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.

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

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

KYLE D. HIGHFUL
BETH KLUSMANN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Statutes—Continued: Page(s)

Miscellaneous:

Miscellaneous—Continued: Page(s)

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.[1]

This Court has assured the States that they may "promote respect for life, including life of the unborn." *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007). Like Mississippi, Amici States do so by restricting abortions that "implicate[] additional ethical and moral concerns that justify a special prohibition," *id.*, such as, in Mississippi's case, an abortion which would inflict excruciating pain on a sentient child. Dogmatic abortion maximalists, unsatisfied by any legal regime short of nationwide abortion on demand, challenge these restrictions reflexively.

And with some reason: This Court invites implacable challengers through a jurisprudence filled with abortion-specific exceptions to traditional legal doctrines. These ever-multiplying exceptions, from standing at the beginning of a case to res judicata following its conclusion, enable unprincipled legal innovations by abortion advocates and destabilize generally applicable doctrines for everyone else. As a result, Amici States have little on which they can rely when defending their abortion laws in court. Indeed, when it comes to abortion, the only constant is change—to the constitutional test and established rules that might otherwise hinder a plaintiff's suit.

---

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. All parties have consented to its filing.

This challenge to Mississippi's 15-week law presents the Court with an opportunity to remedy those problems by reconsidering and overruling their source—*Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Unlawful from the day each was decided, both have kept Amici States in continual litigation as the Court changes the constitutional test and rules. The time has come to return the question of abortion to where it belongs—with the States.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. This Court has propounded a constitutional law of abortion for half a century, and no one can describe it with any certainty. Because the purported right to abortion lacks any textual or historical foundation, it is defined only by the Court's constantly changing opinions. From the trimester test to the undue-burden test to (possibly) a benefits/burdens balancing test and (possibly) back to the undue-burden test, courts and States are constantly kept off-guard trying to predict this Court's next addition to this canon.

Abortion advocates argue that *stare decisis* demands fidelity to the Court's prior decisions in order to foster stability, reliance, and integrity. But this Court's abortion jurisprudence is neither stable nor predictable, and its foundational decisions are patently wrong. *Stare decisis* is not served by hewing to decisions which support none of the values underlying that prudential doctrine.

II. The Court's erroneous abortion jurisprudence has spread throughout unrelated legal doctrines through multiple abortion-specific exceptions to traditional legal doctrines. When it comes to abortion litigation, the Court has effectively eliminated the standard for facial challenges, ignored principles of severability and res

judicata, permitted abortion providers to challenge health-and-safety laws on behalf of their patients, and even limited the First Amendment rights of those who oppose abortion—just to name a few. This "ad hoc nullification machine," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part), undermines the Court's integrity and further supports overruling the precedent that has brought us to this point.

III. The Court should follow the urging of those Justices that, since *Roe* was decided, have argued that the Court has no place in this area. The Court's efforts to bring stability and finality to the question of abortion have proven fruitless at best and counterproductive at worst. The Court should overrule *Roe* and *Casey*.

ARGUMENT

I. The Court's Erroneous and Constantly Changing Abortion Precedent Does Not Warrant *Stare Decisis* Deference.

Because the Court's abortion jurisprudence lacks any constitutional or historical foundation, it has never been stable. To wit: The Court created the right to abortion and the trimester system in *Roe v. Wade*, 410 U.S. 113, 164-65 (1973). But in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, it jettisoned the trimester system in favor of an undue-burden test that looks for a "substantial obstacle" to abortion, 505 U.S. 833, 878-79 (1992) (plurality op.), overruling a few of its prior decisions in the process, *id.* at 881-83. Then, in *Whole Woman's Health v. Hellerstedt*, the Court may—or may not—have changed the undue-burden analysis into a benefits/burdens balancing test. 136 S. Ct. 2292, 2309 (2016). But it may—or may not—have changed it back in *June Medical Services LLC v. Russo*, 140 S. Ct. 2103,

2138-39 (2020) (Roberts, C.J., concurring in the judgment). The courts of appeals are split on that question. *See, e.g.*, *Reprod. Health Servs. v. Strange*, No. 17-13561, 2021 WL 2678574, at *12 n.6 (11th Cir. June 30, 2021) (per curiam); *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020).

Nothing about this warrants any sort of *stare decisis* deference. *Stare decisis*, a prudential doctrine, is useful when 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." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). No objective observer of the Court's abortion precedent could conclude that it is "evenhanded, predictable, or consistent." The continually shifting tests and rules make this area of law unworkable, leaving courts confused and States aiming at a constantly moving target when defending their laws. The Court should feel no obligation to continue to preserve this anti-constitutional "right."

A. *Roe* and *Casey* created and preserved a nonexistent constitutional right.

Justices of this Court have explained why *Roe* was lawless since the day it was decided. *See, e.g.*, *June Med.*, 140 S. Ct. at 2149-53 (Thomas, J., dissenting); *Casey*, 505 U.S. at 979-1002 (Scalia, J., concurring in the judgment in part and dissenting in part); *Doe v. Bolton*, 410 U.S. 179, 221-23 (1973) (White, J., dissenting); *Roe*, 410 U.S. at 172-78 (Rehnquist, J., dissenting). *Roe*'s failing is straightforward: The Constitution does not include a right to abortion, and there is no history or tradition of protecting such a right.

1. The Constitution does not include a right to elective abortion.

a. Abortion is a "right" in search of a constitutional home. It is found nowhere in the text of the Constitution, and the majority in *Roe* did not claim otherwise. Instead, the *Roe* Court determined that abortion fell within the right to privacy, which it admitted was not "explicitly mention[ed]" in the Constitution. 410 U.S. at 152-53. Thus, the Court drew from multiple amendments (the First, Fourth, Fifth, Ninth, and Fourteenth), as well as the "penumbras" of the Bill of Rights, as potential sources. *Id.* at 152. The Court appeared to narrow it down to two possibilities—the Ninth Amendment (as the district court concluded) and the Fourteenth Amendment (as the Court "fe[lt]" it was)—but held it was a protected right regardless of where in the Constitution it was located. *Id.* at 153.

