No. 19-1392

IN THE

Supreme Court of the United States

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

v.

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

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

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Bar Association (ABA) submits this amicus curiae brief in support of the Respondents under Rule 37.3. The ABA is the largest voluntary association of attorneys and legal professionals in the world. Its members include judges, legislators, law professors, prosecutors, and public defenders, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies.[2]

This case stands at the intersection of two principles of great importance to the ABA.

First, promoting the rule of law through adherence to precedent is central to the ABA's mission as the "national representative of the legal profession."[3] In 2006, the ABA adopted a Statement of Core Principles committing to, and urging other nations to commit to, key rule of law principles.[4] To further that mission, the ABA has conducted training

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[1] No part of this brief was authored by counsel for any party, and no person or entity has made any monetary contribution to this brief other than *amicus curiae* and its counsel. Counsel of record for Petitioners and Respondents have filed letters consenting to the filing of all *amicus curiae* briefs.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in this brief's preparation.

[3] ABA Goal IV, https://perma.cc/5UFF-JX2Q.

[4] ABA Policy #111, https://perma.cc/Z6YX-AJJ8. The ABA has also established a Rule of Law Initiative that works to "promote justice, economic opportunity and human dignity through the rule of law." ABA, Rule of Law Initiative Program Book 4 (2016).

on the rule of law internationally, holding the U.S. judicial system up as a model and highlighting adherence to precedent as key to its integrity.

The ABA regularly submits amicus briefs urging adherence to precedent in furtherance of its rule of law mission. For example, in an amicus brief submitted in *Moore v. Texas*, the ABA explained: "No practice is more vital to preserving the rule of law—and ensuring that the ABA's promotion of that rule is legitimized in the eyes of developing countries—than the following by lower courts of binding precedent of this Court."[5] And in *June Medical Services LLC v. Russo*, the ABA urged this Court to adhere to precedent rejecting state laws requiring abortion providers to have hospital admitting privileges.[6] The ABA explained that both vertical and horizontal *stare decisis* are critical to the stability of our legal system and public confidence in the judiciary.[7]

Second, the ABA is committed to equality, including gender and racial equality. One of the ABA's chief goals is to "eliminate bias and enhance diversity" in the legal profession and justice system by "[p]romot[ing] full and equal participation in the

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[5] Brief of Amicus Curiae ABA, No. 18-443, at 5, n.4, at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/amicus-briefs/moorevtexas_amicus.pdf.

[6] Brief of Amicus Curiae ABA, No. 18-1323, *at* https://www.supremecourt.gov/DocketPDF/18/18-1323/124077/20191202141458213_18-1323tsacABA.pdf.

[7] *Id*. at 4-10.

association, our profession, and the justice system by all persons."[8] When it adopted this goal in 2008, the ABA House of Delegates noted that it was building on the ABA's previous commitment to "promote full and equal participation in the legal profession by minorities, [and] women."[9] In the view of the ABA, based on decades of work on and analysis of gender equality issues,[10] women's ability to control and balance their family responsibilities greatly influences their ability to join and fully participate in the practice of law.[11]

Based on its foundational commitment to both *stare decisis* and equality, and its longstanding concern for equality of opportunity for women in the legal profession, the ABA has consistently opposed overturning *Roe v. Wade*, 410 U.S. 113 (1973), or *Planned Parenthood of Southeastern Pennsylvania v.*

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[8] Goal III, https://www.americanbar.org/groups/diversity/disabilityrights/initiatives_awards/goal_3/.

[9] *Id*.

[10] The ABA's work on gender equality extends far beyond reproductive rights. For example, in August 2019 the ABA adopted Resolution 106, urging employers to close the lingering pay gap between male and female attorneys. *See* https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/106-annual-2019.pdf.

[11] *See* Resolution 300B, Report at 2-4 (finding that "[l]ack of affordable, quality childcare and family care is a barrier" for women lawyers, who are "significantly more likely than men to have personal responsibility for childcare"), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/300b-midyear-2021.pdf.

Casey, 505 U.S. 833 (1992), as well as laws that seek to bar abortion before viability. For example, in 1992 the ABA adopted a Resolution opposing "legislation which restricts the right of a woman to choose to terminate a pregnancy [ ] before fetal viability," noting that "there has not been a single legal issue that is of more importance to American women—including women lawyers and ABA members—since suffrage."[12] The ABA recognized that, if *Roe* were overturned, the burdens would fall most heavily on lower-income women and women of color, and asserted: "the lawyers of America have a duty to ensure that the daughters and granddaughters of all Americans—not just those with professional-level incomes—enjoy the same basic rights[.]"[13]

It remains "essential for the ABA to bring its voice to this crucial debate" to "protect the freedom of individual women to make the highly personal and complex decision of whether to have an abortion."[14] That is why the ABA urged the Court to apply *stare decisis* in *June Medical Services*, where the Court wisely declined to depart from its precedents.[15] The ABA again urges this Court to adhere to its longstanding precedent recognizing that women have the right to decide, at least up to the point of viability, whether to continue a pregnancy and bear a child.

