor, and it compiles data showing studies
4 based actually on causal inference, showing that
5 it's the legalization of abortion and not other
6 changes that have had these benefits for women
7 in society, and, again, those benefits are clear
8 for education, for the ability to pursue a
9 profession, for the ability to have --

10 CHIEF JUSTICE ROBERTS: Well, putting
11 that data aside, if you think that the issue is
12 one of choice, that women should have a choice
13 to terminate their pregnancy, that supposes that
14 there is a point at which they've had the fair
15 choice, opportunity to choice, and why would 15
16 weeks be an inappropriate line?

17 So viability, it seems to me, doesn't
18 have anything to do with choice. But, if it
19 really is an issue about choice, why is 15 weeks
20 not enough time?

21 MS. RIKELMAN: For -- for a few
22 reasons, Your Honor.

23 First, the state has conceded that
24 some women will not be able to obtain an
25 abortion before 15 weeks and this law will bar

1 them from doing so. And a reasonable
2 possibility standard would be completely
3 unworkable for the courts. It would be both
4 less principled and less workable than
5 viability, and some of the reasons for that are,
6 without viability, there will be no stopping
7 point.

8 States will rush to ban abortion at
9 virtually any point in pregnancy. Mississippi
10 itself has a six-week ban that it's defending
11 with very similar arguments as it's using to
12 defend the 15-week ban. And there are states
13 that have bans --

14 CHIEF JUSTICE ROBERTS: Well, I know,
15 but I'd like to focus on the 15-week ban because
16 that's not a dramatic departure from viability.
17 It is the standard that the vast majority of
18 other countries have.

19 When you get to the viability
20 standard, we share that standard with the
21 People's Republic of China and North Korea. And
22 I don't think you have to be in favor of looking
23 to international law to set our constitutional
24 standards to be concerned if those are your --
25 share that particular time period.

1 MS. RIKELMAN: I think there's two
2 questions there, Your Honor, if I may.

3 First, that is not correct about
4 international law. In fact, the majority of
5 countries that permit legal access to abortion
6 allow access right up until viability, even if
7 they have nominal lines earlier.

8 So, for example, Canada, Great
9 Britain, and most of Europe allows access to
10 abortion right up until viability, and it also
11 doesn't have the same barriers in place.

12 CHIEF JUSTICE ROBERTS: What do you
13 mean, even if they have nominal lines earlier?

14 MS. RIKELMAN: Some countries, Your
15 Honor, have a nominal line of 12 weeks or 18
16 weeks, but they permit legal access to abortion
17 after that point for broad social reasons,
18 health reasons, socioeconomic reasons, so their
19 regimes really aren't comparable, and they also
20 don't have the same type -- types of barriers
21 that we have here. So, if the Court were to
22 move the line substantial -- substantially
23 backwards -- and 15 weeks is 9 weeks before
24 viability, Your Honor, it's quite a bit
25 backwards -- it may need to reconsider the rules

1 around regulations because, if it's cutting the
2 time period to obtain an abortion roughly in
3 half, then those barriers are going to be much
4 more important.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 JUSTICE BARRETT: Ms. Rikelman, I have
7 a question about the safe haven laws. So
8 Petitioner points out that in all 50 states, you
9 can terminate parental rights by relinquishing a
10 child after abortion, and I think the shortest
11 period might have been 48 hours if I'm
12 remembering the data correctly.

13 So it seems to me, seen in that light,
14 both Roe and Casey emphasize the burdens of
15 parenting, and insofar as you and many of your
16 amici focus on the ways in which forced
17 parenting, forced motherhood, would hinder
18 women's access to the workplace and to equal
19 opportunities, it's also focused on the
20 consequences of parenting and the obligations of
21 motherhood that flow from pregnancy.

22 Why don't the safe haven laws take
23 care of that problem? It seems to me that it
24 focuses the burden much more narrowly. There
25 is, without question, an infringement on bodily

1 autonomy, you know, which we have in other
2 contexts, like vaccines. However, it doesn't
3 seem to me to follow that pregnancy and then
4 parenthood are all part of the same burden.

5 And so it seems to me that the choice
6 more focused would be between, say, the ability
7 to get an abortion at 23 weeks or the state
8 requiring the woman to go 15, 16 weeks more and
9 then terminate parental rights at the
10 conclusion. Why -- why didn't you address the
11 safe haven laws and why don't they matter?

12 MS. RIKELMAN: I think they don't
13 matter for a couple of reasons, Your Honor.

14 First, even if some of those laws are
15 new since Casey, the idea that a woman could
16 place a child up for adoption has, of course,
17 been true since Roe, so it's a consideration
18 that the Court already had before it when it
19 decided those cases and adhered to the viability
20 line.

21 But, in addition, we don't just focus
22 on the burdens of parenting, and neither did Roe
23 and Casey. Instead, pregnancy itself is unique.
24 It imposes unique physical demands and risks on
25 women and, in fact, has impact on all of their

1 lives, on their ability to care for other
2 children, other family members, on their ability
3 to work. And, in particular, in Mississippi,
4 those risks are alarmingly high. It's 75 times
5 more dangerous to give birth in Mississippi than
6 it -- than it is to have a pre-viability
7 abortion, and those risks are disproportionately
8 threatening the lives of women of color.

9 JUSTICE BARRETT: So are you saying --
10 I mean, actually, as I read Roe and Casey, they
11 don't talk very much about adoption. It's a
12 passing reference that that means out of the
13 obligations of parenthood. But, as I hear this
14 answer then, are you saying that the right as
15 you conceive of it is grounded primarily in the
16 bearing of the child, in the carrying of
17 pregnancy, and not so much looking forward into
18 the consequences on professional opportunities
19 and work life and economic burdens?

20 MS. RIKELMAN: No, Your Honor, I
21 believe it's both, and -- and that is exactly
22 how Casey talked about it. It talked about the
23 two strands of cases that supported the right.
24 One was the strand of cases supporting bodily
25 integrity, and it cited to cases like Cruzan and

1 Riggins versus Nevada. And the second was the
2 strand of cases supporting decisional autonomy
3 and specifically decisions related to
4 childbearing, marriage, and procreation,
5 decisions like Griswold, Loving.

6 And so it's really both strands that
7 we're relying on here.

8 JUSTICE GORSUCH: May I ask you a
9 question about stare decisis, counsel? Your --
10 your colleagues on the other side have
11 emphasized that Casey rejected Roe's trimester
12 framework and replaced it with an undue burden
13 standard. They argue that the undue burden
14 standard was not well known to the law before
15 that, and then they argue that the undue burden
16 standard has evolved over time too in ways the
17 Court has found difficult to agree upon.

18 In Hellerstedt, for example, they --
19 they point out in their briefs that the Court
20 seemed to suggest that a court should consider
21 both the benefits and the burdens associated
22 with the proposed restriction. In June Medical
23 more recently, the Court splintered on -- on --
24 on that same question, whether benefits could be
25 considered or only burdens.

1 And so the argument goes that this has
2 proved to be, putting aside all the other
3 obviously difficult questions in the case, that
4 -- that the standard itself has proved difficult
5 to administer and that that is relevant to the
6 stare decisis analysis, and I just wanted to
7 give you an opportunity to respond.

8 MS. RIKELMAN: Yes, Your Honor.

9 The first point I'd like to make is
10 the undue burden test is not at issue in this
11 case. That is the test that applies to
12 regulations, not prohibitions. And the state
13 has conceded that this is a prohibition. In
14 fact, that's the title of this law, is an Act to
15 prohibit abortion after 15 weeks.