Simply reading the relevant amendments reveals that none of them explicitly includes anything resembling the right to abortion. And the "penumbras," of course, contain nothing explicit at all. Nevertheless, the *Roe* Court concluded, based on little more than its own *ipse dixit*, that the right to privacy encompassed a constitutional right to abortion. *Id.*

b. Reconsidering the constitutional source for the right to abortion nearly twenty years later, the Court in *Casey* determined it was a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. 505 U.S. at 846. The Court explained that the liberties protected by the substantive component of the Due Process Clause are not limited to those identified in the Bill of Rights or even those that were protected at the time the Fourteenth Amendment was ratified. *Id.* at 847. Instead, to the Court in *Casey*, whether an act is a

constitutionally protected liberty interest is subject only to this Court's "reasoned judgment." *Id.* at 849; *see also id.* at 850 (stating that there is "[n]o formula" other than "judgment and restraint" (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

Attempting to ground its "reasoned judgment" in prior precedent, the Court analogized abortion to marriage, contraception, school choice, and freedom from forced medical procedures. *Id.* at 849 (citing, *inter alia*, *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Loving v. Virginia*, 388 U.S. 1 (1967); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Rochin v. California*, 342 U.S. 165 (1952)). But none of those rights involve ending the life of an unborn child. *See Gonzales*, 550 U.S. at 147 (noting that "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb"). And as the Court later recognized, "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).

The Court supplemented its review of precedent with vague statements about the "heart of liberty," "defin[ing] one's own concept of existence," "the mystery of human life," and a woman's "conception of her spiritual imperatives and her place in society." *Casey*, 505 U.S. at 852-53. None of these elevated sentiments are found in the text of the Constitution and instead demonstrate that the right to abortion exists only because the Court decided it should.

c. Dissatisfied with the due-process analysis, other Justices began to look to the Equal Protection Clause. Justice Blackmun suggested that denying a woman the right to abort her unborn child "appears to rest upon a

conception of women's role that has triggered the protection of the Equal Protection Clause." *Id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Another four Justices have argued that the right to abortion is not, in fact, about the right to privacy, but rather the right of a woman to "enjoy equal citizenship stature." *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting) (citing Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992)).

Half a century on—and leaving no clause unexamined—the Court has been unable to locate the right to abortion in the Constitution. That is because it is not there.

2. There is no right to elective abortion in the Nation's history and tradition.

As noted above, *Casey* determined that the right to abortion was part of substantive due process. 505 U.S. at 846. But the Court did not even attempt to apply the proper test for substantive-due-process rights: (1) the right must be "objectively[] 'deeply rooted in this Nation's history and tradition'" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it was] sacrificed"; and (2) there must be a "'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Elective abortion is not deeply rooted in the history and tradition of our Nation and is not part of substantive due process.

a. Beginning with the second element first, the "careful description" of the right at issue is a right to elective abortion. *Casey* identified no such right—relying instead on *other* rights (marriage, contraception,

bodily integrity), 505 U.S. at 849, and high-minded, philosophical statements about the human condition and childbearing, *id.* at 852-53. At no point did the Court in *Casey* look for the specific right to elective abortion within America's history and tradition. Had it done so, it would have come up empty, as did the Court in *Roe*.

b. Addressing the right to abortion in the first instance, the majority in *Roe* reviewed the history of abortion. 410 U.S. at 130-47. But rather than establish a preexisting right to abortion protected by the States, *Roe*'s historical discussion demonstrated that most States criminalized elective abortion.

As detailed in *Roe*, until the early to mid-1800s, many States followed English common law regarding abortion, which criminalized abortion after the quickening, when the unborn child's movements could be felt (at about 16-18 weeks' pregnancy). *Id.* at 132-36, 138. But in 1828, New York enacted legislation that became a "model" for other States. *Id.* at 138. Under that law, all abortion was criminalized unless necessary to preserve the life of the mother, although post-quickening abortion was penalized more severely. *Id.* In 1857, the American Medical Association's Committee on Criminal Abortion urged an end to abortion generally, explaining that support for abortion was based on a "wide-spread popular ignorance . . . that the foetus is not alive till after the period of quickening." *Id.* at 141.

The quickening distinction was abandoned by the late 1800s, and by the late 1950s, a "large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother." *Id.* at 139. The *Roe* Court spoke of a recent "trend toward liberalization" of abortion statutes by one-third of States based on the ALI Model Penal Code, but that model law still criminalized all abortions absent a

substantial risk to the mother's health, a grave defect in the child, or a pregnancy resulting from rape or incest. *Id.* at 140; *see also Doe*, 410 U.S. at 205. The only significant movement towards elective abortion noted in *Roe* was in the three years prior, when the American Medical Association, the American Public Health Association, and the American Bar Association announced their support for elective abortion. *Roe*, 410 U.S. at 143-46.

Thus, the history of abortion since the Founding is not one of a "deeply rooted" right, "implicit in the concept of ordered liberty." *See Glucksberg*, 521 U.S. at 720. As then-Justice Rehnquist put it,

> The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication . . . that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Roe, 410 U.S. at 174 (Rehnquist, J., dissenting). Elective abortion is not deeply rooted in this Nation's history and tradition and is not protected by substantive due process.