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[12] Resolution 92A12, Report at 1 (adopted Aug. 1992), https://www.crowell.com/documents/ABA-1992-Resolution-re-Roe.pdf.

[13] *Id*.

[14] *Id*.

[15] *See* 140 S. Ct. 2103 (2020).

SUMMARY OF ARGUMENT

If granted, Mississippi's request that this Court overturn *Roe v. Wade* would severely undermine the rule of law and gender equality, both in the legal profession and society more broadly. For forty-eight years, the right to decide to have an abortion before viability has become embedded in the fabric of our society and the understanding of women as a fundamental right that affects women in every way from economics, to health, to career choices and family life. The revocation of such a right would be unprecedented. It would be a devastating repudiation of *stare decisis*, jeopardize the public's faith in our legal institutions, and have a cruel effect on the lives and expectations of millions of women. The ABA urges this Court not to take that perilous step, and instead reaffirm the rule of law by adhering to its longstanding precedent on this issue.

The principle that a woman may decide, up to the point of viability, whether to continue a pregnancy is the centerpiece of two carefully considered decisions: *Roe* in 1973, and then *Casey* two decades later. And *Casey* reaffirmed *Roe*'s viability holding based in no small part on the rule-of-law principle of *stare decisis*. Thus, while Petitioners urge the Court to renounce *Roe*'s core viability holding, doing so would require the rejection of far more. To reach the outcome that Petitioners advocate, this Court would not only have to disavow *Roe*'s core holding on the underlying substantive issue (along with all of the cases that have applied that holding), but its own well-considered determination in *Casey* that *stare decisis* and the rule of law require the Court to adhere to

Roe's core holding. Nothing has changed in the last 30 years to support a different conclusion now.

Stare decisis may not be absolute, but this is not one of the rare instances where there is good reason to depart from that fundamental rule-of-law principle. To the contrary, there are especially compelling reasons to apply *stare decisis* again here.

First, the right at issue is five decades old. When articulated in *Roe*, that right was already well-grounded in this Court's decades-old precedents on physical autonomy, personal liberty, and the right to make fundamental decisions related to family and relationships. Five decades later, the right recognized in *Roe* has only become more firmly established in U.S. law, having been consistently reaffirmed by this Court and consistently applied by the lower courts.

Equally important, for many American men and women, the understanding that women may decide, up to the point of viability, whether to continue a pregnancy and bear a child has become part of the basic understanding of the liberty guaranteed by the Constitution. Women and men both have structured their lives and relationships based on that understanding. This Court cannot strip away the foundations of that understanding without doing irreparable harm to the rule of law and equality.

Thus, reliance interests weigh particularly strongly in favor of adhering to precedent here. As explained in *Casey*, American women and men have conceived their futures, and the futures of their families, based on the understanding that they will be able to decide whether and when to have children, and

how many. That ability has allowed women from many walks of life, including those of limited economic means, to strive for economic stability and a fulfilling career, including in the legal profession. The ABA has chronicled the obstacles that women lawyers and other professionals continue to face, including many related to children. While increasing numbers of women maintain both a successful career and a full family life—in many cases because they were able to choose when to begin a family—meaningful barriers remain. Recent ABA studies have found that is particularly true for women of color, and women from less-privileged economic backgrounds. Allowing states to ban abortion would undermine much of the progress toward gender and racial equality made over the past several decades in the legal profession, as well as in society more broadly.

Next, the Court's conclusion, half a century ago, that women have a constitutional right to decide, up to the point of viability, whether to bear a child is well-reasoned and fundamentally sound. *Roe* and *Casey* each acknowledged the competing philosophical and moral perspectives on abortion, while recognizing that any government interest in restricting abortion could not wholly overcome women's foundational interest in controlling their own bodies and futures. *Roe*'s holding, and *Casey*'s reaffirmation of that holding, flowed naturally from decades of precedent holding that, in the realm of children and family, the Constitution protects certain choices from undue government restriction.

Finally, *Roe*'s viability holding has proven workable. *Roe* provides a clear and unambiguous line that states may not cross in banning abortion. Both in

and after *Casey*, the courts have accommodated states' interest in regulating abortion while protecting that fundamental right. The result is a long line of case law that predictably and consistently rejects state laws that would bar women from obtaining an abortion before viability, while permitting states great leeway to regulate the conditions under which abortions may be obtained. It is undeniable that opposition to abortion has persisted. But the mere existence of such opposition does not mean that the precedent is wrong (let alone "egregiously" so) or has proved unworkable.

Thus, accepted principles of *stare decisis*, faithfully applied, demonstrate that the Court should not repudiate *Roe* and decades of precedent affirming that all women may decide, up to the point of viability, not to bear a child.

