No. 19-1392

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF *AMICI CURIAE* FOR ORGANIZATIONS OF WOMEN LAWYERS – WOMEN LAWYERS ON GUARD INC., WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA AND NATIONAL ASSOCIATION OF WOMEN LAWYERS *ET AL.* – IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici are organizations of women[2] lawyers and future legal professionals. As lawyers and law students, *amici* have engaged in pro bono and clinical work while maintaining grueling class schedules, have worked in public and private practice as trial attorneys and corporate deal-makers, have represented individuals, corporations, and classes, and, through it all, have dedicated their careers to guarding and championing the integrity of law. *See In re Sawyer*, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting) ("We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion.") (quoting *In re Howell*, 89 A.2d 652, 653 (N.J. 1952)). As *amici* have lived every day with the biological realities of womanhood and shouldered the weight of family planning while pursuing all other aspects of a full life and career. Among *amici* are

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[1] This brief is filed with the written consent of all parties pursuant to the Court's Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk. Pursuant to the Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amici* or their members made any monetary contribution to the preparation or submission of this brief.

[2] Although the term "women" is used here and elsewhere, people of all gender identities may also become pregnant and decide to end a pregnancy. *See Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021). Except where used in proper nouns or to describe case holdings, quotations, or statistics, the word "women" as used in this brief is intended to include all persons capable of becoming pregnant, regardless of gender identity, sexual orientation, or any other characteristic.

women who have borne children and forgone children, struggled with infertility and suffered miscarriages, raised biological and adopted children, experienced planned and unplanned pregnancies, relied on all methods of birth control, and received abortion care and forgone abortions. As lawyers, future legal professionals, and women, *amici* are uniquely positioned to express to the Court the societal reliance on the almost fifty years of jurisprudence guaranteeing a constitutional right to continue or end a pregnancy before viability, and the incalculable damage that would inevitably result from pre-viability bans on abortion.

Women Lawyers on Guard Inc. ("WLG") is a national, nonprofit organization that seeks to harness the power of lawyers and the law to preserve, protect, and defend the democratic values of equality, justice, and opportunity for all. WLG focuses on securing the equal treatment of women by challenging laws and practices that discriminate against women, including gender-based violence and harassment and attempts to curtail women's reproductive rights. As such, WLG has participated as amicus curiae before the United States Supreme Court and other federal courts in cases pertaining to women's equal treatment under the law.

Women's Bar Association of the District of Columbia ("WBA") is one of the oldest women's bar associations in the country. Since 1917, we have advocated for the advancement of women in the profession and upheld our mission to maintain the honor and integrity of the legal profession, promote the administration of justice, advance and protect the interests of women lawyers, promote their mutual

improvement, and encourage a spirit of friendship. As an organization, WBADC is a catalyst for women helping women, and in support of our mission, we participate as amicus curiae before the Supreme Court of the United States and other courts throughout the nation to advocate for women in the legal profession and women's rights more broadly.

National Association of Women Lawyers ("NAWL") is a national, nonprofit organization providing leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success. To advance its mission, NAWL participates as amicus curiae before the United States Supreme Court and other federal courts in cases pertaining to women's equal treatment under the law.

Oregon Women Lawyers seeks to transform the practice of law and ensure justice and equality by advancing women and minorities in the legal profession.

The Women's Law Center of Maryland is dedicated to ensuring the physical safety, economic security, and bodily autonomy of women through access to justice.

Duke Women Law Students Association supports women at Duke Law by creating a community that raises awareness of women's issues, for the betterment of women in the legal profession.

Feminist Legal Forum at the University of Virginia School of Law promotes the social,

political, and economic equality of the sexes in the field of law.

Lawyers Club of San Diego seeks to advance the status of women in the law and society.

Charlotte Women's Bar supports female attorneys by providing educational and networking opportunities.

Women's Law Student Association at the University of Wisconsin ("UW") Law School empowers and supports female-identifying UW Law students.

Asian Pacific American Women Lawyers Alliance promotes inclusion, empowerment, and advancement of Asian Pacific American women in the legal profession.

Washington Women Lawyers furthers the full integration of women in the legal profession by promoting equal rights and opportunities for women and preventing discrimination against them.

Women's Bar Association of Massachusetts seeks to achieve the full and equal participation of women in the legal profession and in a just society.

North Carolina Association of Women Attorneys promotes the participation of women in the legal profession by advancing the rights and welfare of women under the law.

Rhode Island Women's Bar Association promotes the advancement of the status of women in the State of Rhode Island and in the legal profession.

Queen's Bench Bar Association of the Greater Bay Area focuses on furthering the advancement of women in the law.

Women's Bar Association for the State of New York advocates for human rights, and is dedicated to the fair and equal administration of justice.

Legal Association for Women advances the interests of women in the legal profession and in the community.

Harvard Law School Alliance for Reproductive Justice advocates for the promotion of reproductive rights by educating Harvard Law students about reproductive justice issues facing people across different spheres.