16 And the only thing that's at issue in
17 this case is the viability line, and the
18 viability line has been enduringly workable.
19 The lower federal courts have applied it
20 consistently and uniformly for 50 years. And
21 the Fifth Circuit here below had no difficulty
22 striking down this law unanimously, 3-0. So
23 it's been an exceedingly workable standard.

24 And if I may return to your question,
25 Mr. Chief Justice, a reasonable possibility

1 standard would not be workable. It would
2 ultimately boil down to an argument that states
3 can prohibit a category of women from exercising
4 a constitutional right merely because of the
5 number of people in the category. And that's
6 just not how constitutional rights work. A
7 state would never say that it could ban
8 religious services on a Wednesday evening, for
9 example, simply because most people could attend
10 religious services on another night of the week.

11 JUSTICE GORSUCH: So -- so I actually
12 just wanted to -- that's helpful, I think. I
13 just want to make sure I understand what you're
14 telling me, counsel, that -- that if the Court
15 were to, in this case, step past viability and
16 apply undue burden -- the undue burden test, to
17 regulations prior to viability, you would agree
18 with the other side, I -- I think, that that's
19 not a workable standard. Is -- is that -- is
20 that a fair understanding of what you're --
21 you're telling the Court?

22 MS. RIKELMAN: No, Your Honor. I -- I
23 believe --

24 JUSTICE GORSUCH: Do you think that
25 would be workable?

1 MS. RIKELMAN: -- I believe -- if I
2 may clarify, I believe the undue burden test has
3 been workable for regulations that it is --

4 JUSTICE GORSUCH: I -- I -- I
5 understand that. I -- I'm -- if it were to
6 apply -- if the Court were to -- and I thought
7 this is what you were saying in response to the
8 Chief Justice, but maybe I'm mistaken, and
9 please correct me if I am -- but what -- what is
10 your argument against applying the undue burden
11 standard prior to viability?

12 MS. RIKELMAN: If the undue burden
13 standard, as this Court laid out in Casey, which
14 includes the viability line, is applied --

15 JUSTICE GORSUCH: No, no, no, I'm
16 asking -- I know -- I know -- we're fighting the
17 hypothetical here, counsel, all right? Accept
18 the hypothetical. Hypothetically, the Court
19 were to extend the undue burden standard to
20 regulations prior to viability, would that be
21 workable or would that not be workable in your
22 view?

23 MS. RIKELMAN: Without viability, it
24 would not be workable, Your Honor, because it
25 would ultimately, again, always come down to a

1 claim that states can bar a certain category of
2 people from exercising this right simply because
3 of the number of people in the category, and
4 that's not a workable standard and it's not a
5 constitutional standard.

6 JUSTICE GORSUCH: I appreciate that
7 clarification. Thank you.

8 JUSTICE ALITO: Just to follow up on
9 that, I read your briefs -- your brief to say
10 that the only real options we have are to
11 reaffirm Roe and Casey as they stand or to
12 overrule them in their entirety. You say that
13 "there are no half-measures here." Is that a
14 correct understanding of your brief?

15 MS. RIKELMAN: Your Honor, it --
16 certainly, the arguments that the state has
17 presented is what we're responding to there,
18 which is that all of the state's arguments,
19 including their alternatives, which are undue
20 burden without viability, would be the
21 equivalent of overruling Casey and Roe because
22 the viability line is the central holding of
23 those cases. Casey mentioned it no fewer than
24 19 times. And -- and the Court in June Medical
25 just a year ago affirmed that the viability line

1 is the central holding of both Casey and Roe.

2 JUSTICE ALITO: Well, you -- you do
3 emphasize that the Court drew the line at
4 viability in Roe and reaffirmed that in Casey,
5 and that is certainly something that we have to
6 take very seriously into consideration.

7 But suppose we were considering that
8 question now for the first time. I'm sure you
9 know the arguments about the viability line as
10 well as I do, probably better than I do. What
11 would you say in defense of that line? What
12 would you say to the argument that has been made
13 many times by people who are pro-choice and
14 pro-life that the line really doesn't make any
15 sense, that it is, as Justice Blackmun himself
16 described it, arbitrary?

17 The -- the woman's -- if a woman wants
18 to be free of the burdens of pregnancy, that
19 interest does not disappear the moment the
20 viability line is crossed. Isn't that right?

21 MS. RIKELMAN: No, Your Honor, and if
22 I may make a few points to answer your question.

23 First, I think the state views
24 viability as arbitrary because it completely
25 discounts the woman's interests. But

1 viability --

2 JUSTICE ALITO: No, no. But does a
3 woman have -- does -- upon reaching the point of
4 viability, does not the woman have the same
5 interests that she had before viability in being
6 free of this pregnancy that she no longer wants
7 to continue?

8 MS. RIKELMAN: Viability is a
9 principled line, Your Honor, because, in
10 ordering the interests --

11 JUSTICE ALITO: Well, I'm trying to
12 see whether it is a principled line.

13 MS. RIKELMAN: The --

14 JUSTICE ALITO: Will you agree with me
15 at least on that point, that a woman still has
16 the same interest in terminating her pregnancy
17 after the viability line has been crossed?

18 MS. RIKELMAN: Yes, Your Honor, but
19 the Court balanced the interests --

20 JUSTICE ALITO: Okay. And then --

21 MS. RIKELMAN: -- and in ordering the
22 interests at stake --

23 JUSTICE ALITO: -- look at the
24 interests on -- on the other side. The -- the
25 fetus has an interest in having a life, and that

1 doesn't change, does it, from the point before
2 viability to the point after viability?

3 MS. RIKELMAN: In -- in some people's
4 view, it doesn't, Your Honor, but what the Court
5 said is that those philosophical differences
6 couldn't be resolved --

7 JUSTICE ALITO: Well, what is the --

8 MS. RIKELMAN: -- in the way --

9 JUSTICE ALITO: That -- that's what
10 I'm getting at. What is the philosophical
11 argument, the secular philosophical argument for
12 saying this is the appropriate line?

13 There are those who say that the
14 rights of personhood should be considered to
15 have taken hold at a point when the fetus
16 acquires certain independent characteristics.
17 But viability is dependent on medical technology
18 and medical practice. It has changed. It may
19 continue to change.

20 MS. RIKELMAN: No, Your Honor, it is
21 principled because, in ordering the interests at
22 stake, the Court had to set a line between
23 conception and birth, and it logically looked at
24 the fetus's ability to survive separately as a
25 legal line because it's objectively verifiable

1 and doesn't require the Court to resolve the
2 philosophical issues at stake.

3 CHIEF JUSTICE ROBERTS: I just want to
4 focus on stare decisis for a little bit. I
5 found my colleague, Justice Breyer's, comments
6 quite compelling. I'm not quite sure how
7 they're -- they play out in -- in Casey.

8 It is certainly true that we cannot
9 base our decisions on whether they're popular or
10 not with the people. Casey seemed to say we
11 shouldn't base our decisions not only on that
12 but whether they're going to -- whether they're
13 going to seem popular, and it seemed to me to
14 have a paradoxical conclusion that the more
15 unpopular the decisions are, the firmer the
16 Court should be in not departing from prior
17 precedent, sort of a super stare decisis, but
18 it's super stare decisis for what are regarded
19 as -- by many, as the most erroneous decisions.

20 Do you think there is that category?
21 Is there -- or is it just normal stare decisis?

22 MS. RIKELMAN: I think it is precedent
23 on precedent, Your Honor, because Casey did the
24 stare decisis analysis for Roe, so the question
25 before this Court is whether that stare decisis

1 analysis was egregiously wrong.