* * *

The case against abortion as a constitutional right is not difficult to make. It is simply not present in the Constitution or protected throughout the Nation's history. Those who seek to justify the continued preservation of the right have the greater hurdle—and one that must ultimately prove insurmountable.

Stare decisis cannot save clearly erroneous constitutional decisions as these, which have proven wholly unworkable. *See Janus v. State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018). The Constitution is the

"supreme Law of the Land," U.S. Const. art. VI, cl. 2, not the judge-made rule of *stare decisis*. If *Roe* and *Casey* are wrong (and they are), the Court is obligated to overturn them, especially where, as here, "fidelity" to those precedents "does more to damage" the rule-of-law ideals than to advance them. *Citizens United v. F.E.C.*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). This Court must adhere to the Constitution, not to itself.

B. The Court continues to change the constitutional test.

Because the right to abortion arises from only this Court's say-so, States and courts are left with only this Court's opinions for guidance. Yet the Court keeps changing the constitutional test for abortion regulations to say whatever a majority (or plurality) of the Court decides at that time. *Stare decisis* is supposed to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 W. Blackstone, Commentaries on the Laws of England 69 (1765). It should have no application when the Court repeatedly wavers by creating various new constitutional tests to govern a nonexistent constitutional right.

1. *Roe* created the trimester test.

After deciding to recognize a right to abortion, the majority in *Roe* also created a rigid trimester test to determine whether abortion regulations were constitutional. During the first trimester, all abortion regulations were, essentially, off-limits to the States. 410 U.S. at 163. During the second trimester, the States' compelling interest in maternal health permitted them to regulate abortion for the "preservation and protection of maternal health." *Id.* And in the third trimester, the States' compelling interest in unborn life permitted them to

prohibit abortion other than when necessary to preserve the life or health of the mother. *Id.* at 163-64.

The trimester system did not have its source in any existing law but resembled "judicial legislation." *Id.* at 174 (Rehnquist, J., dissenting). As the Court explained, it merely balanced a variety of non-legal factors: "This holding, we feel, is 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 (majority op.). The Court drew the first trimester line based on its understanding of the current safety of abortion and the second trimester line based on its belief that it was "logical" and "biological" to prohibit abortion once the unborn child could live outside the womb. *Id.* at 163-64.

Then-Justice Rehnquist dissented, predicting that "the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it." *Id.* at 173 (Rehnquist, J., dissenting). He was proven correct.

2. *Casey* rejected the trimester test in favor of the undue-burden test.

Less than twenty years later, the Court abandoned the trimester test. *Casey*, 505 U.S. at 873 (plurality op.). Now-Chief Justice Rehnquist summarized the "confused state of th[e] Court's abortion jurisprudence" leading up to *Casey*, noting shifting and inconsistent rulings with respect to parental notice and consent, the rights of the father, informed-consent laws, facility regulations, and protecting the lives of viable unborn children. *Id.* at 944, 946-50 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). And to top it off, the Court's most recent abortion decisions had not resulted in

majority opinions, leaving lower courts struggling to apply *Marks v. United States*, 430 U.S. 188, 193 (1977), to figure out what the constitutional test was. *Casey*, 505 U.S. at 950-51 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (describing *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) and *Hodgson v. Minnesota*, 497 U.S. 417 (1990)).

Casey's new constitutional test did not result in a majority opinion, either, with only three Justices joining that portion of the opinion. *Id.* at 869-79 (plurality op.). The flaw in *Roe*, as the plurality explained, was that it contained a contradiction from the very beginning: it recognized the State's important and legitimate interest in unborn life but created a trimester system that forbid States from giving any effect to that interest prior to viability. *Id.* at 875-76 (citing *Roe*, 410 U.S. at 162).

The plurality, therefore, rejected the trimester framework and adopted a new undue-burden test for all previability abortion regulations. *Id.* at 878-79. An abortion regulation creates an unconstitutional undue burden "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878. As with the trimester test, this new constitutional test does not come from the Constitution or history. Instead, it was drawn from various concurring and dissenting opinions of members of the Court. *Id.* at 874.

Four Justices, dissenting in part, criticized the new undue-burden standard, finding it "inherently manipulable" and likely to prove "hopelessly unworkable in practice." *Id.* at 985-86 (Scalia, J., concurring in the judgment in part and dissenting in part). They believed it would "conceal raw judicial policy choices concerning what is 'appropriate' abortion legislation." *Id.* at 987.

The twin *Carhart* cases show the prescience of that prediction. Applying *Casey*'s new standard, the Court found unconstitutional the partial-birth abortion law in *Stenberg v. Carhart*, in part because it lacked a maternal-health exception. 530 U.S. 914, 937-38 (2000). But just seven years later, it found the partial-birth abortion law in *Gonzales* constitutional, even though it also lacked a maternal-health exception. 550 U.S. at 166-67. Thus, consistency in the Court's decisions was still lacking. *Casey*'s new test thus utterly failed to "promote[] the even-handed, predictable, and consistent development of legal principles." *Payne*, 501 U.S. at 827.

3. *Whole Woman's Health* may have introduced a benefits/burdens balancing test.

In 2015, the Fifth Circuit considered the constitutionality of two Texas laws regarding health-and-safety standards for abortion providers and facilities. *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) (per curiam). Relying on *Casey* and subsequent precedent, the Fifth Circuit held that "a law regulating previability abortion is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." *Id.* at 572; *see also Casey*, 505 U.S. at 877 (plurality op.) (stating that a law is unconstitutional if "while furthering the interest in potential life or some other valid state interest, [it] has the effect of placing a substantial obstacle in the path of a woman's choice").