Women's Bar Association of Illinois promotes the interests and welfare of women lawyers and aids in the enactment of legislation in furtherance of the administration of justice.

Hawaii Women Lawyers is committed to improving the lives and careers of women attorneys by enhancing the status of women and promoting equal opportunities for all.

Loyola Law School RJ/LA: Reproductive Justice Los Angeles seeks to educate, advocate, and mobilize Loyola Law students on issues that impact reproductive justice.

Women's Leadership Coalition at Northwestern Law creates a supportive network for female law students by discussing issues of interest to women in the legal community.

Cornell Law Women of Color Collective provides a supportive space for women, gender non-conforming, and non-binary students of color at Cornell Law.

Women Law Students Association at the University of Michigan supports a law school community in which every woman is an equal member both academically and socially.

New York University Law Women promotes the success of females in the legal field and advocates for women's rights locally and globally.

Yale Law Women seeks to advance the status of women and traditionally underrepresented gender identities at Yale Law School and in the legal profession at large.

Penn Law Women's Association aims to create an inclusive community at Penn Law and provide female-identifying students with academic, professional, and social resources.

Sex and Law Committee of the New York City Bar Association addresses issues pertaining to gender and the law in a variety of areas with the goal of reducing barriers to gender equality in health care, the workplace, and civic life.

Harvard Women's Law Association Executive Board engages members of the Harvard Law School community on academic, social, political, and professional topics including tackling gender inequality within the legal profession.

SUMMARY OF ARGUMENT

Mississippi's Gestational Age Act (Gestational Age Act, ch. 393, § 1, 2018 Miss. Laws (codified at MISS. CODE ANN. § 41-41-191) (the "Ban")) is a brazen repudiation of *Roe v. Wade*, 410 U.S. 113 (1973) (hereinafter "*Roe*") and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (hereinafter "*Casey*") and is plainly unconstitutional in its near-total ban of abortion after fifteen weeks. In its brief on the merits, the State of Mississippi has gone even further than its unconstitutional Ban and has invited the Court to overturn *Roe* and *Casey*, equating the constitutional protections implicated by women's ability to make a deeply personal decision about their bodies and their lives with those afforded to economic and social regulations. There is no doubt that if the Court accepts this invitation, more than twenty states would enact or begin enforcing restrictive abortion laws "reminiscent of the Dark Ages." *Webster v. Reprod. Health Servi.*, 492 U.S. 490, 521 (1989).[3]

Critical to the Court's consideration here is the widespread and long-standing reliance of women on the right to end a pregnancy before viability, as established by *Roe* in 1973 and reaffirmed by *Casey* in

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[3] *See, e.g.*, S. B. 8 § 3, the recently enacted Texas statute that outlaws abortions if a physician detects a so-called "fetal heartbeat" or fails to perform a test to detect cardiac activity (to be codified at Tex. Health & Safety Code Ann. §§ 171.201(1), 171.204(a) (West 2021)). The statute effectively bans all abortions after six weeks (when many women do not even realize they are pregnant) and offers a significant financial bounty to neighbors and strangers for spying on and suing each other, reminiscent of an authoritarian state.

1992. *See Janus v. American Fed'n of State, Cnty., and Mun. Empls., Council 31*, 138 S. Ct. 2448, 2478-79 (2018) (reliance is one of the most critical factors in determining whether to overturn precedent); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring) (reliance is one of three predominant factors to consider in such circumstances).

Mississippi's assertion that women in the "highest echelon" of society have made gains independent of their ability to decide whether to have an abortion is simply nonsense. Pet. Br. 35. Women, including many *amici*, have exercised and relied on their right to individual liberty and bodily autonomy to plan their families and their futures. They have graduated from high school, college, and law school, passed the bar, and entered the legal profession in ever-greater numbers since *Roe* and *Casey* were decided. Yet, even today, women lawyers throughout the nation are fighting to overcome substantial hurdles to attain parity in the legal profession. Essential to this goal is the ability to plan their families, which will not be possible if they lose the hard-fought constitutional right to decide not to bear a child at a time when that could upend those dreams, plans, and careers. If *Roe* and *Casey* were overturned, the Court would irreparably reverse the upward trajectory set in motion by American women, who "have organized intimate relationships . . . in reliance on the availability of abortion." *Casey* 505 U.S. 833, 856.