2 And if I may answer your earlier
3 question about whether viability was squarely at
4 issue in Casey, it clearly was, Your Honor. At
5 pages 869 to 871, the Court squarely addressed
6 viability because the government had made the
7 argument that viability was arbitrary --

8 CHIEF JUSTICE ROBERTS: Well, no, I
9 appreciate that Casey addressed it, but that's
10 different than saying it was at issue. It said
11 it was the central principle of Roe because it
12 was pretty much all that was left after they
13 were done dealing with the rest of it.

14 And the regulations in Casey had --
15 had no applicability or not depending upon where
16 viability was. They applied throughout the
17 whole range, period. So, if they didn't say
18 anything about viability, it's like what Justice
19 Blackmun said in -- when discussing among his
20 colleagues, which is a good reason not to have
21 papers out that -- that early, is that they
22 don't have to address the line-drawing at all in
23 Roe, and they didn't have to address the
24 line-drawing at all in Casey.

25 MS. RIKELMAN: I disagree with that,

1 Your Honor, because the undue burden test
2 incorporates the viability line. That was what
3 the Court was assessing the regulations against,
4 whether they imposed a substantial obstacle in
5 the path of a woman before viability.

6 And if a prohibition like this law
7 isn't a substantial obstacle, then nothing would
8 be. So the issue was squarely before the Court,
9 and, in fact, the Court said at page 879 that in
10 adopting the undue burden test, it was not
11 disturbing the viability line.

12 JUSTICE BREYER: It's a very
13 interesting question that I think Justice
14 Barrett raised too. It's usually just
15 philosophical, but I think it has bite here.

16 When I read Casey, it's not just one
17 on one, you know, two is greater than one.
18 Casey plus Roe is greater than -- it -- it's --
19 they're making a point that -- that -- that
20 we're an institution perhaps more than a court
21 of appeals or a district court. It's Hamilton's
22 point, no purse, no sword, and yet we have to
23 have public support, and that comes primarily,
24 says Casey -- I wonder if it was O'Connor who
25 wrote that? I don't know.

1 But it comes primarily from people
2 believing that we do our job. We use reason.
3 We don't look to just what's popular. And
4 that's where you're seeing the paradox. But the
5 problem with the super case of which we've heard
6 three mentioned, the problem with a super case
7 like this, the rare case, the watershed case,
8 where people are really opposed on both sides
9 and they really fight each other, is they're
10 going to be ready to say, no, you're just
11 political, you're just politicians.

12 And that's what kills us as an
13 American institution. That's what they're
14 saying. So we're looking at it for that. But
15 we are looking to, and that they say is a reason
16 why -- a reason why, when you get a case like
17 that, you better be damn sure that the normal
18 stare considerations, stare decisis overrulings
19 are really there in spades, double, triple,
20 quadruple, and then they go through and show
21 they're not. Okay?

22 What's the paradox? Now maybe you
23 think I just made an argument that there isn't
24 one, but, really, in my head, I'm thinking I'm
25 not sure. There may be one. And I don't know

1 if you've ever thought about this. I don't know
2 if you've ever -- if -- when -- when -- when
3 that occurred to you, I don't want to overrule
4 the stare -- I wouldn't want the Court to
5 overrule the stare decisis section of Casey, you
6 say. And that -- that's -- that's what I think
7 is being brought up, and maybe I haven't made it
8 clearer, but I've tried to.

9 MS. RIKELMAN: Yes, Your Honor. I
10 think the point that the Court was making was
11 that the fact that some states may continue to
12 enact laws in the teeth of the Court's precedent
13 has never been enough of a reason to overrule.
14 And that's true for a number of decisions that
15 the Court has issued. The fact that some people
16 continue to disagree with them is not a basis to
17 discard that precedent.

18 CHIEF JUSTICE ROBERTS: Justice
19 Thomas, anything further?

20 JUSTICE THOMAS: Back to my original
21 question. If I were -- I know your interest
22 here is in abortion, I understand that, but, if
23 I were to ask you what constitutional right
24 protects the right to abortion, is it privacy?
25 Is it autonomy? What would it be?

1 MS. RIKELMAN: It's liberty, Your
2 Honor. It's the textual protection in the
3 Fourteenth Amendment that a state can't deprive
4 a person of liberty without due process of law,
5 and the Court has interpreted liberty to include
6 the right to make family decisions and the right
7 to physical autonomy, including the right to end
8 a pre-viability pregnancy.

9 JUSTICE THOMAS: So it's all of the
10 above?

11 MS. RIKELMAN: Well, the Court --
12 that's how the Court has interpreted the liberty
13 clause for over a hundred years in cases going
14 back to Meyer, Griswold, Carey, Loving,
15 Lawrence.

16 JUSTICE THOMAS: Yeah, but I -- I
17 mean, all of those sort of just come out of
18 Lochner, the -- so it's that we -- we've dropped
19 part of it. So I understand what you're saying,
20 but what I'm trying to focus on is, if we -- is
21 to lower the level of generality or at least be
22 a little bit more specific.

23 In the old days, we used to say it was
24 a right to privacy that the Court found in the
25 due process, substantive due process clause,

1 okay? So -- or in substantive due process, and
2 I'm trying to get you to tell me, what are we
3 relying on now? Is it privacy? Is it autonomy?
4 What is it?

5 MS. RIKELMAN: I think it continues to
6 be liberty, and the right exists whatever level
7 of generality the Court applies. There was a
8 tradition under the common law for centuries of
9 women being able to end their pregnancies.

10 But, in addition, when it comes to
11 decisions related to family, marriage, and
12 childbearing, the Court has done the analysis at
13 a higher level of generality, and that makes
14 sense because, otherwise, the Constitution would
15 reinforce the historical discrimination against
16 women.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer?

20 Justice Alito?

21 JUSTICE ALITO: Well, you just
22 mentioned the common law, so let me ask you a
23 couple of questions about history.

24 Did any state constitutional provision
25 recognize that abortion was a right, liberty, or

1 immunity in 1868, when the Fourteenth Amendment
2 was adopted?

3 MS. RIKELMAN: No, Your Honor, but it
4 had been allowed under the common law for many
5 years.

6 JUSTICE ALITO: Does any judicial
7 decision at that time or shortly or immediately
8 after 1868 recognize that abortion was a right,
9 liberty, or immunity?

10 MS. RIKELMAN: There were state high
11 court decisions shortly before then, Your Honor,
12 talking about the ability of women to end a
13 pregnancy before quickening.

14 JUSTICE ALITO: What's your best case?

15 MS. RIKELMAN: For the right to end a
16 pregnancy, Your Honor?

17 JUSTICE ALITO: Uh-huh.

18 MS. RIKELMAN: Allowing a state to
19 take control of a woman's body and force her to
20 undergo the physical demands, risks, and
21 life-altering consequences of pregnancy is a
22 fundamental deprivation of her liberty. And,
23 once the Court recognizes that that liberty
24 interest deserves heightened protection, it does
25 need to draw a workable line, and viability is a

1 line that logically balances the interests at
2 stake.

3 JUSTICE ALITO: The brief for the
4 American Historical Association says that
5 abortion was not legal before quickening in 26
6 out of 37 states at the time when the Fourteenth
7 Amendment was adopted. Is that correct?

8 MS. RIKELMAN: That is correct because
9 some of the states had started to discard the
10 common law at that point because of a
11 discriminatory view that a woman's proper role
12 was as a wife and mother, a view that the
13 Constitution now rejects, and that's why it's
14 appropriate to do the historical analysis at a
15 higher level of generality.