Even though the Fifth Circuit drew its test nearly word-for-word from *Casey*, this Court held that the Fifth Circuit used an incorrect legal standard. *Whole*

Woman's Health, 136 S. Ct. at 2309. According to the majority, "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* The Court cited the spousal-notice and parental-consent portions of *Casey* to make this point, *id.*, but neither analysis balances benefits and burdens. *Casey*, 505 U.S. at 887-98; *id.* at 899-901 (plurality op.). Moreover, the Court's post-*Casey* opinions did not weigh the benefits of a challenged regulation against its burdens. *See generally Gonzales*, 550 U.S. 124; *Stenberg*, 530 U.S. 914; *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam).

Thus, while purporting to hold to *Casey*, the Court introduced a wholly new standard—considering the burdens "together with the benefits"—that many took to create a new constitutional test that required courts to balance a law's benefits against its burdens. As Justice Thomas noted, "the majority applies the undue-burden standard in a way that will surely mystify lower courts for years to come." *Whole Woman's Health*, 136 S. Ct. at 2326 (Thomas, J., dissenting).

The *Whole Woman's Health* ruling set off a new wave of abortion litigation in which abortion providers challenged numerous long-standing abortion laws under the theory that States now had to prove that the benefits of the law outweighed the burdens. *See, e.g.*, *In re Gee*, 941 F.3d 153, 156 (5th Cir. 2019) (per curiam) (seeking a "federal injunction against virtually all of Louisiana's legal framework for regulating abortion"); *Whole Woman's Health All. v. Hill*, 493 F. Supp. 3d 694, 704 (S.D. Ind. 2020) (challenging "no fewer than twenty-five sections and subsections of the Indiana abortion code and their accompanying regulations").

4. *June Medical* may have returned to the undue-burden test.

Two years after the *Whole Woman's Health* decision, the Fifth Circuit attempted to reconcile *Casey* and *Whole Woman's Health* in a challenge to Louisiana's admitting-privileges law. *June Med. Servs. LLC v. Gee*, 905 F.3d 787, 803 (5th Cir. 2018). The court concluded that, under *Whole Woman's Health*, it must weigh the benefits and burdens to determine whether the law imposed a substantial obstacle. *Id.* Doing so, the court upheld the Louisiana law. *Id.* at 815.

This Court granted certiorari and reversed but failed to produce a majority opinion. *June Med.*, 140 S. Ct. 2103. The four-Justice plurality did not address whether the Fifth Circuit properly interpreted *Whole Woman's Health*. Instead, it merely repeated the benefits language from *Whole Woman's Health*, as well as the substantial-obstacle language from *Casey*. *Id.* at 2120 (plurality op.).

Chief Justice Roberts, concurring in the judgment as the fifth vote for reversal, concluded that *Casey*'s undue-burden test (that looks for a substantial obstacle) still applied: "Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are 'reasonably related' to a legitimate state interest." *Id.* at 2135 (Roberts, C.J., concurring in the judgment). As for the extraneous benefits language in *Whole Woman's Health*, the Chief Justice explained that (1) it is not plausible to apply a balancing test, (2) *Casey* did not require one, and (3) the Court should respect the statement in *Whole Woman's Health* that it was merely applying *Casey*. *Id.* at 2136-39.

Unsurprisingly, the multiple opinions in *June Medical* have led to a circuit split over the proper application

of the *Marks* analysis. The Sixth and Eighth Circuits have held that that the undue-burden/substantial-obstacle standard applies. *EMW Women's Surgical Ctr.*, 978 F.3d at 437; *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (per curiam). And the Seventh and Eleventh Circuits have held that the balancing test controls. *Reprod. Health Servs.*, 2021 WL 2678574, at *12 n.6; *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 752 (7th Cir. 2021). Thus, nearly fifty years after *Roe* was decided, the constitutional test remains unknown.

C. The Court's abortion precedent is unreliable and unworkable.

In addition to the flaws in *Roe* and *Casey*'s constitutional holdings, the unsettled nature of the Court's abortion precedent makes *Roe* and *Casey* ripe for overruling. States and courts cannot rely on the Court's decisions from one precedent to the next, making the entire system unworkable and resolvable only by the Court. *See Janus*, 138 S. Ct. at 2478-79 (listing factors, such as reliance and workability, that support overruling precedent).

After *Whole Woman's Health*, States had to defend new challenges to longstanding statutes under a novel benefits/burdens balancing test. But after *June Medical*, States are left to guess even at the correct constitutional test. As a result, some cases have lingered in the appellate courts for years, as those courts awaited guidance from this Court. *See, e.g.*, *Whole Woman's Health v. Young*, No. 18-50730 (5th Cir., pending since September 2018); *Whole Woman's Health v. Paxton*, No. 17-51060 (5th Cir., pending since December 2017); *Hopkins v. Jegley*, No. 17-2879 (8th Cir., three years from appeal to judgment); *Tulsa Women's Reprod. Clinic, LLC v. Hunter*, No. 118,292 (Okla., pending since December

2019); *see also Planned Parenthood of Ind. & Ky., Inc.*, 991 F.3d 740 (decision following grant, vacatur, and remand in light of *June Medical*), *cert. filed* No. 20-1375 (U.S. Apr. 1, 2021).

In addition to the benefits/burdens and undue-burden tests, respondents here have introduced yet another test: a law that prohibits any previability abortion is necessarily unconstitutional. But this Court has held that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand." *Doe*, 410 U.S. at 189. Accepting respondents' position and holding that a State's law is unconstitutional if it prevents *any* previability abortion, no matter the circumstances, would make the right to abortion effectively absolute, introducing even more confusion into this already muddled area.

The Court's abortion precedent is erroneous, unreliable, and unworkable. It has caused some judges to throw up their hands, knowing that any decision they make is simply a guess at what this Court will think is "undue":

> How much burden is "undue" is a matter of judgment, which depends on what the burden would be (something the injunction prevents us from knowing) and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators). Only the Justices, the proprietors of the undue-burden standard, can apply it.