ARGUMENT

I. THE BAN WAS CORRECTLY RULED UNCONSTITUTIONAL AND THAT DECISION SHOULD BE AFFIRMED UNDER *STARE DECISIS*.

The court below correctly found that the Ban was unconstitutional, and the Court should affirm that decision under the doctrine of *stare decisis*. As discussed in *Casey*, *Roe* satisfies all of the requirements of *stare decisis*: it is consistent with the Court's subsequent liberty and due process jurisprudence; remains applicable based on current factual and legal underpinnings; provides a clearly articulable workable standard for lower courts; is well reasoned in concluding that the right to decide whether to end a pregnancy flows from principles recognizing bodily integrity and personal autonomy as central to liberty; and has generated reliance interests. *Casey*, 505 U.S. 833, 854-861. *See also Janus*, 138 S. Ct. 2448, 2478-79 (2018) (*stare decisis* factors include "quality of [the] reasoning, the workability of the rule [] established, [] consistency with other related decisions, developments since the decision was handed down, and reliance"); *cf. Ramos*, 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring) (three predominant factors of *stare decisis* are whether the prior decision was "egregiously wrong;" caused "significant negative jurisprudential or real-world consequences," and would "unduly upset reliance interests").

Of utmost importance and weight here is the reliance factor. *Ramos*, 140 S. Ct. at 1408 (noting that

the reliance the American people place on their constitutionally protected liberties is perhaps most important) (Kavanaugh, J., concurring).

A. *Stare decisis* is the foundational legal principle that allows the American public to rely on constitutionally guaranteed rights.

Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (Marshall, J.). The Court's legitimacy hinges, in large part, on adherence to precedent. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

Stare decisis also maintains the Court's appearance as an apolitical institution, which is critical to maintaining the public's trust in the American court system. The "constraint of precedent distinguishes the judicial 'method and philosophy from those of the political and legislative process.'" *See June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (quoting Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334 (1944)).

The Court has consistently recognized and respected the role of precedent as an integral aspect of the judiciary's independence. *See Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) ("demand[ing] a 'special justification,' over and above the belief 'that the precedent was wrongly decided'" before overturning precedent)); *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (establishing that "even in constitutional cases, a departure from precedent 'demands special justification'")); *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (recognizing that "even a good argument" that the Court was wrong in its precedent is not enough to "justify scrapping settled precedent").

B. Overturning *Roe* and *Casey* would severely curtail women's constitutional rights as reaffirmed by the Court's long line of abortion precedent.

Under the principle of *stare decisis*, the Court in *Casey* upheld the central holding in *Roe* in part because it recognized that "[a]n entire generation has come of age" relying on "*Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." *Casey*, 505 U.S. 833, 860. Now, close to thirty years after *Casey*, this statement applies to every woman of childbearing age in the United States.

Casey emphasized that "only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision

overruling the first was anything but a surrender to political pressure." *Id.* at 867; *see also id.* at 864, citing *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government.").

For close to half a century, the Court has repeatedly upheld abortion precedent in the face of relentless challenges, like the instant challenge by the State of Mississippi. Despite arguments that viability[4] is not a workable standard, Pet. for Cert. 18, or that abortion jurisprudence is "shaky . . . at best," *id.* at 20, the fact remains that the Court has never deviated from its central holdings in *Roe* and *Casey*: States may not ban abortions prior to viability. *Stenberg v. Carhart*, 530 U.S. 914, 920-22 (2000) ("[b]efore fetal viability, a woman has a right to terminate her pregnancy"); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (reaffirming *Roe* and emphasizing that "the most central principle of *Roe v. Wade*" is "a woman's right to terminate her pregnancy before viability") (Roberts, C.J., concurring).

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[4] The Court in *Casey* explicitly reaffirmed *Roe*'s central holding, grappling with medical advancements in neonatal care and acknowledging that the point of viability might have become slightly earlier since *Roe*, but affirming that viability should remain the critical line because it was logical and workable, and nothing other than a predisposition to reach another outcome could justify a different line. *Casey*, 505 U.S. 833, 860.

Even in the cases that Mississippi cites to bolster its argument for overturning *Roe* and *Casey*, the Court still upheld the central holdings in both cases. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 529 (1989) (finding that "viability remains the 'critical point'" regardless of any one "element[]entering into the ascertainment of viability"); *Gonzalez v. Carhart*, 550 U.S. 124, 146 (2007) ("[B]efore viability, a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy").

Moreover, in departing from the viability rule, the Court would not only be flouting *stare decisis* on the substantive issue of whether liberty includes a right to make the decision to end a pregnancy, but also on the question whether *Casey* erred in applying the *stare decisis* analysis. Such a constriction of women's constitutional rights and overturning of precedent is unjustifiable.

C. Overruling precedent is particularly disfavored when doing so would diminish or completely abandon individual liberty interests, such as those in *Roe* and *Casey*.

The Court has repeatedly recognized that the right to decide whether to continue or end a pregnancy before viability is a liberty interest. *E.g.*, *Casey*, 505 U.S. at 846 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."); *id.* at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a

component of liberty we cannot renounce."). And the Court in *Casey* was extremely clear on its duty in such cases: "Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us [Justices] as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code." *Id.* at 850; *see also Webster*, 492 U.S. at 558 (discarding decisions "that secured a fundamental personal liberty to millions of persons would be unprecedented in our 200 years of constitutional history").