16 JUSTICE ALITO: Right. In the face of
17 that, can it said that the right to -- to
18 abortion is deeply rooted in the history and
19 traditions of the American people?

20 MS. RIKELMAN: Yes, it can, Your
21 Honor. Again, at the founding, women were able
22 to end their pregnancy under the common law.
23 And, in fact, this Court in Glucksberg
24 specifically decide -- discussed Casey as a
25 decision based on history and tradition and, at

1 Note 19, specifically called out and relied on
2 Roe's conclusion that at the time of the
3 founding and well into the 1800s, women had the
4 ability to end a pregnancy.

5 JUSTICE ALITO: What was the -- the
6 principal source that the Court relied on in Roe
7 for its historical analysis? Who was the author
8 of that -- of that article?

9 MS. RIKELMAN: I apologize, Your
10 Honor, I don't remember the author. I know that
11 the Court spent many pages of the opinion doing
12 a historical analysis. There's also a brief on
13 behalf of several key American historian
14 associations that go through that history in
15 detail because there's even more information now
16 that supports Roe's legal conclusions.

17 JUSTICE ALITO: All right. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 Justice Kagan?

21 Justice Gorsuch?

22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: I think the other
24 side would say that the core problem here is
25 that the Court has been forced by the position

1 you're taking and by the -- the cases to pick
2 sides on the most contentious social debate in
3 American life and to do so in a situation where
4 they say that the Constitution is neutral on the
5 question of abortion, the text and history, that
6 the Constitution's neither pro-life nor
7 pro-choice on the question of abortion, and they
8 would say, therefore, it should be left to the
9 people, to the states, or to Congress.

10 And I think they also then continue,
11 because the Constitution is neutral, that this
12 Court should be scrupulously neutral on the
13 question of abortion, neither pro-choice nor
14 pro-life, but, because, they say, the
15 Constitution doesn't give us the authority, we
16 should leave it to the states and we should be
17 scrupulously neutral on the question and that
18 they are saying here, I think, that we should
19 return to a position of neutrality on that
20 contentious social issue rather than continuing
21 to pick sides on that issue.

22 So I think that's, at a big-picture
23 level, their argument. I want to give you a
24 chance to respond to that.

25 MS. RIKELMAN: Yes. A -- a few points

1 if I may, Your Honor.

2 First, of course, those very same
3 arguments were made in Casey, and the Court
4 rejected them, saying that this philosophical
5 disagreements can't be resolved in a way that a
6 woman has no choice in the matter.

7 And, second, I don't think it would be
8 a neutral position. The Constitution provides a
9 guarantee of liberty. The Court has interpreted
10 that liberty to include the ability to make
11 decisions related to child -- childbearing,
12 marriage, and family. Women have an equal right
13 to liberty under the Constitution, Your Honor,
14 and if they're not able to make this decision,
15 if states can take control of women's bodies and
16 force them to endure months of pregnancy and
17 childbirth, then they will never have equal
18 status under the Constitution.

19 JUSTICE KAVANAUGH: And I want to ask
20 a question about stare decisis and to think
21 about how to approach that here because there
22 have been lots of questions picking up on
23 Justice Barrett's questions and others. And
24 history helps think about stare decisis, as I've
25 looked at it, and the history of how the Court's

1 applied stare decisis, and when you really dig
2 into it, history tells a somewhat different
3 story, I think, than is sometimes assumed.

4 If you think about some of the most
5 important cases, the most consequential cases in
6 this Court's history, there's a string of them
7 where the cases overruled precedent. Brown v.
8 Board outlawed separate but equal. Baker versus
9 Carr, which set the stage for one person/one
10 vote. West Coast Hotel, which recognized the
11 states' authority to regulate business. Miranda
12 versus Arizona, which required police to give
13 warnings when the right to -- about the right to
14 remain silent and to have an attorney present to
15 suspects in criminal custody. Lawrence v.
16 Texas, which said that the state may not
17 prohibit same-sex conduct. Mapp versus Ohio,
18 which held that the exclusionary rule applies to
19 state criminal prosecutions to exclude evidence
20 obtained in violation of the Fourth Amendment.
21 Gideon versus Wainwright, which guaranteed the
22 right to counsel in criminal cases. Obergefell,
23 which recognized a constitutional right to
24 same-sex marriage.

25 In each of those cases -- and that's a

1 list, and I could go on, and those are some of
2 the most consequential and important in the
3 Court's history -- the Court overruled
4 precedent. And it turns out, if the Court in
5 those cases had -- had listened, and they were
6 presented in -- with arguments in those cases,
7 adhere to precedent. In *Brown v. Board*, adhere
8 to *Plessy*. In *West Coast Hotel*, adhere to
9 *Atkins* and adhere to *Lochner*, and if the Court
10 had done that in those cases, you know, this --
11 the country would be a much different place.

12 So I assume you agree with most, if
13 not all, the cases I listed there, where the
14 Court overruled the precedent. So the question
15 on *stare decisis* is why, if -- and I know you
16 disagree with what about I'm about to say in the
17 "if" -- if we think that the prior precedents
18 are seriously wrong, if that, why then doesn't
19 the history of this Court's practice with
20 respect to those cases tell us that the right
21 answer is actually a return to the position of
22 neutrality and -- and not stick with those
23 precedents in the same way that all those other
24 cases didn't?

25 MS. RIKELMAN: Because the view that a

1 previous precedent is wrong, Your Honor, has
2 never been enough for this Court to overrule,
3 and it certainly shouldn't be enough here when
4 there's 50 years of precedent. Instead, the
5 Court has required something else, a special
6 justification. And the state doesn't come
7 forward with any special justification. It
8 makes the same exact arguments the Court already
9 considered and rejected in its stare decisis
10 analysis in Casey.

11 And, in fact, there is nothing
12 different. There is no less need today than 30
13 years ago or 50 years ago for women to be able
14 to make this fundamental decision for themselves
15 about their bodies, lives, and health.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: I want to ask you a
20 follow-up question. You know, the Chief was
21 asking you about the viability line and if that
22 was the right place, if that's the right line to
23 draw. So let's take it out of the question of
24 stare decisis and imagine that there is a state
25 constitution that's identical to the Fourteenth

1 Amendment's Due Process Clause, and a state
2 supreme court has to decide as a matter of state
3 constitutional law what the scope of an abortion
4 right is. And the second trimester ends at 27
5 weeks. And so that state supreme court says, we
6 think that the right exists, you know, in a --
7 in a -- in an absolute sense, that the state
8 cannot take away the right up to 27 weeks and
9 then after that adopts an undue burden standard.

10 As a matter of first principles, is
11 that line acceptable as a matter of
12 constitutional law?

13 MS. RIKELMAN: Your Honor, it may be,
14 but I think the -- the question in this case is
15 whether a line is obviously more principled or
16 obviously more workable than viability because
17 of the stare decisis context.

18 JUSTICE BARRETT: Why -- I mean,
19 that's the Roe framework basically, the
20 trimester. Why wouldn't that be workable if you
21 pick a line and say the end of the second
22 trimester, 27 weeks, third trimester, state's
23 interests increase? I don't understand why 27
24 weeks is less workable than 24.