Planned Parenthood of Ind. & Ky., Inc. v. Box, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., concurring in denial of rehearing en banc); *see also Stenberg*, 530 U.S. at 955 (Scalia, J., dissenting) (commenting that the

undue-burden test results in "a democratic vote by nine lawyers" on a "pure policy question").

The inability of the Court to settle on a constitutional test that can be objectively and predictably applied has caused chaos in the lower courts and confusion in States that seek to enact laws that comply with precedent and defend those laws in court. *Stare decisis* is no bar to overruling erroneous constitutional decisions that the Court keeps changing.

II. The Court Frequently Alters Other Doctrines in Abortion Cases.

In addition to facing uncertainty about what constitutional test the Court will use, States litigating abortion cases also have no assurance that the Court will evenly apply traditional legal rules. Indeed, "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

These disorienting developments in the case law have sown confusion and undermined confidence that the Court will follow its own precedents in the abortion context. *Stare decisis* has not kept the Court from uprooting settled doctrines as needed to strike down democratically enacted abortion laws. And *stare decisis* should not prevent the Court from reexamining the roots of its inconsistent and unpredictable abortion jurisprudence. *See Janus*, 138 S. Ct. at 2478-79 (listing consistency with other decisions and subsequent legal developments as factors in the *stare decisis* analysis).

A. The Court has created multiple abortion-specific rules and exceptions.

"[T]he abortion right recognized in this Court's decisions" has been "used like a bulldozer to flatten legal rules that stand in the way." *June Med.*, 140 S. Ct. at 2153 (Alito, J., dissenting). Whether it be the standard for facial challenges, severability, res judicata, standing, or even the First Amendment, the Court's abortion precedents have created and applied abortion-specific rules and exceptions.

1. The large-fraction test lowers the burden of proving facial unconstitutionality in abortion cases.

In most contexts, facial constitutional challenges are "the most difficult . . . to mount successfully." *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). That is because, as the Court explained in *Salerno*, the challenger bears the "heavy burden" of establishing "that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. In abortion cases, however, the Court has rendered that burden almost nonexistent.

In *Casey*, the Court accepted that Pennsylvania's spousal-notification law would impact only 1% of women seeking abortions. 505 U.S. at 894. But instead of rejecting the facial challenge under *Salerno*'s no-set-of-circumstances test, the Court announced that the "proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* Thus, the Court first eliminated from consideration all women to whom the law would operate constitutionally and then announced that the law was unconstitutional because "in a large fraction of the cases in which [the spousal-notification requirement] is relevant,

it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895.

Whatever one thinks of spousal-notification laws as a policy matter, this deviance from the established rule for facial challenges did not go unnoticed. Four Justices would have held that the facial challenge failed because "it is not enough for petitioners to show that, in some 'worst case' circumstances," the law would operate unconstitutionally. *Id.* at 972-73 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Unsurprisingly, the tension between *Casey* and *Salerno* resulted in confusion in the lower courts. *See* Skye Gabel, Casey *"Versus"* Salerno*: Determining an Appropriate Standard for Evaluating the Facial Constitutionality of Abortion Statutes*, 19 Cardozo L. Rev. 1825, 1827-28 (1998).

The Court's subsequent use of *Casey*'s large-fraction test has not clarified matters. In *Whole Woman's Health*, the majority used as its denominator the number of women for whom the law was an "actual rather than an irrelevant restriction." 136 S. Ct. at 2320. But as Justice Alito pointed out in his dissent, defining the denominator as the number of women whom the law restricts will always result in a large fraction of "1." *Id.* at 2343 n.11 (Alito, J., dissenting). Justice Gorsuch put it more simply: *Casey*'s large-fraction test "winds up asking only whether the law burdens a very large fraction of the people that it burdens" and is "unlike anything we apply to facial challenges anywhere else." *June Med.*, 140 S. Ct. at 2176 (Gorsuch, J., dissenting).

2. The Court has disregarded the doctrines of severability and res judicata in abortion cases.

The Court doubled down on its abortion-specific standards in *Whole Woman's Health*, setting aside the otherwise-applicable doctrines of severability and res judicata in order to declare both of Texas's laws facially unconstitutional—a remedy the plaintiffs had not even requested.

First, the Court rejected Texas's severability argument, which was based on "what must surely be the most emphatic severability clause ever written." *Whole Woman's Health*, 136 S. Ct. at 2331 (Alito, J., dissenting). The Court had previously held that it "prefer[red] . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force or to sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006) (citations omitted). Yet, when confronted with a challenge to Texas's requirement that abortion facilities comply with ambulatory-surgical-center regulations, the Court invalidated the entire regulatory system rather than severing the allegedly unconstitutional regulations from those for which the plaintiffs offered no proof at all. *Whole Woman's Health*, 136 S. Ct. at 2319-20; *see also id.* at 2352 (Alito, J., dissenting) (explaining that the Court invalidated such innocuous standards as treating patients with respect, having fire alarms, and eliminating slipping hazards). Not even First Amendment rights receive this *de facto* antiseverability doctrine. *E.g.*, *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349-56 (2020) (plurality op.). Abortion plaintiffs alone receive its

benefit, providing them with relief beyond what other litigants would be entitled to receive.

A second doctrine that *Whole Woman's Health* sidelined was res judicata. Several of the plaintiffs had previously brought a facial challenge to Texas's admitting-privileges law and lost. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 605 (5th Cir. 2014). Under the ordinary rules of res judicata, facial invalidation would have been barred by claim preclusion: It is a "fundamental precept of common-law adjudication" that, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Moreover, it is "a cardinal rule of res judicata" that "[c]laim preclusion does not contain a 'better evidence' exception." *Whole Woman's Health*, 136 S. Ct. at 2335 (Alito, J., dissenting); *see* Restatement (Second) of Judgments § 25, cmt. b; 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4403, p. 33 (2d ed. 2002).