Furthermore, the Court has recognized that the collective reliance of all individuals on the liberty interest established by precedent coalesces into an even larger societal reliance on that precedent. *Id.* at 860 ("An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant.").

Today, the Court is asked to depart forever from a half-century of consistent jurisprudence and to reallocate profound, powerful, and relied-upon constitutional liberty interests away from the individual and in favor of state legislatures. The Court must weigh this individual and societal reliance on the precedent, and may only overturn the precedent where a "special justification" exists. *E.g.,*

Webster, 492 U.S. 490 at 558 (Blackmun, J., dissenting). But "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims" and thus cannot form the basis for overturning *Roe* and *Casey*. *Casey*, 505 U.S. at 857; *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019).

The Court has weighed reliance interests differently depending on whether the question before it is whether to expand or constrict rights. Arthur J. Goldberg, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT 74-75 (1971) ("[W]hen the Supreme Court seeks to overrule in order to cut back the individual's fundamental, constitutional protections against governmental interference, the commands of *stare decisis* are all but absolute; yet when a court overrules to expand personal liberties, the doctrine interposes a markedly less restrictive caution.").

When the Court is considering reversing precedent to *expand upon* individual rights or liberty interests, the weight of competing reliance interests is comparatively low. The Court's recognition of new or expanded liberty interests affords additional rights to individuals, the previous absence of which, while conceivably relied on by other parties and the state, is rarely sufficient to justify abandoning the previous line of cases. *See Lawrence v. Texas*, 539 U.S. 558, 566-71 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and finding that due process as articulated in *Roe* and *Casey* encompassed the right to intimacy in the home); *Knick v. Towp. of Scott, Pa.*, 139 S. Ct. 2162, 2177 (2019) (overturning precedent to eliminate the state litigation requirement for property

owners, allowing them to bring federal takings claims at the time of a taking); *Brown v. Board of Education of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 494 (1955) (overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896), to expand equal protection by finding that separate educational facilities based on race were unconstitutional).

By contrast, where the Court is considering reversing precedent to *constrict* or *eliminate* an individual right or liberty interest, individual and societal reliance interests are incalculably greater, and necessarily include the interests of every individual whose rights stand to be restricted. For example, in *Dickerson v. United States*, the Court considered whether to overturn *Miranda v. Arizona*, 384 U.S. 436 (1966), decided thirty-four years earlier, a decision that would contract the Fifth Amendment protections of everyday Americans. The Court adhered to precedent, explaining that "*stare decisis* weigh[ed] heavily against overruling [*Miranda*]," particularly where "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." 530 U.S. 428, 443 (2000).

Similarly, in *McDonald v. City of Chicago, Ill.*, the Court was asked to ignore at least fifty years of precedent recognizing the Fourteenth Amendment's incorporation of the Bill of Rights and finding that the Second Amendment did not apply to the states. 561 U.S. 742, 782 (2010). The Court declined. Instead, it adhered to precedent, finding that "a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the

Federal Government and the States." *Id.* at 791. Again, in *Vasquez v. Hillery*, the Court rejected the petitioner's invitation to break from precedent and contract the Fourteenth Amendment's protections from racial discrimination in grand jury proceedings. 474 U.S. 254, 265-66 (1986).

Finally, and most importantly, in *Casey*, Pennsylvania asked the Court to overrule *Roe* and thereby eliminate the personal liberty interests of millions of American women. The Court refused, and instead reaffirmed *Roe*'s central holding by weighing the "explication of individual liberty . . . combined with the force of *stare decisis*." *Casey*, 505 U.S. 833, 853. Under *Casey*'s *stare decisis* analysis, *Roe* was neither "egregiously wrong based on later legal or factual understandings or developments" nor did it cause any "negative jurisprudential or real-world consequences." *Ramos,* 140 S. Ct. at 1414-15. Instead, *Casey* recognized and affirmed that reliance interests must "count[] the cost of a rule's repudiation as it would fall on those who have relied reasonably on the [] continued application" of *Roe*. *Casey*, 505 U.S. 833, 856.

Women's reliance on the constitutional right to decide to end a pregnancy before viability is paramount, and the Court must protect that right. The fate of women's constitutional freedoms is not a matter to be decided by state legislatures like run-of-the-mill economic and social regulation. Just as the Court safeguards other constitutionally guaranteed rights, it has a duty to protect women from unconstitutional state laws—including the Ban—that

restrict the right to decide to end a pregnancy in contravention of *Roe* and *Casey*.

II. THE RIGHT TO DECIDE TO END A PREGNANCY HAS BEEN CRITICAL TO GENDER EQUALITY AND WOMEN'S HEALTH.

For almost fifty years, women and their families, including countless *amici*, have relied on the constitutional guarantee of the right to decide to end a pregnancy when exercising autonomy over their life, health, family and future. This well-placed reliance on *Roe*, *Casey*, and their progeny is essential not only to women lawyers, but to all American women.

