No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., STATE HEALTH OFFICER, 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

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QUESTION PRESENTED

Whether all pre-viability prohibitions on elective abortion are unconstitutional.

PARTIES TO THE PROCEEDINGS

Petitioners are Thomas E. Dobbs, M.D., M.P.H., in his official capacity as State Health Officer of the Mississippi Department of Health, and Kenneth Cleveland, M.D., in his official capacity as Executive Director of the Mississippi State Board of Medical Licensure.

Respondents are Jackson Women's Health Organization, on behalf of itself and its patients, and Sacheen Carr-Ellis, M.D., M.P.H., on behalf of herself and her patients.

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OPINIONS BELOW

The court of appeals' opinion (Petition Appendix ("Pet. App.") 1a–37a) is reported at 945 F.3d 265. The court of appeals' order denying rehearing en banc, Pet. App. 38a–39a, is unpublished. The district court's decision declaring Mississippi's ban on abortion after 15 weeks of pregnancy unconstitutional and granting summary judgment to Respondents, Pet. App. 40a–55a, is reported at 349 F. Supp. 3d 536.

JURISDICTION

The court of appeals' judgment was entered on December 13, 2019. The court of appeals denied rehearing en banc on January 17, 2020. On March 19, 2020, Justice Alito extended the time to file a petition for a writ of certiorari to and including June 15, 2020. The petition was filed on June 15, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Mississippi's ban on abortions after 15 weeks of pregnancy, Miss. Code Ann. § 41-41-191, is reproduced at Pet. App. 65a–74a.

INTRODUCTION

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court was asked to overrule *Roe v. Wade*, 410 U.S. 113 (1973). After a searching examination, the Court concluded that "the essential holding of *Roe* should be reaffirmed." *Casey*, 505 U.S. at 871. It further explained in no uncertain terms: "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." *Id.*[1]

Mississippi now asks the Court to reconsider this decision, and to overrule *Casey* and *Roe* in their entirety, or "at least" to discard the viability line. Petrs. Br. 48. It does so by turning a footnote in its petition for certiorari into an entire merits brief. *See* Pet. Cert. 5–6 n.1. If the Court considers the State's new arguments, it should reject the invitation to jettison a half-century of settled precedent and to abandon a rule of law that this Court has said uniquely implicates the country's "confidence in the Judiciary." *Casey*, 505 U.S. at 867.

In reaffirming the "essential holding" of *Roe*, *Casey* struck a careful balance. The Court held that, before viability, a state may regulate abortion, but it cannot resolve the personal, family, and medical implications of ending a pregnancy "in such a definitive way that a woman lacks all choice in the matter." *Id.* at 850. Because pregnancy so intensely impacts a woman's bodily integrity, her liberty interests are

[1] Unless otherwise indicated, all citations to *Casey* are to the plurality opinion of Justices O'Connor, Kennedy, and Souter.

categorically stronger than any state interest until viability. *Id.* at 852–53.

Mississippi does not come close to making the showing required to upend this balance, and to disregard entirely the vital liberty and equality interests of those who would be affected by the radical change in the law it requests—the nearly one in four women who decide to end a pregnancy during their lives, and the tens of thousands each year who need abortions after 15 weeks. Mississippi criticizes the viability line as insufficiently protective of its interests. But the very same argument was raised in *Casey*, and the Court gave careful regard to the state's asserted interests, including in fetal life. Having considered each of the state's arguments, the Court reaffirmed that the viability line strikes a principled and workable balance between individual liberty and any countervailing government interests. *Id.* at 870.

The State additionally faults *Casey* for failing to "bring[] peace to the controversy over abortion," Petrs. Br. 3, pointing primarily to laws that it and others continue to enact in the teeth of this Court's precedent. *Id.* at 24, 27. But *Casey* foresaw this too. The Court understood that there would be "inevitable efforts to overturn [its decision] and to thwart its implementation." *Casey*, 505 U.S. at 867; *accord id.* at 869. That reality, the Court cautioned, could not undermine the "precedential force" of the viability rule, *id.* at 867, lest the Court implicitly encourage states and private parties to obstruct its other major contested decisions. Some, for example, may disagree whether the First Amendment guarantees a right to make financial donations to political campaigns, *see*

Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), or whether the Second Amendment protects an individual right to own a handgun, *see District of Columbia v. Heller*, 554 U.S. 570 (2008). Unless the Court is to be perceived as representing nothing more than the preferences of its current membership, it is critical that judicial protection hold firm absent the most dramatic and unexpected changes in law or fact. *See Casey*, 505 U.S. at 866; *accord id.* at 864. All the more so where, as here, the Court has already thoroughly reconsidered and reaffirmed the right at issue.