ARGUMENT

I. *Stare Decisis* Requires the Court to Follow Its Longstanding Precedent Recognizing a Woman's Fundamental Right to Choose Whether to Bear a Child.

The ABA has long viewed *stare decisis* as fundamental to the rule of law and central to this Court's special role as the exemplar of the rule of law. To abandon it here would severely damage both.

"Adherence to precedent is 'a foundation stone of the rule of law.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). As a 1944 ABA Journal article explained, it is that very principle that distinguishes the judiciary's "method and philosophy from those of

the political and legislative process." Robert H. Jackson, J., *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944); *see also Payne v. Tenn.*, 501 U.S. 808, 827 (1991) (*stare decisis* "contributes to the actual and perceived integrity of the judicial process"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, J., concurring) ("Fidelity to precedent . . . is vital to the proper exercise of the judicial function.").

Stare decisis also "reflects respect for the accumulated wisdom of judges who have previously tried to solve the same problem." *Ramos v. La.*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring); *see also id.* at 1405 (majority op.) ("[T]he precedents of this Court warrant our deep respect as embodying the considered views of those who have come before."). That respect is doubly warranted here because the principle that a woman has a constitutional right to terminate a pregnancy before viability is the centerpiece of *two* carefully considered opinions of this Court, many years apart.

A half-century ago, that basic principle was first adopted by a 7-2 vote of this Court. The Court's comprehensive decision was communicated through a thoughtful opinion by Justice Blackmun, joined by justices with as diverse jurisprudential approaches as Chief Justice Burger and Justices Stewart and Powell, on the one hand, and Justices Douglas, Brennan, and Marshall on the other. The Court acknowledged that abortion provoked "deep and seemingly absolute convictions" influenced by "[o]ne's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and

their values, and the moral standards one establishes and seeks to observe[.]" *Roe*, 410 U.S. at 116. But recognition of the right and interest of women in controlling their own bodies and reproductive decisions demanded that a balance be struck *between* those rights and interests, and any interest that a State may have in restricting abortion.

To strike that balance, the Court carefully reviewed historical attitudes and approaches towards regulating abortion. It described, for example, the divergent approaches to abortion of ancient Persia and Rome; how founding-era common law did *not* regulate abortion prior to "quickening"; and how, after increasingly restricting access to abortion in the mid- to late-19th century, England and the United States had begun loosening those restrictions. *Id.* at 129-41.[16] The Court also surveyed more than a century of medical opinions, the "wide divergence of thinking" among religious communities, and the practical contentions of advocates on both sides of the debate. *Id.* at 141-62. Only after this careful analysis did the Court conclude that drawing the constitutional line at viability was "consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day." *Id.* at 165. This "le[ft] the State free to place increasing restrictions on abortion as the period

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[16] *See also* James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* at 3-7, 200 (Oxford Univ. Press, 1978) (chronicling the history of U.S. abortion legislation, including the introduction of abortion restrictions by some states in the latter half of the nineteenth century).

of pregnancy lengthens," while also permitting a patient and her doctor to make appropriate determinations regarding the course of the patient's medical care. *Id.* at 165-66.

Two decades later, in *Casey*, this Court reaffirmed the principle that a woman has the right to decide whether to bear a child up to the point of viability. The Court considered the precedents that led to the Court's decision in *Roe*, and the arguments for rejecting its holding. "No evolution of legal principle ha[d] left *Roe*'s doctrinal footings weaker than they were in 1973." 505 U.S. at 857. And despite medical advances, the Court found that "the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided . . . [so] no change in *Roe*'s factual underpinning ha[d] left its central holding obsolete, and none supports an argument for overruling it." *Id.* at 860. There is absolutely no sense in which these decisions could be regarded as casual or ill-considered—a common rationale for overturning precedent.

Indeed, the rule of *stare decisis* is doubly applicable here. Not only are *Roe* and *Casey* precedential on the substantive question presented, but the *Casey* Court directly confronted all of the reasons why some assert that *Roe* was wrongly decided and declined to overturn that precedent. Indeed, *Casey* has become leading precedent on the importance and application of *stare decisis*.

Justices O'Connor, Kennedy, and Souter, writing for the Court, explained why it was particularly appropriate to apply *stare decisis* where fundamental constitutional rights are at stake: "Liberty finds no

refuge in a jurisprudence of doubt." *Id.* at 844. The Court then went on to explain that it would be particularly inappropriate to overrule precedent where "the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*" because such a "decision has a dimension that the resolution of the normal case does not carry." *Id.* at 866-67 (identifying the Court's decision ending racial segregation in *Brown v. Board of Education* as the only other such case). In such cases, the Court must "remain steadfast" because

> [t]he promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives. . . . A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

Id. at 868. As when *Casey* was decided, overturning *Roe* now would undermine trust in the Court as an institution that remains steadfast despite shifting popular and political opinion. "A decision to overrule Roe's essential holding . . . [would be] . . . at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Id.* at 869. It would also, to say the least, "disturb the calm," *Ramos*, 140 S. Ct. at 1411 (Kavanaugh, J., concurring), by throwing the entire body of abortion jurisprudence, and the principles of constitutional liberty on which it is founded, into disarray.