A. Women attorneys rely on the rights guaranteed by *Roe* and *Casey* to advance their careers and achieve greater gender parity in the legal field.

Mississippi's claim that women have been able to reach society's highest echelon without reliance on the right to decide to end a pregnancy is simply wrong. Pet. Br. 35. While Congress has passed some laws that provide some support for parents, many women throughout the legal profession continue to experience significant setbacks to career advancement if they cannot decide the timing and size of their families. *Amici* members have personally relied on the guarantee of bodily autonomy to advance their own careers and women's position in the legal field as a whole.

1. *Roe* and *Casey* have enabled more women to advance in the legal profession, but women are still significantly underrepresented.

The percentage of lawyers who are women has increased from less than 4% in 1960 to 38% in 2016. Jennifer Cheeseman Day, *More Than 1 in 3 Lawyers Are Women*, U.S. CENSUS BUREAU (May 8, 2018), https://www.census.gov/library/stories/2018/05/women-lawyers.html. Moreover, among attorneys aged 25-34, the number of women is now on par with that of men. *Id.* Yet, even considering the strides women have made since *Roe*, there is a long way to go before women lawyers can achieve gender parity. In fact, gender parity is not estimated to occur until 2181. American Bar Association, *In Their Own Words* (2021) at 3 (hereinafter "ABA 2021"). This is especially the case for women attorneys of color who make up only 15% of associates and fewer than 4% of partners in law firms. Destiny Peery et al., A.B.A., *Left Out and Left Behind: the Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color* at v (2020) (hereinafter "ABA WOC").

The numbers for equity partners are even more dismal. A survey published this September pointed out that while women make up nearly 40% of the associate ranks, they make up less than a quarter of equity partners. Law360, *These Firms Have the Most Women In Equity Partnerships* (Sept. 14, 2021).

Moreover, although women make up over 50% of law students, attrition among women increases with seniority, in large part because of a lack of senior opportunities for women in the legal field. Roberta D.

Liebenberg & Stephanie A. Scharf, A.B.A., *Practicing Law in the Pandemic and Moving Forward: Results and Best Practices From a Nationwide Survey of the Legal Profession* at 28, 55 (2021) (hereinafter "COVID ABA"). Women occupy, on average, only about one-third of state and federal benches. *See* Democracy and Government Reform Team, *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AM. PROGRESS at 4 (2020); *2019 Representation of United States State Court Women Judges*, NATIONAL ASSOCIATION OF WOMEN JUDGES (NAWJ) (2019), https://www.nawj.org/statistics/2019-us-state-court-women-judges. As a 2019 Association of Corporate Counsel report demonstrates, this extends to in-house positions as well, where women received only one out of every five promotions to General Counsel of Fortune 500 positions in 2019. Ass'n of Corporate Counsel, *The General Counsel Landscape* at 18 (2019). This same report reveals that, between 2017 and 2018, retiring general counsel (25 out of 30 being men) were not replaced with more gender-balanced hires (instead, 22 out of 30 new hires were also men), and all five women incumbents had been replaced by male general counsels. *Id.*

2. Even with the constitutional guarantee of bodily autonomy, women face significant obstacles to achieving equality in the legal profession.

It is well documented and deeply unfortunate that women attorneys continue to experience significant gender discrimination in the legal workplace. Roberta D. Liebenberg & Stephanie A. Scharf, A.B.A., *Walking Out the Door* (2019) (hereinafter "ABA 2019"). In a

study by the American Bar Association, 82% of women who took the survey had been mistaken for a lower-level employee (as compared to 0% of men), 63% were perceived as being less committed to their career (compared to 2% of men), 53% had been denied or overlooked for a promotion (compared to 7% of men), and 50% had been subjected to unwanted sexual conduct (as compared to 6% of men). *Id*. at 7-8. These patterns are consistent across different studies, as shown in the ABA's *You Can't Change What You Can't See* Report, which found that—compared to 80% of white men who reported receiving equally desirable assignments as their colleagues—only 53% of women lawyers of color and 59% of white women lawyers felt they received equal assignments. Joan C. Williams et al., *You Can't Change What You Can't See* at 18 (2018) (hereinafter "ABA 2018").

In addition to this persistent discrimination, there continues to be a significant gender wage gap across the legal landscape. One study reports that women law firm partners earn less than men, regardless of how much money they originate for the firm. ABA 2018 at 25. Of these women, more than 80% reported being denied fair origination credit. *Id*. One woman lawyer shared that two male partners together were not originating as much as she was but "when [she] asked about it, [she] was told, 'Well, such and such, he has two kids and he has a family to take care of.'" ABA 2021 at 9. A different woman partner discovered she was being paid $80,000 less a year than a senior male associate. *Id*. When asked why, the senior partner said it was because the associate was supporting a wife and kids. This woman partner explained she too had a spouse and two children. The senior partner responded, "Your husband can leave and go to work."