Nevertheless, in a second challenge to Texas's admitting-privileges law (and one that sought only as-applied relief), the *Whole Woman's Health* Court upheld the grant of facial relief, trampling res judicata in the process. Once again demonstrating that the ordinary rules do not apply in the abortion context, the Court "create[d] an entirely new exception to the rule that a losing plaintiff cannot relitigate a claim just because it now has new and better evidence." *Whole Woman's Health*, 136 S. Ct. at 2337 (Alito, J., dissenting). Based solely on subsequent "concrete factual developments," the Court held that the plaintiffs' earlier defeat did not prevent the Court from sustaining a facial challenge—this, even though the

plaintiffs had not requested facial relief. *Id.* at 2306-07 (majority op.).

Thus, in its zeal to strike down Texas's laws, the Court in *Whole Woman's Health* disregarded the traditional standard for facial challenges, severability, res judicata, and the scope of relief. *See id.* at 2321 (Thomas, J., dissenting) (stating that the majority's decision "creates an abortion exception to ordinary rules of res judicata . . . and disregards basic principles of the severability doctrine"); *see also June Med.*, 140 S. Ct. at 2153 (Alito, J., dissenting) ("In *Whole Woman's Health*, res judicata and our standard approach to severability were laid low.").

By setting aside severability and using the large-fraction test, the Court permits federal courts to hold entire bodies of regulations unconstitutional based on their impact on a handful of women. And if at first the plaintiffs don't succeed, they can try again without the bar of res judicata. No other class of plaintiffs is given such preferential treatment.

3. The Court has allowed abortion providers to exercise third-party standing despite conflicts of interest.

As recently litigated in *June Medical*, the Court has also permitted abortion providers to bring suit on behalf of their patients in circumstances that would typically preclude third-party standing. Ordinarily, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). A limited exception applies when "the party asserting the right has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance'

to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Concerns about third-party standing are at their apex when there may be a conflict of interest between the plaintiff and the third party. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004).

The evidence in *June Medical* revealed no "close" relationship between abortion providers and patients, showing that a patient seldom met with the provider more than once or twice and often did not know who the provider was. 140 S. Ct. at 2168 (Alito, J., dissenting). And abortion patients do not face a hindrance to bringing suit, as they may use pseudonyms to protect their privacy and the capable-of-repetition-yet-evading-review rule to avoid mootness. *Id.* at 2168-69. Yet, as in many cases before it, a majority of the Court in *June Medical* permitted abortion providers to challenge (on behalf of their patients) Louisiana's admitting-privileges law. 140 S. Ct. at 2117-20 (plurality op.); *id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment). "This lackadaisical treatment of third-party standing in the abortion context is markedly different from the Court's strict adherence to the doctrine where other constitutional rights are at stake." Kaytlin L. Roholt, *Give Me Your Tired, Your Poor, Your Pregnant: The Jurisprudence of Abortion Exceptionalism in* Garza v. Hargan, 5 Tex. A&M L. Rev. 505, 530 (2018) (providing examples).

Worse, the Court has allowed abortion providers to exercise third-party standing even when challenging laws designed to protect their patients. *June Med.*, 140 S. Ct. at 2119-20 (plurality op.). "[T]he idea that a regulated party can invoke the right of a third party for the purpose of attacking legislation enacted to protect the third party is stunning." *Id.* at 2153 (Alito, J., dissenting); *see also id.* at 2174 (Gorsuch, J., dissenting) ("Louisiana's

law expressly aims to protect women from the unsafe conditions maintained by at least some abortion providers who, like the plaintiffs, are either unwilling or unable to obtain admitting privileges."). It is "an abortion-only rule." *Id.* at 2170 (Alito, J., dissenting).

4. The Court's abortion exceptionalism has muddled its First Amendment jurisprudence.

Those who choose to exercise their First Amendment rights to speak out against abortion have also fallen victim to the Court's "ad hoc nullification machine" that "push[es] aside whatever doctrines of constitutional law stand in the way of that highly favored practice." *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting). In *Hill*, individuals who engaged in sidewalk counseling outside abortion clinics challenged a Colorado law that made it a crime to approach within eight feet of an unwilling listener near the entrance of a healthcare facility "for the purpose of . . . engaging in oral protest, education, or counseling with such other person." *Id.* at 707 (majority op.). Even though the law could not be enforced without reference to the content of the speaker's speech (to determine his "purpose" for speaking), the Court found the law content neutral. *Id.* at 725. Applying only intermediate scrutiny, the Court held the law was constitutional because it was "reasonable and narrowly tailored." *Id.* at 730.

The dissenters were unsparing in their criticism, concluding that the decision was "patently incompatible with the guarantees of the First Amendment." *Id.* at 741 (Scalia, J., dissenting); *see also id.* at 742 (noting that "the jurisprudence of this Court has a way of changing when abortion is involved"); *cf. Virginia v. Black*, 538 U.S. 343, 399-400 (2003) (Thomas, J., dissenting)

(contrasting First Amendment protection in the abortion and cross-burning contexts). Justice Kennedy agreed that the majority's holding "contradict[ed] more than a half century of well-established First Amendment principles" and that, "[f]or the first time, the Court approve[d] a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk." *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting). Scholars also accused the majority's decision of being "deeply colored by abortion politics" and opined that "[t]he decision reflects a disoriented attitude . . . about aggressive legislative assaults on free speech rights in the most public spaces." Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights:* Hill v. Colorado*, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 Am. U.L. Rev. 179, 182 (2001).