As the ABA warned in its 1992 Resolution, overturning *Roe* would also carry with it a range of

undesirable consequences, including "confusion" as to the status of abortion rights in states that long ago enacted legislation—which never went into effect—banning, severely restricting, and even criminalizing abortion.[17] The result will surely be a "patchwork quilt of state laws" that "force[s] thousands of women to travel great distances to obtain a legal abortion," while others resort to "illegal abortions, many of which will result in infection, sterility or death."[18] Those burdens will fall disproportionately on women of color and those of limited economic means who will be unable to travel to those locales where a safe abortion will remain available.[19]

Practical impacts aside, adhering to precedent "keep[s] the scale of justice even and steady[.]" *June Medical*, 140 S. Ct. at 2134 (Roberts, C.J., concurring) (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (1765)).[20] Thus, this Court should continue to "apply the constitutional standards set forth in [its] earlier abortion-related cases[.]" *Id.* at 2120 (plurality op.).

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[17] ABA Resolution 92A12, n.12, *supra*, Report at 3-4.

[18] *Id*. at 4-5.

[19] *Id.*

[20] *See also* Bryan A. Garner, *et al.*, *The Law of Judicial Precedent* 21 (2016) ("Following established precedents helps keep the law settled, furthers the rule of law, and promotes both consistency and predictability.").

II. There Are Particularly Compelling Reasons to Apply *Stare Decisis* Here.

For almost five decades, it has been the law that the constitutional right to control one's own body and reproductive choices means that states may not bar outright the termination of a pregnancy before viability. As this Court observed when reaffirming *Roe*'s core holding in *Casey*, 505 U.S. at 856, the constitutional line first drawn in *Roe* has allowed women to "ma[ke] choices that define their views of themselves and their places in society[.]" Women of all backgrounds, including those in the legal profession, continue to rely on their right to make those choices.

Even in constitutional cases, departure from precedent "'demands special justification.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). In an opinion authored by Justice Scalia concerning the constitutional right to counsel under the Fifth and Sixth Amendments, this Court has explained that "the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned," as well as "workability." *Montejo v. La.*, 556 U.S. 778, 792–93 (2009).

Here, the fact that *Roe*'s holding has been reaffirmed and applied for five decades; its place at the center of the modern constitutional canon on liberty; and the ongoing reliance on that right by women across the nation—including women in the legal profession—combine to make this a precedent

that this Court cannot overturn without causing deep damage to the fabric of our legal system. And contrary to Petitioners' arguments, *Roe* and *Casey* are both well-reasoned and entirely workable, as the decades of case law applying those decisions to balance states' interest in regulating abortion, on one hand, and women's right to decide whether to bear a child, on the other, demonstrate.

A. *Roe*'s longevity, consistent reaffirmation by this Court, and faithful application by lower courts heavily favor retaining it.

For almost fifty years, the central holding of *Roe*, upheld in *Casey*—that a state may prohibit abortion after viability, but not before—has been applied faithfully by the lower courts. *E.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (holding six-week abortion ban unconstitutional), *cert. denied*, 577 U.S. 1119 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (holding twelve-week abortion ban unconstitutional), *cert. denied*, 577 U.S. 1102 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013) (holding twenty-week abortion ban unconstitutional), *cert. denied*, 571 U.S. 1127 (2014); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 144 (3d Cir. 2000) (holding statute that was "so vague as to be easily construed to ban even the safest, most common and readily available conventional pre- and post-viability abortion procedures" unconstitutional); *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999) (holding unconstitutional a ban on "the most common procedure for second-trimester abortions"), *aff'd*, 530 U.S. 914, 922 (2000); *Jane L. v. Bangerter*, 102 F.3d 1112, 1118 (10th Cir. 1996) (holding twenty-week

abortion ban unconstitutional), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992) (holding statute criminalizing most abortions unconstitutional), *cert. denied*, 507 U.S. 972 (1993).

Roe's core holding, and *Casey*'s reaffirmation of that core holding, have also been upheld by this Court against many challenges. As noted in *Casey*, 505 U.S. at 844, the government itself urged the Court to overturn *Roe* no less than five times in the intervening years—and yet the Court held firm then, and it has held firm since. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (applying *Roe* and *Casey* despite multiple briefs asking the Court to revisit those precedents); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (taking as a given that States may not prohibit pre-viability abortion despite multiple briefs asking the Court to revisit *Roe* and *Casey*); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 323 (2006) ("We do not revisit our abortion precedents today . . . ."); *Stenberg*, 530 U.S. at 921 ("[T]his Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. We shall not revisit those legal principles.") (citations omitted). The Court should be particularly hesitant to overturn longstanding precedent after consistently declining to do so over the course of a half-century.