Id. Women fare no better in in-house positions. Male general counsel are paid, on average, 39% more than their women counterparts. *The 2019 General Counsel Landscape* at 16 (2019).

On top of discrimination within the workplace, women—especially women of color—often receive disparate treatment from other lawyers and judges. COVID ABA at 33. One Asian woman attorney shared that a white male opposing counsel claimed that she had received favorable treatment, but she "was able to point out that the referee in the oral argument had interrupted [her] 22 times as compared to the man only four times" and that the referee had addressed her using her first name while addressing opposing counsel as Mr. X consistently. ABA WOC at 8. These behavioral transgressions against women attorneys permeate the highest levels of the legal profession (and have been experienced firsthand by *amici* and counsel). Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379 (2017). An in-depth study of Supreme Court oral arguments in the 1990, 2002, and 2015 terms conducted by researchers at Northwestern University Pritzker School of Law found that "even though female Justices speak less often and use fewer words than male Justices, they are nonetheless interrupted during oral arguments at a significantly higher rate. Men interrupt more than women, and they particularly interrupt women more than they interrupt other men. This effect is not limited to the male Justices, as [the] research shows the male advocates also regularly interrupt the female Justices." *Id.* at 1383-84.

3. Women with children are particularly disadvantaged professionally.

Women in the law are disproportionately more likely to be completely or primarily in charge of childcare for their families. ABA 2019. This responsibility has become more pronounced during the pandemic. COVID ABA at 12. And, women of color have even more extensive childcare responsibilities. ABA WOC at IX. As the *Walking Out the Door* survey explains, 54% of women are fully in charge of arranging childcare as compared to just 1% of men, and 32% of women are responsible for leaving work early for childcare as compared to just 4% of men. *Id*. at 12. Women are also likely to be passed over for certain projects after returning from maternity leave because of assumptions about their need to participate in childcare. ABA 2021. One woman noted she was denied the option to travel for a project because her firm assumed she would want to stay home with her child. *Id.* These obligations, or the assumption of their existence, can also result in women losing their jobs. *Id.* One woman recounted her employer telling her that he had assumed she would want to spend more time with her children and therefore had concluded that there was no place for her in the firm after its reorganization. *Id.* During the pandemic, women with children especially felt that they were overlooked for assignments or client opportunities. COVID ABA at 20.

Family obligations also exacerbate the pressure and alienation women lawyers feel in the workplace, which ultimately contributes to their departure from the profession. ABA 2019. Women, and especially women of color, report being treated especially badly

after having had children. They report being passed up for promotions and given low-quality assignments. ABA WOC at 5. They are demoted, paid less, and treated unfairly for working part-time. *Id.* This disparate treatment stems from the misperception that women lawyers who are parents have chosen the "mommy track." *Id.* One woman recounted that "[a] judge in our jurisdiction denied a continuance for a woman who had just had a baby, and when she appeared with baby in tow, he held her in contempt." Another woman lawyer stated that after having her fourth child "people assumed [she] was part-time" even though she was "billing more than anyone else in [her] department." ABA 2021 at 27. In the *You Can't Change What You Can't See* survey, white women feel they are seen as less competent after having children "at a level 36 percentage points higher" than white men. ABA 2018 at 8. And 50% of women of color and 57% of white women state taking family leave would negatively impact their career. *Id.* Additionally, nearly 50% of men surveyed, including men of color, reported feeling the same parenthood stigma, revealing that such stigma damages all lawyers with children. ABA 2018 at 8. But this stigma cuts sharpest against women, as shown in the *You Can't Change What You Can't See* report, which confirmed that mothers were 79% less likely to be hired than an otherwise identical candidate without children. ABA 2018 at 14.

The pandemic has exacerbated the motherhood tax experienced by women lawyers. COVID ABA at 12. Women, on average, are working more hours from home than men and are less likely to use third-party day care. COVID ABA at 12, 14. This decreases women's interactions with clients, increases work

disruption due to family obligations, and increases stress due to work and the difficulty separating work from the home. *Id.* Of respondents, 52% felt stress at work because of their gender, with 36% of women feeling this stress at least "sometimes" as opposed to only 6% of men. *Id.* at 33. Women lawyers with younger children felt these effects more intensely. *Id.* Considering that 34% of women surveyed had at least one dependent child, 66% had children under the age of 13, and 89% had children under 18 years old, these effects are significant. *Id.* at 10-11. Women burdened with disproportionate childcare responsibilities were also anxious about meeting billable-hour requirements, meeting client expectations, and managing their workload and its subsequent effects on their compensation. *Id.* at 46. Unfortunately, working mothers stated that employers are not currently equipped to help them using current resources. COVID ABA at 43. About half of women with children under 13 considered becoming part-time or leaving the profession altogether. COVID ABA at 18. Though most employers allow part-time work, it is mostly used by women. *Id.* at 54. Moreover, women are less likely to receive advancement opportunities because they are seen as being on the "mommy track." *Id.*