Hill was all but reversed in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). In that case—notably outside the abortion context—the town "adopted a comprehensive code governing the manner in which people may display outdoor signs." *Id.* at 159. The Court rejected the argument that the sign code was content neutral, explaining that even if a law is content neutral on its face, it is content based if it "cannot be justified without reference to the content of the regulated speech." *Id.* at 164. Because the sign code "single[d] out specific subject matter for differential treatment" by applying different rules to different signs based on their purpose (temporary directional, political, and ideological), it was content based and subject to strict scrutiny, even though it did not discriminate among viewpoints. *Id.* at 169, 171.

As Justice Thomas recently noted, there is "glaring tension" between *Hill* and *Reed* with respect to whether a law is subject to strict scrutiny when it "targets a

'specific subject matter . . . even if it does not discriminate among viewpoints within that subject matter.'" *Bruni v. City of Pittsburgh*, 141 S. Ct. 578, 578 (2021) (Thomas, J., respecting the denial of certiorari) (quoting *Reed*, 576 U.S. at 179). And he is not the only one to notice this tension. The Seventh Circuit, in *Price v. City of Chicago*, considered Chicago's "bubble zone" ordinance, which prohibited individuals from approaching within eight feet of a person in the vicinity of an abortion clinic if their purpose is to "engage in counseling, education, leafletting, handbilling, or protest." 915 F.3d 1107, 1109 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 185 (2020). The Seventh Circuit flatly stated that "*Hill* is incompatible with current First Amendment doctrine" as explained in *Reed*. *Id.* at 1117. But the court also acknowledged that, "[w]hile the Supreme Court has deeply unsettled *Hill*, it has not overruled the decision." *Id.* at 1119.

Thus, there continues to be an abortion exception to the First Amendment. And while this case cannot alleviate that conflict, it is simply further evidence of the way in which abortion has warped this Court's jurisprudence.

5. The Court has declined to give discretion to legislatures crafting abortion laws amid medical uncertainty.

The ability of legislatures to legislate on matters of medical or scientific uncertainty also waxes and wanes depending on whether the legislation concerns abortion. The Court has previously explained that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974); *see also Jones v. United States*, 463 U.S. 354, 364-65, n.13 (1983). The same is true for state legislatures, which are "afforded the widest latitude" in

drafting statutes when "disagreement exists" in the fields of medicine and science. *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997); *see also Collins v. State of Tex.*, 223 U.S. 288, 297-98 (1912) (noting that States may "adopt a policy even upon medical matters concerning which there is difference of opinion and dispute"). Indeed, members of the Court relied on that latitude when upholding various government regulations aimed at combatting COVID-19. *See, e.g.*, *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) (stating that such decisions "should not be subject to second-guessing by an 'unelected federal judiciary'"); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring) (same).

For a while, it appeared the Court would give Congress and state legislatures that broad latitude when it came to enacting laws regulating abortion. Regarding Pennsylvania's law that a physician must provide information to a patient in *Casey*, the Court noted that States have "broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." 505 U.S. at 885. When it considered the "documented medical disagreement" about the health risks of the Partial-Birth Abortion Ban Act in *Gonzales*, this Court observed that it "has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." 550 U.S. at 162-63. Going further, the Court concluded that "[t]he medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." *Id.* at 164.

But the Court has since departed from that position. In *Whole Woman's Health*, the Court walked back "[t]he statement that legislatures, and not courts, must resolve questions of medical uncertainty." 136 S. Ct. at 2310. Instead, the Court explained that, "when determining the constitutionality of laws regulating abortion procedures, [the Court] has placed considerable weight upon evidence and argument presented in judicial proceedings." *Id.* In doing so, the Court discarded a "core element of the *Casey* framework" and inverted the traditional rule applied in *Gonzales*. *See id.* at 2325 (Thomas, J., dissenting).

The Court again declined to allow a state legislature to decide an issue of medical uncertainty in *June Medical*. There, the plurality relied on the district court's finding that Louisiana's admitting-privileges law offered "no significant health-related benefits." 140 S. Ct. at 2132 (plurality op.). Yet Justice Alito identified "ample evidence in the record showing that admitting privileges help to protect the health of women by ensuring that physicians who perform abortions meet a higher standard of competence than is shown by the mere possession of a license to practice." *Id.* at 2155 (Alito, J., dissenting). Justice Gorsuch agreed, pointing out that the plurality ignored Louisiana's legislative findings and yielded the State no more discretion than if the law had "fallen from the sky." *Id.* at 2172 (Gorsuch, J., dissenting). This is yet another example of abortion exceptionalism that casts doubt on the Court's "willingness to follow the traditional constraints of the judicial process when a case touching on abortion enters the courtroom." *Id.* at 2171.

B. The Court's abortion-specific jurisprudence should be corrected by overruling *Roe* and *Casey*.

Other abortion-specific rules abound. Justice Thomas recently noted that, in the context of criminal conduct, the Court treats minors as "children" who are less culpable, but in the context of abortion, the Court treats minors as mature young women. *Jones v. Mississippi*, 141 S. Ct. 1307, 1326 n.2 (2021) (Thomas, J., concurring). The Court has ruled on the constitutionality of abortion regulations despite having only a preliminary-injunction record "in contravention of settled principles of constitutional adjudication and procedural fairness." *Thornburgh*, 476 U.S. at 815 (O'Connor, J., dissenting). And *Roe* itself departed from the Court's "longstanding admonition that it should never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 410 U.S. at 172 (Rehnquist, J., dissenting) (internal quotation marks omitted).