Indeed, just two years ago, in *June Medical*, this Court rejected an appeal to depart from its abortion precedents and allow states to impose greater pre-viability restrictions, emphasizing the importance of *stare decisis*. The law at issue there was "nearly

identical" (140 S. Ct. at 2133) to restrictions found to be an undue burden in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2019). Despite disagreeing with the outcome in *Whole Women's Health*, the Chief Justice joined a majority of the Court in following that decision because "for precedent to mean anything, the doctrine [of *stare decisis*] must give way only to a rationale that goes beyond whether the case was decided correctly." *June Medical*, 140 S. Ct. at 2134.

To overturn *Roe* and *Casey* now, after five decades in which this Court has steadfastly declined to do so and lower courts have faithfully applied those precedents, would create a wave of political and social turmoil, and damage the Court as an institution. *See Casey*, 505 U.S. at 865, 868 ("Like the character of an individual, the legitimacy of the Court must be earned over time."). There is no precedent for this type of dramatic about-face from such a longstanding, widely known, and carefully considered precedent.

B. The right to choose whether to bear a child is an integral part of our understanding of constitutionally protected liberty.

As a result of *Roe* and *Casey*, generations of women—and men—have come of age understanding that, under our Constitution, women enjoy a protected sovereignty over their bodies and reproductive decisions. That sovereignty generally leaves it for them to decide whether to proceed with a pregnancy, accepting the significant health risks and consequences inherent in doing so, and assuming the lifetime of responsibilities that come with parenthood.

See Casey, 505 U.S. at 852 (recognizing that "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law"). The sovereignty that women enjoy over their own bodies and reproductive choices has become, for many men and women, a core constitutional value reflected in many aspects of modern American life.

In asking the Court to overturn *Roe* and *Casey*, Mississippi urges the Court to embrace a dramatic departure from rule of law principles by decisively narrowing the liberty that women enjoy under the 14th Amendment. Petitioners argue that the Court should do so because, when the Fourteenth Amendment was ratified, abortion was unlawful in most states. That restrictive view of the liberty secured by our Constitution—which would deny a broad swath of rights now well-recognized as essential to individual self-determination and fulfillment, such as the right to marry the person of one's choosing regardless of race or gender—was eloquently dispatched in *Casey*:

> It is also tempting . . . to suppose that the Due Process Clause protects only those practices . . . protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before.

505 U.S. at 847-48 (citing *Loving v. Va.*, 388 U.S. 1, 12 (1967)).[21]

In rejecting the view of constitutionally protected liberties as limited to those recognized as such in 1868, *Casey* examined the Court's earlier decisions "afford[ing] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 505 U.S. at 851. For example, the Court relied on *Eisenstadt v. Baird*, which announced the "right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id*. (quoting *Eisenstadt*, 405 U.S. 438, 453 (1972)). The Court also quoted *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), as requiring it to "respect[ ] the private realm of family life which the state cannot enter." *Id*. The Court reaffirmed that such "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." 505 U.S. at 851.

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[21] History instructs that this type of historically focused analysis provides no assurance of legitimacy or propriety. *Cf. Dred Scott v. Sandford*, 60 U.S. 393 (1857) (concluding that black persons were not entitled to the rights of citizenship based on a survey of state and local laws at the time the Constitution was enacted). Applying such an analysis here, pinned to a period when women were second-class citizens who would not gain the right to vote for another 50 years, is even less likely to provide that assurance.

Roe and *Casey* thus built on the Court's prior precedents protecting the right to make personal decisions regarding marriage, family, and child-rearing, pointing to cases dating back to the 1920s.[22] *See Casey* 505 U.S. at 853 (placing *Roe* within "the tradition of the precedents we have discussed, granting protection to substantive liberties of the person"). The right described in *Roe* and reaffirmed in *Casey* was not called into being out of thin air, but was the result of years of consideration by the Court of what liberty encompasses when applied to the realm of children and family.

The principles on which *Roe* was founded have not diminished in importance since that decision was announced. Whatever novelty may have been ascribed to *Roe* at its inception, a half-century and several generations later, the basic premise that the Constitution protects certain forms of liberty not specifically described in the text, including a woman's right to make reproductive choices, enjoys wide acceptance. And that premise has since been the foundation for several other important decisions by this Court addressing the personal liberty enjoyed by American women and men, including to choose who to marry and how to conduct personal relationships. *E.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003). Renouncing

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[22] *E.g.*, *Pierce v. Soc'y of Sisters of The Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925) (constitution assures a right to make decisions regarding child-rearing and education); *Meyer v. Neb.*, 262 U.S. 390, 399 (1923) (same); *Skinner v. Okla.*, 316 U.S. 535, 541-42 (1942) (right to make decision about procreation); *Griswold v. Conn.*, 381 U.S. 479, 484-85 (1965) (right to access contraception); *Loving*, 388 U.S. at 12 (right to choose whom to marry).