In fact, the *Walking Out the Door* survey reports that women, men, and management leaders all agreed that the top reason women leave the legal profession is caretaking commitments. *Id.* at 10. Experienced women lawyers agreed that this is the primary reason why other women leave the legal profession. *Id.* at 11. These numbers are even more pronounced among women of color. ABA WOC at 8. Vault, a nationally renowned resource for data collected from and for

lawyers, law students, and others in the legal field, has recorded that 2019 reflected the highest departure rates "to date" among women of color, ABA 2021 at 3, a fact confirmed by the *Left Out and Left Behind* study's findings that 70% of women of color participants left or seriously considered leaving the legal profession. ABA WOC at 13.

Ideally, women lawyers should be able to have successful careers *and* fulfilling family lives, but this is often not the case. Considering the limited resources and opportunities available to women lawyers with children, particularly against the backdrop of the ongoing pandemic, losing the ability to decide whether and when to have their children, and how many children to have, would undoubtedly be detrimental to women lawyers' careers. The number of women who leave the profession due to childcare obligations would significantly increase and much of the gender equality progress the profession has seen in recent years would decline.

B. Women rely on the constitutional right to continue or end a pregnancy before viability in order to live meaningful and fulfilling lives, plan their families, and achieve economic independence.

Women who decide to end a pregnancy have complex and interrelated reasons for doing so. The predominant themes include financial concerns (40%), timing (36%), partner-related issues (31%), the need to focus on other children (29%) and interference with

educational or career plans (20%).[5] M.A. Biggs, et al., *Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal and Cohort Study*, JAMA Psychiatry 169-78, 169 (2017) ("Biggs"). A woman's ability to exercise control over these facets of her life is critical to living a fulfilling life free from undue government interference.

Access to safe and legal abortion care is central to women's attainment of social equality. Research suggests that a woman's ability to make decisions about her own reproductive life and timing of entry into parenthood is associated with greater relationship stability and satisfaction, more work experience, and increased wages and average career earnings. *See* Kasey Buckles, Kasey Buckles, *Understanding the Returns to Delayed Childbearing for Working Women*, 98 AM. ECON. REV., 403, 403-07 (hereinafter "Buckles"); Amalia Miller, *The Effects of Motherhood Timing on Career Path*, 24 J. OF POPULATION ECON., 1071, 1071-1100. As one *amicus* wrote for *June Medical*, "I was determined to break the cycle of poverty and teenage pregnancy that had shaped the lives of three generations of women in my family, and thanks to the availability of safe and legal abortion, I did." Brief for Michelle 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 10, *June Med. Servs.*

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[5] Women could select more than one reason for deciding to end a pre-viability pregnancy, which is why these figures add up to more than 100%.

LLC v. Russo, 140 S. Ct. 2103 (2020) (nos. 18-1323) (hereinafter the "*June Medical* Legal Professionals amicus brief"). This is not a unique experience among women who decide to end a pregnancy. The *June Medical* Legal Professionals amicus brief confirms that: "[A] large number of amici received abortions while in school and credit their ability to control their reproductive lives with ultimately being able to attain higher education." *Id.* As Justice Blackmun noted in his *Casey* concurrence, "[b]ecause motherhood has a dramatic impact on a woman's educational prospects, employment opportunities and self-determination, restrictive abortion laws deprive her of basic control over her life." 505 U.S. at 928.

Conversely, denial of the right to end a pregnancy resulted in a nearly four-fold increase in the odds that a woman's household income would be below the federal poverty level. Diana Greene Foster et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. OF PEDIATRICS 183, 183-89 (2019).

C. Women rely on the constitutional right to continue or end a pregnancy before viability for the health and safety of themselves and their families.

The right to decide to end a pregnancy is critical to women's physical and mental health, and likewise impacts their economic independence and opportunities.

1. Denying the right safely end a pre-viability pregnancy has a significant negative impact on women's physical health.

Pregnancy and childbirth are far more risky for women than abortion is, and are associated with increased levels of hypertension, gestational diabetes, preeclampsia, and eclampsia. *See* CDC, *Data on Selected Pregnancy Complications in the United States* (2019); U.S. Dep't of Health & Human Servs. National Institute of Health, *Am I at Risk for Gestational Diabetes?* (2012); U.S. Dep't of Health & Human Servs. Office on Women's Health, *Pregnancy Complications* (2019). Moreover, pregnancy and childbirth complications are on the rise, increasing 31.5% between 2014 and 2018. Denying the right to decide to end a pregnancy means increasing the potential for more women to experience these health risks. Blue Cross Blue Shield, *Trends in Pregnancy and Childbirth Complications in the U.S.* at 1 (2020).