25 MS. RIKELMAN: I'm not trying to

1 suggest it is, Your Honor, and -- what I was
2 trying to suggest is that the viability line is
3 a principled and workable line, so, to change
4 it, there would have to be a new line that's
5 obviously more principled and more workable.
6 And -- and the line that the Court has
7 drawn actually --

8 JUSTICE BARRETT: But that's stare
9 decisis. I'm asking as a matter of first
10 principles.

11 MS. RIKELMAN: As a matter of first
12 principle, the viability line makes sense
13 because, if the -- the state constitution was
14 the same --

15 JUSTICE BARRETT: As a matter of
16 prudential judgment. It's not constitutionally
17 required as a matter of first principles
18 because, in fact, we could decide to be more
19 protective and say 27 weeks, end of the second
20 trimester.

21 MS. RIKELMAN: You could, Your Honor,
22 but the -- the viability line makes sense given
23 the protection for liberty because it comes from
24 the woman's liberty interest in resisting state
25 control of her body. And, once the Court

1 recognizes that interest, it does need to draw a
2 line, as it does in many other constitutional
3 contexts, like the Fourth and Fifth Amendment.

4 And the viability line, as I
5 mentioned, makes sense because it focuses on the
6 fetus's ability to survive separately, which is
7 an appropriate legal line because it's
8 objectively verifiable and doesn't delve into
9 philosophical questions about when life begins.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 General Prelogar?

13 ORAL ARGUMENT OF GENERAL ELIZABETH B. PRELOGAR
14 FOR THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE RESPONDENTS

16 GENERAL PRELOGAR: Mr. Chief Justice,
17 and may it please the court:

18 For a half century, this Court has
19 correctly recognized that the Constitution
20 protects a woman's fundamental right to decide
21 whether to end a pregnancy before viability.
22 That guarantee that the state cannot force a
23 woman to carry a pregnancy to term and give
24 birth has engendered substantial individual and
25 societal reliance.

1 The real-world effects of overruling
2 Roe and Casey would be severe and swift. Nearly
3 half of the states already have or are expected
4 to enact bans on abortion at all stages of
5 pregnancy, many without exceptions for rape or
6 incest.

7 Women who are unable to travel
8 hundreds of miles to gain access to legal
9 abortion will be required to continue with their
10 pregnancies and give birth, with profound
11 effects on their bodies, their health, and the
12 course of their lives.

13 If this Court renounces the liberty
14 interest recognized in Roe and reaffirmed in
15 Casey, it would be an unprecedented contraction
16 of individual rights and a stark departure from
17 principles of stare decisis.

18 The Court has never revoked a right
19 that is so fundamental to so many Americans and
20 so central to their ability to participate fully
21 and equally in society. The Court should not
22 overrule this central component of women's
23 liberty.

24 JUSTICE THOMAS: General, would you
25 specifically tell me -- specifically state what

1 the right is? Is it specifically abortion? Is
2 it liberty? Is it autonomy? Is it privacy?

3 GENERAL PRELOGAR: The right is
4 grounded in the liberty component of the
5 Fourteenth Amendment, Justice Thomas, but I
6 think that it promotes interests in autonomy,
7 bodily integrity, liberty, and equality. And I
8 do think that it is specifically the right to
9 abortion here, the right of a woman to be able
10 to control, without the state forcing her to
11 continue a pregnancy, whether to carry that baby
12 to term.

13 JUSTICE THOMAS: I understand we're
14 talking about abortion here, but what is
15 confusing is that we -- if we were talking about
16 the Second Amendment, I know exactly what we're
17 talking about. If we're talking about the
18 Fourth Amendment, I know what we're talking
19 about because it's written. It's there.

20 What specifically is the right here
21 that we're talking about?

22 GENERAL PRELOGAR: Well, Justice
23 Thomas, I think that the Court in those other
24 contexts with respect to those other amendments
25 has had to articulate what the text means and

1 the bounds of the constitutional guarantees, and
2 it's done so through a variety of different
3 tests that implement First Amendment rights,
4 Second Amendment rights, Fourth Amendment
5 rights.

6 So I don't think that there is
7 anything unprecedented or anomalous about the
8 right that the Court articulated in Roe and
9 Casey and the way that it implemented that right
10 by defining the scope of the liberty interest by
11 reference to viability and providing that that
12 is the moment when the balance of interests tips
13 and when the state can act to prohibit a woman
14 from -- from getting an abortion based on its
15 interest in protecting the fetal life at that
16 point.

17 JUSTICE THOMAS: So the right
18 specifically is abortion?

19 GENERAL PRELOGAR: It's the right of a
20 woman prior to viability to control whether to
21 continue with the pregnancy, yes.

22 JUSTICE THOMAS: Thank you.

23 JUSTICE SOTOMAYOR: General, I am
24 interested in Justice Kavanaugh's long litany of
25 cases in which we've overruled precedent, and we

1 have. Yet, you did call this unprecedented. As
2 I see the structure of the Constitution, the
3 body of it is the relationship of the three
4 branches of government, and then there is the
5 relationship of the federal government to the
6 state, and, through our incorporation of the
7 Fourteenth Amendment, of the state vis-à-vis the
8 individual, it's the federal government and the
9 states' relationship to individuals.

10 And I see the Bill of Rights,
11 including the Fourteenth Amendment, as basically
12 setting the limits, giving individual freedom to
13 do certain things and stopping the government
14 from intruding in those liberties, in those Bill
15 of Rights, correct?

16 Of all of the decisions that Justice
17 Kavanaugh listed, all of them invite --
18 virtually, except for maybe one, involved us
19 recognizing and overturning state control over
20 issues that we said belong to individuals. The
21 right in Miranda to be warned was an individual
22 right, correct?

23 GENERAL PRELOGAR: That's right,
24 Justice Sotomayor, and I think that that is a
25 key distinction with the list of precedents that

1 Justice Kavanaugh was relying on.

2 I think that there are really two key
3 distinctions, and the first is that in the vast
4 majority of those cases, the Court was actually
5 taking the issue away from the people and saying
6 that it had been wrong before not to recognize a
7 right. And I think that matters because it goes
8 straight to reliance interests.

9 Here, the Court would be doing the
10 opposite. It would be telling the women of
11 America that it was wrong, that, actually, the
12 ability to control their bodies and perhaps the
13 most important decision they can make about
14 whether to bring a child into this world is not
15 part of their protected liberty, and I think
16 that that would come at tremendous cost to the
17 reliance that women have placed on this right
18 and on societal reliance and what this right has
19 meant for further ensuring equality.

20 JUSTICE BREYER: The reliance point is
21 a -- is a good point, and this may be my fault.
22 I'm talking about pages 854 to 863 in the Casey
23 case. And I've already used up too much time.
24 I can't read those pages out loud. But they do
25 not include the list that Justice Kavanaugh had.

1 They do include two. One is Brown, and the
2 second one is West Coast Hotel versus Parrish.
3 And you could add the gay rights cases as a
4 third which would fit the criteria.

5 But there are complex criteria that
6 she's talking about that link to the position in
7 the rule of law of this Court, so all I would
8 say is you have to read them before beginning to
9 say whether they are overruling or not
10 overruling in the sense meant there calling for
11 special concern.

12 Now they say in those, I -- maybe I'd
13 mention two, wait a minute -- of course, Plessy
14 was wrong when decided, but, just a minute, also
15 remember Plessy said that separate but equal was
16 a badge of inferiority. No, they said, it
17 isn't. Well, all you have to do is open your
18 eyes and look at the South, my friend, and you
19 will see whether it was or it wasn't in 1954.

20 And they made a similar point. They
21 said, are you going to sit here in the middle of
22 the Depression and tell me that -- that Lochner,
23 with its other cases, and pure, just about pure
24 laissez faire, that we can run the country that
25 way?