Roe, after five decades in which it has been a key component of this Court's constitutional canon, would undermine the edifice of modern constitutional jurisprudence—and the rule of law.

To be sure, important—even fundamental—objections to abortion remain. But as *Roe* and *Casey* recognized, those objections cannot be vindicated without riding roughshod over the rights of women that this Court has repeatedly and correctly held to be a necessary part of the balance in considering whether a state (or the federal government) may restrict or prohibit abortion.

Even if the Court could find some way to revoke only the right to choose to terminate a pregnancy before viability without tearing down the framework of family-related liberty on which it is constructed (and Petitioners have not suggested any way in which the Court could do so), it should not. There is an important difference between correcting a precedent that has improperly *constrained* liberty by permitting, for example, "imprisonment pursuant to unconstitutional procedures," *Ramos*, 140 S. Ct. at 1410, and overturning a precedent widely understood as protecting the basic rights and liberty interests of half the population. The cases in which this Court has overturned a constitutional precedent have generally been rights-conferring, not rights-withdrawing. *See, e.g.*, *Obergefell*, 576 U.S. at 644; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Lawrence*, 539 U.S. at 558; *Ring v. Ariz.*, 536 U.S. 584 (2002); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1964); and *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Once granted, liberty-based rights cannot be revoked without creating disrespect for the mechanism by which they were taken away, and the document on which they were founded. To revoke a woman's right to terminate a pregnancy before viability after fifty years would do untold damage to the Court as an institution, and to our democracy.

C. *Roe* and *Casey* Have Engendered Important Reliance Interests, Including for Women in The Legal Profession.

Another important consideration when this Court is urged to overturn constitutional precedent is whether doing so would "unduly upset reliance interests" in light of the "age of the precedent." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh J., concurring); *see also Montejo*, 556 U.S. at 792–93 (identifying reliance interests as a key consideration in deciding whether to abandon precedent). In *Ramos*, this Court recognized that "reliance interests" counsel against overturning precedent where persons have made significant life choices, such as marrying or entering into a business, based on the expectation of the continued application of the legal norm at issue. 140 S. Ct. at 1406. The ABA strongly believes that is very much the case here.

For a half century, American women have "ordered their thinking and living around" the right recognized in *Roe*, and they continue to do so. *Casey*, 505 U.S. at 856. Several generations of women have "come of age free to assume" that the liberty guaranteed them by the Constitution includes the right "to make reproductive decisions" as they plan a future that may include some combination of

marriage, family and career. *Id.* at 860. Men and women—not all, but many—have envisioned and planned their futures against the background that they can control whether and when to have children and how many they will have, and need not fear that an error, accident, or misfortune will require them to abandon their plans and aspirations. To deny the existence of that widespread and pervasive reliance on the protections of *Roe* ignores the reality of modern American society. It also disregards the voices of the many women lawyers who have explained how important that longstanding right is to them.[23]

Petitioners assert that "the facts have changed" since *Roe* and *Casey*, arguing that women have made great strides toward equality. True. But that advancement is not *ex nihilo*. One reason that "the facts have changed" is precisely because, for the past 50 years, women have had the "ability to control their reproductive lives." 505 U.S. at 856. And the principle embodied by *Roe* and *Casey*, that the Constitution protects women's sovereignty over their bodies, is today at the core of the increasingly equitable treatment of women in our society. To eviscerate that principle by overruling the foundational cases from

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[23] *See, e.g.*, Brief for Michele Coleman Mayes, Claudia Hammerman, Charanya Krishnaswami, and 365 Other Legal Professionals Who Have Exercised Their Constitutional Right to an Abortion as *Amici Curiae* Supporting Petitioners, at 5-17, *June Medical* (Nos. 18-1323 and 18-1460); Brief of Janice Macavoy, Janie Schulman, and Over 110 Other Women in the Legal Profession Who Have Exercised Their Constitutional Right to an Abortion as *Amici Curiae* in Support of Petitioners, at 8-33, *Whole Women's Health* (No. 15-274).

which it springs would profoundly undermine gender equality.

A decision revoking a woman's right to decide whether to bear a child in light of her age, health, economic status, and educational and professional goals directly harms women seeking to participate in professional life on equal footing with men. *Roe* and *Casey* have allowed countless women who otherwise might not have been financially or physically able to enter the work force, due to the need to care for a child, to do so—including women lawyers. *See* n.24 *supra*; *see also Casey*, 505 U.S. at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

Overturning *Roe* will prevent many women from obtaining abortions, and from entering the workforce and improving their lives and those of their families. As the ABA recognized in 1992, wealthier women may still be able to obtain safe abortions by travelling to states that permit them, while many poorer women likely will not be able to do so.[24] This would have the pernicious effect of exacerbating existing socio-economic inequities, which have a disparate impact on women of color.[25]

Petitioners argue that many women are now able to balance a successful career with parenting. But while that is true for an increasing number of women,

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[24] ABA Resolution 92A12, n.12, *supra*, Report at 1, 5.