Losing the right to end a pre-viability pregnancy has the greatest impact on those who can least afford it. *See* Brief Amici Curiae for Organizations and Individuals Dedicated to the Fight for Reproductive Justice – Women With A Vision et al. – in Support of Petitioners at 21-33, *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020) (18-1323). Those who can afford to travel to another state for abortion care after fifteen weeks will still be able to do so; those who cannot afford such travel (or the unpaid days off from work, childcare, hotel stays, etc.), of course, will not. *Id*.

Denying women the right to end a pre-viability pregnancy in Mississippi is especially dangerous

considering the state is already experiencing maternal mortality at a rate nearly double the national average. Miss. State Dep't of Health, *Mississippi Maternal Mortality Report 2013-2016* (2019). In Mississippi, 37.5% of maternal deaths are pregnancy-related. *Id.* This is a conservative estimate. *Id*. The statistics are even worse for Black women—including Black women attorneys—who have a maternal mortality rate three times higher than White women in the state. *Id.* This trend can also be observed nationwide. *Id*. From 2011 to 2014, the mortality ratio for Black women was 40 deaths per 100,000 live births whereas it was 12.4 deaths per 100,000 live births for White women in the United States. *Id.* The second leading pregnancy-associated death in Mississippi women is from cardiovascular conditions, including cardiomyopathy, with nearly 80% of these cardiac deaths being among Black women. *Id*.

Moreover, the negative implications of forced pregnancy are felt by more than just the woman denied an abortion, especially considering the fact that the vast majority of individuals who decide to end a pregnancy are already parents. Forcing someone to have another child when they have concluded it is not the right decision for them or their family also has attendant negative consequences on the other children in the home as well. Katherine Kortsmit et al., *Abortion Surveillance – United States – 2018*, 69 MMWR SURVEILLANCE SUMMARIES (2020) (Table 7) (revealing that 68.2% of Mississippi's abortions were provided to people who were already parents); *see, e.g.*, Foster et al. at 183 (revealing that children of those who were denied a wanted abortion have lower

developmental scores and are more likely to live below the federal poverty line).

2. Individuals who have decided to end a pregnancy but are denied access to an abortion suffer continued and substantial mental health problems.

Women who decide to end a pregnancy but are denied the ability to do so are more likely to experience higher levels of anxiety, lower life satisfaction, and lower self-esteem compared to women who have access to abortion care. Biggs at 169-78. Similarly, women who are denied the right to end a pre-viability pregnancy are more likely to stay tethered to abusive partners and experience poor physical health for years after pregnancy and are less likely to have aspirational life plans for the coming year. *The Turnaway Study*; Marianne Bitler & Madeline Zavodny, *Child Abuse and Abortion Availability*, 92 AM. ECON. REV. 363, 363-67 (2002). As several *amici* in *June Medical* note, having the right to decide to end a pregnancy allowed them to escape abusive relationships and terminate pregnancies that resulted from assault and deceit. *June Medical* Legal Professionals Brief at 8. Conversely, claims that many women who have had abortions suffer deep psychological trauma are contradicted by the actual evidence. Women who have abortions are no more likely to have depression, anxiety, or suicidal ideation than those denied the procedure. *The Turnaway Study*; *see also* Steinberg JR, et al., *Examining the Association of Antidepressant Prescriptions with First Abortion and First Childbirth*, JAMA PSYCHIATRY 828-34 (2018).

In fact, the ability to safely end a pregnancy is so integral to women's autonomy and well-being that the American Psychological Association has recognized it as a civil right of the pregnant woman. International human rights bodies have found that denying or obstructing a woman's ability to do so can amount to cruel, inhumane, or degrading treatment under multiple human rights treaties. *See Resolution on Abortion (1969)*, AM. PSYCH. ASS'N (2009), https://www.apa.org/about/policy/abortion; Alyson Zureick, *(En)gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman, or Degrading Treatment*, 38 FORDHAM INTERNATIONAL LAW JOURNAL, 199 (2015). A woman's right to reproductive choice is also considered a human right according to the United Nations 1979 Convention on the Elimination of All Forms of Discrimination Against Women to which the United States is a signatory.

This Court, too, has recognized the fundamental nature of women's right to decide to end a pregnancy before viability—finding "the mother who carries a child to full term is subject to anxieties, to physical constraints, to pain only she must bear" and "the liberty of a woman is at stake in a sense unique to the human condition and so unique to the law" when it comes to abortion access. *Casey*, 505 U.S. at 852.

CONCLUSION

Amici implore the Court to uphold the liberty interests recognized in *Roe* and *Casey*. The negative consequences to American women that would result from overturning *Roe* and *Casey* implicate every facet of women's lives and health. The Ban and other, more extreme anti-abortion statutes will not stop abortion.

Instead, they will roll back the clock on the advances that women have made since *Roe* and *Casey* and will prevent women from reaching economic parity with men in the legal and other professions. For the foregoing reasons, the judgment below should be upheld.

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