1 I mention that because I want people
2 to read those 15 pages with care, and that's why
3 I said that. If you had anything to add to my
4 plea to read it, please do.

5 GENERAL PRELOGAR: Well, Justice
6 Breyer, I agree completely. I have read those
7 pages and re-read them many times, and I think
8 that this is actually another key distinction
9 from the cases that Justice Kavanaugh was
10 referring to, and that is, as I understand those
11 passages in Casey, the Court carefully walked
12 through each and every stare decisis factor that
13 this Court focuses on. It looked at workability
14 of the viability rule, doctrinal underpinnings,
15 legal and factual developments, and, critically,
16 reliance interests.

17 And down the line, it found that the
18 case for reaffirming Roe was overwhelming. And
19 in that situation, when every factor that the
20 Court consults to determine whether to retain
21 precedent counsels in favor of retaining it, I
22 think Casey properly perceived that a decision
23 to overrule nevertheless, perhaps based on a --
24 the conclusion that the justices thought the
25 case was wrongly decided in the first instance,

1 would run counter to the ability of stare
2 decisis to function as a cornerstone of the rule
3 of law in this context.

4 JUSTICE ALITO: Is it your argument
5 that a case can never be overruled simply
6 because it was egregiously wrong?

7 GENERAL PRELOGAR: I think that at the
8 very least, the state would have to come forward
9 with some kind of materially changed
10 circumstance or some kind of materially new
11 argument, and Mississippi hasn't done so in this
12 case. It is --

13 JUSTICE ALITO: Really? So suppose
14 Plessy versus Ferguson was re-argued in 1897, so
15 nothing had changed. Would it not be sufficient
16 to say that was an egregiously wrong decision on
17 the day it was handed down and now it should be
18 overruled?

19 GENERAL PRELOGAR: It certainly
20 was egregiously wrong on the day that it was
21 handed down, Plessy, but what the Court said in
22 analyzing Plessy to Brown and Casey was that
23 what had become clear is that the factual
24 premise that underlay the decision, this idea
25 that segregation didn't create a badge of

1 inferiority, had been entirely mistaken.

2 JUSTICE ALITO: So it is your -- is it
3 really --

4 GENERAL PRELOGAR: And, here, the
5 state is not --

6 JUSTICE ALITO: -- is it your answer
7 that we needed all the experience from 1896 to
8 1954 to realize that Plessy was -- was wrongly
9 decided? Would you answer my question? Had it
10 come before the Court in 1897, should it have
11 been overruled or not?

12 GENERAL PRELOGAR: I think it should
13 have been overruled, but I think that the
14 factual premise was wrong in the moment it was
15 decided, and the Court realized that and
16 clarified that when it overruled in Brown.

17 JUSTICE ALITO: So there are --

18 GENERAL PRELOGAR: And, here --

19 JUSTICE ALITO: -- circumstances in
20 which a decision may be overruled, properly
21 overruled, when it must be overruled simply
22 because it was egregiously wrong at the moment
23 it was decided?

24 GENERAL PRELOGAR: Well, I think --

25 JUSTICE ALITO: Correct?

1 GENERAL PRELOGAR: -- every other --

2 JUSTICE ALITO: Is that correct?

3 GENERAL PRELOGAR: -- stare decisis
4 factor likewise would have justified overruling
5 in that interest, that actually it would run
6 counter to any notion of reasonable reliance,
7 that it was not a workable rule, that it had
8 become an -- and outlier in our understanding of
9 fundamental freedoms.

10 JUSTICE ALITO: Well, there was a lot
11 of reliance on --

12 GENERAL PRELOGAR: And so I think,
13 looking at all of the facts --

14 JUSTICE ALITO: -- there was a lot of
15 reliance on Plessy. The -- the South built up a
16 whole society based on the idea of white
17 supremacy. So there was a lot of reliance. It
18 was rely -- it was improper reliance. It was
19 reliance on an egregiously wrong understanding
20 of what equal protection means.

21 But your answer is -- I don't -- I
22 still don't understand -- I still don't have
23 your answer clearly. Can a decision be
24 overruled simply because it was erroneously
25 wrong, even if nothing has changed between the

1 time of that decision and the time when the
2 Court is called upon to consider whether it
3 should be overruled? Yes or no? Can you give
4 me a yes or no answer on that?

5 GENERAL PRELOGAR: This Court, no, has
6 never overruled in that situation just based on
7 a conclusion that the decision was wrong. It
8 has always applied the stare decisis factors and
9 likewise found that they warrant overruling in
10 that instance. And -- and Casey did that. It
11 applied the stare decisis factors.

12 If stare decisis is to mean anything,
13 it has to mean that that kind of extensive
14 consideration of all of the same arguments for
15 whether to retain or discard a precedent itself
16 is an additional layer of precedent that needs
17 to be relied on and can form a -- a stable
18 foundation of the rule of law.

19 JUSTICE KAGAN: General, you've talked
20 a number of times about the reliance interests
21 here, and I think I'd like you to say a little
22 bit more about that because, you know,
23 sometimes, when we talk about reliance
24 interests, it's like there's a rule of law and
25 you look at it and you say, oh, somebody will

1 enforce my contract because of this rule, and it
2 has a very kind of grounded quality to it.

3 And, as Casey talked about the
4 reliance interests here, they're a little bit
5 more airy. And I -- I just wanted to get your
6 sense of what are the reliance interests here
7 and how does -- how do they cash out on the
8 ground?

9 GENERAL PRELOGAR: Well, there are
10 multiple reliance interests here, as I think
11 Casey correctly recognized. Casey pointed to
12 the individual reliance of women and their
13 partners who had been able to organize their
14 lives and make important life decisions against
15 the backdrop of having control over this
16 incredibly consequential decision whether to
17 have a child. And people make decisions in
18 reliance on having that kind of reproductive
19 control, decisions about where to live, what
20 relationships to enter into, what investments to
21 make in their jobs and careers.

22 And so I think, on a very individual
23 level, there has been profound reliance. And
24 it's certainly the case that not every woman in
25 America has needed to exercise this right or has

1 wanted to, but one in four American women have
2 had an abortion, and for those women, the right
3 secured by Roe and Casey has been critical in
4 ensuring that they can control their bodies and
5 control their lives.

6 And then I think there's a second
7 dimension to it that Casey also properly
8 recognized, and that's the societal dimension.
9 That's the -- the understanding of our society,
10 even though this has been a controversial
11 decision, that this is a liberty interest of
12 women. It's the case that not everyone agrees
13 with Roe versus Wade, but just about every
14 person in America knows what this Court held,
15 they know how the Court has defined this concept
16 of liberty for women and what control they will
17 have in the situation of an unplanned pregnancy.

18 And for the Court to reverse course
19 now, I think, would run counter to that societal
20 reliance and the very concept we have of what
21 equality is guaranteed to women in this country.

22 JUSTICE SOTOMAYOR: It is certainly
23 true that there can be some planning by some
24 people about pregnancy. People who are raped
25 don't have a choice, whether it's by an outsider

1 or their own husband. And not everybody can
2 afford contraceptives, contrary to the -- the --
3 your adversary's brief. In fact, 19 percent of
4 the women in Mississippi are uninsured, so they
5 don't have money to pay for contraceptives.

6 So -- but why -- their point in their
7 brief was, you know, contraceptives, if you use
8 them, the failure rate is very small, et cetera,
9 et cetera, how can there be real reliance. So
10 could you address that issue?