[25] *See id*.

it remains a struggle for many. Having children still can and does derail or delay post-secondary education and professional careers for many women.[26] Studies predicated on the data generated by the ground-breaking Turnaway Study[27] confirm that women who are denied abortions suffer a significant and persistent increase in financial hardship and instability for years following the denial. Women denied abortions had significantly higher odds of poverty than women who obtained abortions.[28] The "large and persistent negative effects" of being denied access to abortion "on a woman's financial well-being"[29] directly impacts women's access to higher

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[26] *See, e.g.*, Lauren J. Ralph, PhD, *et al.*, *A Prospective Cohort Study of the Effect of Receiving Versus Being Denied an Abortion on Educational Attainment*, 29(6) Women's Health Issues J. 455-464 (2019) (finding that women denied an abortion less often completed a post-secondary degree (27%) compared with those who received a wanted abortion (71%)); *see also* n.23, *supra.*

[27] The Turnaway Study, conducted by the University of California, followed women seeking abortions at 30 different clinics in 21 states, including women who received abortions as well as those who were turned away due to gestational limits. The Study followed these women for five years, gathering social, psychological, health, family, and financial information from each woman. Further details are available at https://www.ansirh.org/research/ongoing/turnaway-study.

[28] Diana Greene Foster, PhD, *et al.*, *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am. J. Pub. Health 407, 411-12 (Feb. 2018).

[29] Sarah Miller, *et al., The Economic Consequences of Being Denied an Abortion*, Nat'l Bureau of Economic Research, Working Paper 26662, 29 (Jan. 2020), http://www.nber.org/papers/w26662.

education and ability to enter or remain in the workforce, including in the legal profession.

The ABA has found that women in the legal profession continue to lack equal footing,[30] and that this is due in no small part to the perceived and real burdens of bearing primary responsibility for child-care.[31] "[E]xperienced women lawyers bear a disproportionate brunt of responsibility for arranging for care, leaving work when needed by the child, children's extracurricular activities, and evening and daytime childcare."[32] And "there are still top law firms that do not permit women to advance if they are

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[30] *See* ABA Resolution 106, n.10 *supra*, Report at 3-4 (finding in 2018 that women lawyers make less than 80% of what their male counterparts make, with women of color faring worse); Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues*, National Ass'n of Women Lawyers, 3 (2015) (reporting that, since 2006, law firms "have made no appreciable progress in the rate at which they are promoting women into the role of equity partner" and men "continue to be promoted to non-equity partner ... in significantly higher numbers").

[31] *See* Joyce Sterling & Linda Chanow, *In Their Own Words: Experienced Women Lawyers Explain Why They Are Leaving Their Law Firms and the Profession*, ABA at 21 (2021) (reporting on discrimination women lawyers faced once they had children based on real and perceived burdens of childcare).

[32] Roberta D. Liebenberg & Stephanie A. Scharf, *Walking Out The Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private* Practice, ABA at 12 (2019); *see also Charting Our Progress: The Status of Women in the Profession Today*, ABA Commission on Women in the Profession at 7 (2006) (women lawyers "reported that they were shouldering more responsibility for child care than men, and that this affected their real or perceived availability for work").

on a reduced-hours schedule."[33] Allowing states to bar women professionals (or would-be professionals) who do not wish to, or are not ready to, have children from obtaining a pre-viability abortion will exacerbate lingering gender disparities in the legal profession, as in society more broadly.

Of equal concern, as the ABA has long recognized, women from more modest economic backgrounds will be disproportionately harmed by a decision withdrawing women's right to decide not to bear a child when they are not ready or able to do so.[34] Within the legal profession, this will exacerbate existing disparities between women of color and white women;[35] lawyers from wealthier and more modest backgrounds; and those in higher-paying segments of the legal profession versus those who choose to pursue public service. As with society writ large, the legal profession will not be a level playing field if all women do not have the same right to decide whether and when to have a child.

In light of the reliance interests it has engendered and for the other reasons discussed above, the Court should decline Petitioners' invitation to revoke the right acknowledged by *Roe*, and then reaffirmed twenty years later in *Casey*.

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[33] Rikleen, n.31, *supra*, at 11.

[34] ABA Resolution 92A12, n.12, *supra*, Report at 1, 5.

[35] *See* ABA Resolution 106, n.10, *supra*, Report at 3-4 (finding that gender disparity in pay was even greater for women lawyers of color; on the current trajectory, African American women lawyers will not achieve pay equity until 2119, and Latina lawyers will not achieve pay equity until 2224).