The creation of numerous abortion-specific rules will only hurt the Court's integrity in the long run. "Abortion doctrine has become known for inconsistency and incoherence. Those on both sides of the abortion conflict have bemoaned what they call abortion law exceptionalism—doctrinal twists or interpretations that seem applicable only in abortion cases." Mary Ziegler, *The Jurisprudence of Uncertainty: Knowledge, Science, and Abortion*, 2018 Wis. L. Rev. 317, 357 (2018) (footnotes omitted). As a result, the Court's case law "is now so riddled with special exceptions for special rights that [its] decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law." *Whole Woman's Health*, 136 S. Ct. at 2321 (Thomas, J., dissenting).

These developments since *Roe* and *Casey* show that the Court's abortion jurisprudence is both unworkable and corrosive, gradually wearing away the foundations of doctrines as varied as facial constitutional challenges, severability, res judicata, third-party standing, free speech, and legislative discretion. Accordingly, *stare decisis* should not prevent the Court from revisiting its fundamental pronouncements concerning abortion. *See Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it."); *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997) ("*[S]tare decisis* does not prevent [the Court] from overruling a previous decision where there has been a significant change in, or subsequent development of, [its] constitutional law.").

III. It Is Time To Revisit and Overturn *Roe* and *Casey*.

The States may, consistent with this Court's decisions, regulate the availability of abortion before viability to prevent pain *in utero*. But if they cannot, it is this Court's decisions, and not the States' laws, which must yield. Any precedent that can be interpreted to mean that it is irrelevant whether an unborn child feels pain during dismemberment has no place in a just society.

The Court declined this opportunity in *Casey*, hoping that its decision would preserve the Court's integrity and "call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." 505 U.S. at 866-67. It has done neither. Time has not lessened the belief that unborn life deserves protection. Rather, an increasing number of States are enacting laws that seek to protect

unborn life earlier and earlier in gestation.[2] People of good conscience will always disagree on this issue, *id.* at 850, and the Court's attempt to settle it has failed. Moreover, the Court's continuing vacillation over the constitutional test and the creation of new, abortion-specific rules have only made matters worse.

In *Casey*, the Court spoke of allowing a woman to shape her "destiny" and to "define [her] own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851-52. These enlightened sentiments have produced a grim reality. This Court's opinions have resulted in lower-court decisions holding that a woman has a constitutional right to (1) have a doctor dismember her living unborn child, *see W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1329 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2606 (2019); (2) reject her unborn child based on the child's sex, gender, and abilities, *see Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1781 (2019) (per curiam) (denying certiorari on second question); and (3) as here, demand an abortion at any point prior to viability, even if it causes her unborn child excruciating pain, *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 273 (5th Cir. 2019), *cert. granted in part*, No. 19-1392, 2021 WL 1951792 (U.S. May 17, 2021).

---

[2] Ala. Code § 26-23H-4; Ariz. Rev. Stat. § 36-2159(B); Ark. Code § 20-16-1304(a); Ga. Code § 16-12-141(b); Idaho Code § 18-8704; Ind. Code § 16-34-2-1(a)(3); Iowa Code § 146C.2; Kan. Stat. §§ 65-6723(f) & 6724(a); Ky. Rev. Stat. § 311.7706(1); La. Stat. § 40:1061.1(E); Miss. Code § 41-41-137; Mo. Rev. Stat. § 188.058(1); Neb. Rev. Stat. § 28-3,106; N.C. Gen. Stat. § 14-45.1(a); N.D. Cent. Code § 14-02.1-05.3(3); Ohio Rev. Code § 2919.195(A); Okla. Stat. tit. 63, § 1-745.5(A); S.C. Code § 44-41-680; S.D. Codified Laws § 34-23A-70; Tenn. Code § 39-15-216; Tex. Health & Safety Code § 171.203; Utah Code § 76-7-302.5; W. Va. Code §§ 16-2M-2(7) & 4(a).

As Justice Thomas has stated, the Court "cannot continue blinking the reality of what [it] has wrought." *W. Ala. Women's Ctr.*, 139 S. Ct. at 2607 (Thomas, J., concurring in the denial of certiorari). The Court's abortion precedent is erroneous, inconsistent, uneven, and unreliable. Traditional *stare decisis* principles cannot save it. *Roe* and *Casey* should be overruled.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

KYLE D. HIGHFUL
BETH KLUSMANN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

JULY 2021

Counsel for Additional Amici States:

STEVE MARSHALL
Attorney General
of Alabama

MARK BRNOVICH
Attorney General
of Arizona

TREG R. TAYLOR
Attorney General
of Alaska

LESLIE RUTLEDGE
Attorney General
of Arkansas

ASHLEY MOODY
Attorney General
of Florida

CHRISTOPHER M. CARR
Attorney General
of Georgia

LAWRENCE G. WASDEN
Attorney General
of Idaho

THEODORE E. ROKITA
Attorney General
of Indiana

DEREK SCHMIDT
Attorney General
of Kansas

DANIEL CAMERON
Attorney General
of Kentucky

JEFF LANDRY
Attorney General
of Louisiana

ERIC SCHMITT
Attorney General
of Missouri

AUSTIN KNUDSEN
Attorney General
of Montana

DOUGLAS J. PETERSON
Attorney General
of Nebraska

WAYNE STENEHJEM
Attorney General
of North Dakota

DAVE YOST
Attorney General
of Ohio

JOHN M. O'CONNOR
Attorney General
of Oklahoma

ALAN WILSON
Attorney General
of South Carolina

JASON R. RAVNSBORG
Attorney General
of South Dakota

HERBERT H. SLATERY III
Attorney General
of Tennessee

SEAN D. REYES
Attorney General
of Utah

PATRICK MORRISEY
Attorney General
of West Virginia

BRIDGET HILL
Attorney General
of Wyoming