11 GENERAL PRELOGAR: Of course.

12 So, first, this is not a -- a new
13 circumstance since Roe and Casey.
14 Contraceptives existed in 1973 and in 1992, and
15 still the Court recognized that unplanned
16 pregnancies would persist and deeply implicate
17 the liberty interest of women.

18 But I think even on the facts, the
19 state is mistaken here. Contraceptive failure
20 rate in this country is at about 10 percent,
21 using the most common methods. That means that
22 women using contraceptives, approximately one in
23 10 will experience an unplanned pregnancy in the
24 first year of use alone. About half the women
25 who have unplanned pregnancies were on

1 contraceptives in the month that that occurred.
2 And so I think the idea that contraceptives
3 could make the need for abortion dissipate is --
4 is just contrary to the factual reality.

5 JUSTICE SOTOMAYOR: You also
6 mentioned, or maybe it was your co-counsel, that
7 life changes for women after 15 weeks.

8 GENERAL PRELOGAR: That's exactly
9 right, Justice Sotomayor, and I think that this
10 is responsive as well to the questions that the
11 Chief Justice was asking about, in particular,
12 the impact of enforcing a 15-week bar in this
13 case. The Court has always looked at that issue
14 by looking at the people for whom the law is a
15 restriction, not those for whom it's irrelevant.

16 So the question is, why would women
17 need access to abortion after 15 weeks, and what
18 is the effect on them? And there are any number
19 of women who cannot get an abortion earlier.
20 They don't realize that they're pregnant.
21 That's especially true of women who are young or
22 don't have -- haven't experienced a pregnancy
23 before, or their life circumstances change, as
24 you referred to, Justice Sotomayor. They lose
25 their job or their relationship breaks apart or

1 they have medical complications. Or, for many
2 women, they don't have the resources to pay for
3 it earlier. It takes time for them to raise the
4 money or make the appropriate logistical
5 arrangements to be able to take time off work
6 and travel and have childcare. And for all
7 those women in this category who need access
8 to abortion after 15 weeks, the fact that other
9 women were able to exercise their constitutional
10 rights does nothing to diminish the impact on
11 their liberty interest in forcing them to
12 continue with that pregnancy.

13 JUSTICE SOTOMAYOR: Thank you.

14 CHIEF JUSTICE ROBERTS: General,
15 following up on that, would that argument be
16 true in terms of viability as well? In other
17 words, what -- your discussion of the reliance
18 interests and the ability of women and men to
19 control their lives in reliance on the right to
20 -- to an abortion, the argument would not be as
21 strong, I think you'll have to concede, given
22 what we're talking about, which is not a
23 prohibition; it's a 15-week line.

24 Is that right?

25 GENERAL PRELOGAR: Yes. So this --

1 CHIEF JUSTICE ROBERTS: There -- you
2 have to hypothesize people who have planned
3 their lives according to a 24 or whatever week
4 limit it is but not a 15-week limit on abortion,
5 right?

6 GENERAL PRELOGAR: Well, I don't think
7 the Court has ever analyzed reliance with that
8 kind of parsing. I think, here, the -- I -- the
9 -- the force of the viability line is that it's
10 clearly demarcated to the scope of a
11 woman's protected liberty interest in this
12 context. And the state is not actually asking
13 this Court to replace it with a clear 15-week
14 line that would provide some measure of
15 continued protection for this right. They're
16 asking the Court to reverse the liberty interest
17 altogether or leave it up in the air.

18 And if that were to happen, then
19 immediately states with six-week bans,
20 eight-week bans, ten-week bans, and so on, would
21 seek to enforce those with no continued guidance
22 of what the scope of the liberty interest is
23 going forward.

24 CHIEF JUSTICE ROBERTS: Well, that may
25 be what they're asking for, but the thing that

1 is at issue before us today is 15 weeks. And I
2 just wonder what the strength of your reliance
3 arguments, which sounded to me like being based
4 on a total prohibition, would be if there isn't
5 a total prohibition, and as far as viability
6 goes, I don't see what that has to do with the
7 question of choice at all.

8 GENERAL PRELOGAR: Well, I think, as
9 Casey emphasized in reaffirming the viability
10 line, the Court justified that as having both a
11 logical and a biological justification that it
12 marks the point in pregnancy when the fetus is
13 capable of meaningful life --

14 CHIEF JUSTICE ROBERTS: No, that's
15 what John Hart Ely explained was a complete
16 syllogism. That's the definition of viability.
17 It's not a reason that viability is a good line.

18 GENERAL PRELOGAR: Well, it's focused
19 on the idea of fetal separateness, and I think
20 that that is a line that also accords with the
21 history and tradition in this country of
22 abortion regulation. Contrary to the state's
23 arguments here, at the time of the founding and
24 for most of early American history, women had an
25 -- an ability to access abortion in the early

1 stages of pregnancy, and it was only when the
2 fetus was deemed sufficiently separate the
3 states could act to bar that.

4 So I think that the viability line
5 also aligns with history and tradition in that
6 respect.

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas?

9 JUSTICE THOMAS: You heard my question
10 to counsel earlier about the woman who was
11 convicted of criminal child neglect. What would
12 be your reaction to that as far as her liberty
13 and whether or not the liberty interest that
14 we're talking about extends to her?

15 GENERAL PRELOGAR: Well, Justice
16 Thomas, I have to confess that I haven't read
17 the specific case you're referring to, but, if I
18 understand the question you were posing, it
19 sounds as though the state is seeking to
20 regulate for a child that's been born that was
21 injured while it was inside the womb.

22 And I think that we are not denying
23 that a state has an interest there. We're not
24 denying that a state has an interest here
25 either. Roe recognized that states have

1 interests that exist from the outset of
2 pregnancy.

3 But, with respect to this specific
4 right to abortion, there are also profound
5 liberty interests of the woman on the other side
6 of the scale in not being forced to continue
7 with a pregnancy, not being forced to endure
8 childbirth and to have a child out in the world.

9 And the state's arguments here seem to
10 ask this Court to look only at its interests and
11 to ignore entirely those incredibly weighty
12 interests of the women on the other side.

13 JUSTICE THOMAS: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer?

16 Justice Alito? No?

17 Justice Gorsuch, anything further?

18 JUSTICE GORSUCH: I just want to make
19 sure I understand your response to the Chief
20 Justice. If this Court will reject the
21 viability line, do you see any other
22 intelligible principle that the Court could
23 choose?

24 GENERAL PRELOGAR: Well, I think that
25 it would be critically important, even if this

1 Court were to reject the viability line, to
2 reinforce and reaffirm the fundamental and
3 profound liberty interest --

4 JUSTICE GORSUCH: That -- that --

5 GENERAL PRELOGAR: -- at stake here,
6 and I --

7 JUSTICE GORSUCH: Counsel, I'm sorry
8 for interrupting, but that wasn't my question.
9 I understand -- I understand you -- I understand
10 that point fully by the end of this argument.
11 That is deeply clear to me. I understand your
12 position.

13 I -- I'm just asking a question about
14 whether you think there would be another
15 alternative line that the government would
16 propose or not. You emphasized that if -- if 15
17 weeks were approved, then we'd have cases about
18 12 and 10 and 8 and 6, and so my question is, is
19 there a line in there that the government
20 believes would be principled or not?

21 GENERAL PRELOGAR: I don't think
22 there's any line that could be more principled
23 than viability. You know, I think the factors
24 the Court would have to think about are what is
25 most consistent with precedent, what would be

1 clear and workable, and what would preserve
2 the -- the essential components of the liberty
3 interest, and viability checks all of those
4 boxes and has the advantage as well as being a
5 rule of law for 50 years.