D. The Precedent Set in *Roe* and Reaffirmed in *Casey* Is Well Reasoned.

Contrary to Petitioners' assertions, the precedents at issue were rightly decided. While Petitioners disagree with the results, *Roe* and *Casey* are "well reasoned" and correct. *Montejo*, 556 U.S. at 792–93. They are certainly not "egregiously wrong," *Ramos*, 140 S. Ct. at 1414, so as to justify overturning them despite a half-century of reliance on them by women and the courts.

There are very few cases in which this Court has overturned its precedent on a major issue because it was "egregiously" wrong. In *Casey*, the Court could identify only two: the decisions overturning *Lochner v. New York* and *Plessy v. Ferguson*. *Casey*, 505 U.S. at 861-63. There can be no analogy between the Court's precedents recognizing a woman's fundamental right to reproductive choice and those decisions, the former of which repudiated the government's power to limit working hours and the latter of which sanctioned racial segregation.

In sharp contrast to such era-defining mistakes, *Roe* and *Casey* were each soundly rooted in precedent, and embodied a careful balance between the state's "legitimate interests in protecting prenatal life" and a woman's fundamental interest in making one of "the most intimate and personal choices a person may make in a lifetime." *Casey*, 505 U.S. at 851-53. The Court did so fully cognizant that this was a subject on which "reasonable people will have differences of opinion[.]" *Id.* at 853. Eschewing an "all or nothing" approach, the Court deliberately articulated standards that respected the potential government

interest in limiting abortion, while recognizing that governmental power is limited by individual rights. *See Roe*, 410 U.S. at 165-66 ("This holding, we feel, is consistent with the relative weights of the respective interests involved," including those of states, physicians, and women.).

While one may or may not agree with the result, the reasoning reflected in those decisions was exceedingly comprehensive and thoughtful (*see* pp. 10-13, *supra*), fully cognizant of the importance of the issue presented. Indeed, the conclusion that women have a liberty-based right to decide, up to the point of viability, whether to bear a child reflects the reasoned judgment of not only the Justices that combined to support it in *Roe* and *Casey*, but iterative majorities that have repeatedly declined to abandon it.

There is a clear contrast between this case and a situation like the one in *Ramos*, where not a single justice thought the Court's precedent allowing a defendant to be convicted of a serious crime by a less-than-unanimous jury was correct, and both that practice and the precedent were outliers, based on racially discriminatory motives. 140 S. Ct. at 1404-05 ("Even if we accepted the premise that *Apodaca* established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true."). While Petitioners may firmly believe that there is no constitutional right to terminate a pregnancy before viability, that is most certainly not something "everyone knows to be true."

E. *Roe* has proven entirely workable.

Roe's holding—that states may not prohibit abortion outright before viability—has not proven unworkable, nor has it caused "significant negative jurisprudential [and] real-world consequences." Pet. Br. at 23 (quoting *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring)).

Viability continues to provide a clear line for assessing the lawfulness of legislative action to restrict abortion access. *See Casey*, 805 U.S. at 855 (*Roe* "represent[s] . . . a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement . . . the required determinations fall within judicial competence"). As the ABA observed in 1992, it is the dismantling of *Roe* and its progeny that would prove unworkable, replacing a clear understanding of how states may not regulate, with confusion and disarray.[36]

Rather than assert that viability has been a difficult standard to apply, Petitioners assert that *Casey*'s "undue burden" test is subjective. Pet. Br. at 19-20. But it is *Roe*'s viability line, not *Casey*'s undue burden test, that is at issue in this case. And while nine Justices may not always agree what sort of burden is undue, *Casey's* result has been a string of sensible decisions often accommodating states' interest in regulating abortion, while protecting

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[36] *See* ABA Resolution 92A12, n.12, *supra*, Report at 3-4.

women's fundamental right to decide, up to the point of viability, whether to proceed with a pregnancy.[37] Indeed, *Casey* itself upheld four state restrictions on abortion, while overturning only one—and simultaneously reaffirming *Roe*'s core viability holding. 505 U.S. at 879-901.

The long line of case law implementing *Roe*'s bright-line holding that women must be permitted to decide to end a pregnancy pre-viability, while allowing states to reasonably regulate the conditions under which that right may be exercised, cannot be viewed as "negative jurisprudential [or] real-world consequences" (Pet. Br. at 23)—unless one is viewing them from an outcome-determinative perspective that either condemns all abortions or believes there should be no restrictions. The Court should continue to reject making decisions about this issue based on such subjective viewpoints. *Stare decisis* and the rule of law must prevail.

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[37] *See, e.g.*, *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 370-74 (6th Cir. 2006) (holding statute limiting parental consent judicial bypass procedures unconstitutional, but an in-person informed consent requirement constitutional); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1468 (8th Cir. 1995) (striking down criminal and civil penalty statutes while upholding a "mandatory-information" statute), *cert. denied*, *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996); *Reproductive Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1267-68 (M.D. Ala. 2017) (holding certain provisions of parental consent judicial bypass statute unconstitutional while preserving the rest).

CONCLUSION

This Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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