6 JUSTICE GORSUCH: Thank you. That's
7 helpful, counsel. Appreciate it.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 JUSTICE KAVANAUGH: You -- you make a
11 very forceful argument and identify critically
12 important interests that are at stake in this
13 issue, no doubt about that.

14 The other side says, though, that
15 there are two interests at stake, that there's
16 also the interest in -- in fetal life at stake
17 as well. And in your brief, you say that the
18 existing framework accommodates -- that's your
19 word -- both the interests of the pregnant woman
20 and the interest of the fetus.

21 And -- and the problem, I think the
22 other side would say and the reason this issue
23 is hard, is that you can't accommodate both
24 interests. You have to pick. That's the
25 fundamental problem. And one interest has to

1 prevail over the other at any given point in
2 time, and that's why this is so challenging, I
3 think.

4 And the question then becomes, what
5 does the Constitution say about that? And I
6 just want to get your reaction to what the other
7 side's theme is, and I've mentioned it in my
8 prior questions.

9 When you have those two interests at
10 stake and both are important, as you
11 acknowledge, why not -- why should this Court be
12 the arbiter rather than Congress, the state
13 legislatures, state supreme courts, the people
14 being able to resolve this? And there will be
15 different answers in Mississippi and New York,
16 different answers in Alabama than California,
17 because they're two different interests at stake
18 and the people in those states might value those
19 interests somewhat differently.

20 Why is that not the right answer?

21 GENERAL PRELOGAR: Justice Kavanaugh,
22 it's not the right answer because the Court
23 correctly recognized that this is a fundamental
24 right of women, and the nature of fundamental
25 rights is that it's not left up to state

1 legislatures to decide whether to honor them or
2 not.

3 And it's true, different rules would
4 prevail throughout the country if this Court
5 were to overrule Roe and Wade -- Roe and Casey,
6 but what that would mean is that women in those
7 states who are refusing to honor their rights
8 and who are forcing them to continue to use
9 their bodies to sustain a pregnancy and then to
10 bring a child into the world will have no
11 recourse other than to travel if they're able to
12 afford it or to attempt abortion outside the
13 confines of the medical system or to have a
14 child even though that was not the best choice
15 for them and their family.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett.

19 JUSTICE BARRETT: I have a follow-up
20 to Justice Kagan's question about reliance. I'm
21 just trying to nail down, and -- and I asked Ms.
22 Rikelman this question too, but I'm not sure
23 that I fully understand the government's
24 position or Ms. Rikelman's position.

25 So, on pages 18 and 19 of your brief,

1 you talk about reliance interests and you quote
2 some of the language from Casey about a woman's
3 ability to participate in the social and
4 economic life of the nation.

5 And I mentioned the safe haven laws to
6 Ms. Rikelman, and it -- it seems to me I fully
7 understand the reliance interests. There are
8 the airy ones Justice Kagan was referring to and
9 then there are the more -- excuse me -- specific
10 ones about a woman's access to abortion as a
11 backup form of birth control in the event that
12 contraception fails so that she need not bear
13 the burdens of pregnancy.

14 But what do you have to say to
15 Petitioners' argument that those reliance
16 interests do not include the reliance interests
17 of parenting and bringing a child into the world
18 when maybe that's not the best thing for her
19 family or her career?

20 GENERAL PRELOGAR: I think the state
21 is wrong about that. And I -- I think where the
22 analysis goes wrong in reliance on those safe
23 haven laws is overlooking the -- the
24 consequences of -- of forcing a woman -- upon
25 her the choice of having to decide whether to

1 give a child up for adoption. That itself is
2 its own monumental decision for her.

3 And so I think that there's nothing
4 new about the safe haven laws, the -- or -- or
5 at least nothing new about the availability of
6 adoption as an alternative. Roe and Casey
7 already took account of that fact. And I think
8 that there are certainly, of course, all of
9 the -- the bodily integrity interests that we've
10 referred to, but, also, the autonomy interests
11 retain in force as well.

12 JUSTICE BARRETT: Okay. So it's
13 the -- the reliance interests and the right to
14 be able to choose to terminate the pregnancy
15 rather than having to terminate the parental
16 rights?

17 GENERAL PRELOGAR: I think that that
18 is part of it, yes. And I think, for many
19 women, that is an incredibly difficult choice,
20 but it's one that this Court for 50 years has
21 recognized must be left up to them based on
22 their beliefs and their conscience and their
23 determination about what is best for the course
24 of their lives.

25 JUSTICE BARRETT: Thank you, General.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 General.

3 Rebuttal, General Stewart.

4 REBUTTAL ARGUMENT OF SCOTT G. STEWART
5 ON BEHALF OF THE PETITIONERS

6 MR. STEWART: Thank you, Mr. Chief
7 Justice. I'd like to do my best to make three
8 points.

9 First, picking up where -- where you
10 just left off, Justice Barrett, on safe haven
11 laws, the Respondents in this case, I -- I
12 believe, as Your Honor pointed out, have
13 emphasized parenting burdens being a lead or the
14 lead reason that women seek abortions.

15 I would emphasize safe haven laws, as
16 best I've been able to find, first came into
17 existence in 1999 in Texas. They're now
18 ubiquitous, and you're correct, Justice Barrett,
19 that they relieve that huge burden.

20 I would also add that as to -- as to
21 burdens during pregnancy, I would emphasize that
22 contraception is more accessible and affordable
23 and available than it was at the time of Roe or
24 Casey. It serves the same goal of allowing
25 women to decide if, when, and how many children

1 to have.

2 And I would also note, just frankly,
3 the lowest-cost abortion at Jackson Women's
4 Health is \$600 for the abortion. Additional
5 costs and further fees, according to -- to my
6 friends, the Respondents, and their amici, there
7 are also additional costs related to travel,
8 taking off time -- time off of work,
9 accommodations, all of those sorts of things.
10 Whether somebody is uninsured or not, the costs
11 of contraception are consistently significantly
12 less than those.

13 Number two, I -- I think you --
14 Justice Kavanaugh, you had it exactly right when
15 you -- when you used the term scrupulously
16 neutral. I think that's a very good description
17 of what we're asking for here. I think it's the
18 problem and the value that has evaded the Court
19 and will continue to evade this Court under Roe
20 and Casey, but that is exact -- exactly right.

21 This is a hard issue. It involves --
22 and -- and I would emphasize, Your Honor, that,
23 as you said, there are interests here on -- on
24 both sides. There are interests for everyone
25 involved. This is unique for the woman. It's

1 unique for the unborn child too whose life is at
2 stake in all of these decisions. It's unique
3 for us as a society in how we decide if the
4 states get to -- get -- get to legislate on this
5 issue, how to decide and how to weigh these
6 tremendously momentous issues.

7 In closing, I would say that in his
8 dissent in Plessy versus Ferguson, Justice
9 Harlan emphasized that there is no caste system
10 here. The humblest in our country is the pure,
11 the most powerful. Our Constitution neither
12 knows nor tolerates distinctions on the basis of
13 race.

14 It took 58 years for this Court to
15 recognize the truth of those realities in a
16 decision, and that was the greatest decision
17 that this Court ever reached. We're -- we're
18 running on 50 years of Roe. It is an
19 egregiously wrong decision that has inflicted
20 tremendous damage on our country and will
21 continue to do so and take innumerable human
22 lives unless and until this Court overrules it.

23 We ask the Court to do so in this case
24 and uphold the state's law.

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 General, counsel. The case is submitted.
3 (Whereupon, at 11:54 a.m., the case
4 was submitted.)
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