Finally, the *Casey* Court stressed that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856. In 1992, "[a]n entire generation ha[d] come of age" under "*Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." *Id.* at 860. "[P]eople ha[d] organized intimate relationships and made choices . . . in reliance on the availability of abortion." *Id.* at 856.

Nothing in the years since *Casey* was decided has rendered individuals' rights to make basic decisions about their bodies and their lives any less worthy of constitutional protection. To the contrary, *two* generations—spanning almost five decades—have come to depend on the availability of legal abortion, and the right to make this decision has been further cemented as critical to gender equality.

For all the reasons the Court so deliberately set forth in *Casey*, that decision must be taken to have

settled the question presented. The judgment of the Fifth Circuit should be affirmed.

STATEMENT OF THE CASE

A. Factual and Statutory Background

Despite the Court's clear precedent, several states have recently enacted pre-viability abortion bans. These laws would prohibit abortion completely, or at virtually every pre-viability stage of pregnancy from 6 weeks to 20 weeks.

This case involves one such law, Mississippi House Bill 1510 ("the 15-week ban" or "the Ban"). The Ban was enacted on March 19, 2018, with an immediate effective date. Pet. App. 65a. It states that "a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion," if "the probable gestational age" of the fetus, which the physician is required to determine and document prior to performing the abortion, is "greater than fifteen (15) weeks." Pet. App. 70a. The Ban defines "gestational age" or "probable gestational age" as "calculated from the first day of the last menstrual period of the pregnant woman." Pet. App. 69a.

The only exceptions are for a "medical emergency" or a "severe fetal abnormality." Pet. App. 70a. The Ban defines "medical emergency" as a physical condition or illness that makes it necessary to perform an abortion to save a person's life or to prevent "a serious risk of substantial and irreversible impairment of a major bodily function." Pet. App. 69a. It defines a "severe fetal abnormality" as "a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving medical

treatment, is incompatible with life outside the womb." *Id.*

"A physician who intentionally or knowingly violates" the Ban "commits an act of unprofessional conduct and his or her license to practice medicine in the State of Mississippi shall be suspended or revoked pursuant to action by the Mississippi State Board of Medical Licensure." Pet. App. 71a–72a.

Just four months after the district court declared the 15-week ban unconstitutional, Mississippi enacted an even more restrictive ban—prohibiting abortion once embryonic cardiac activity can be detected, as early as 6 weeks from the first day of the person's last menstrual period ("lmp"). Miss. Code Ann. § 41-41-34.1(2)(a). The Senate sponsor of the 6-week ban noted that the composition of the Court was "absolutely . . . a factor" in proposing that law. Suppl. Amend. Compl. at 18, D. Ct. Dkt. 119 (citations omitted). Additionally, a decade-old Mississippi statute is designed to ban abortion completely if and when *Roe* is overruled. Miss. Code Ann. § 41-41-45.[2]

B. Procedural History

1. Respondents are Jackson Women's Health Organization—the only licensed abortion clinic in Mississippi—and Sacheen Carr-Ellis, M.D., M.P.H., the clinic's medical director and a board-certified obstetrician/gynecologist licensed to practice medicine in

[2] Prior to enacting the Ban, Mississippi also prohibited abortion after 20 weeks lmp, and that ban remains in effect today. Miss. Code Ann. § 41-41-137.

Mississippi (collectively "the Providers"). The Providers offer abortion care up to 16 weeks 0 days lmp. JA17. Approximately 100 patients per year obtain an abortion after 15 weeks from the Providers. *Id.*

The day Mississippi enacted the 15-week ban, the Providers sought a temporary restraining order against its enforcement. JA1. The district court granted that request, and the parties extended the order on consent. Pet. App. 62a–64a; JA2–3.

The district court recognized that under *Casey*, "the ban's lawfulness hinges on a single question: whether the 15-week mark is before or after viability." Pet. App. 60a. The district court thus limited discovery to the issue of viability. Pet. App. 58a–61a. But it allowed the State to proffer evidence on any other issues the State wanted to raise, including evidence related to its interests in prohibiting abortion after 15 weeks and any changed circumstances that would support the Ban. Pet. App. 56a–57a.

Mississippi proffered some evidence related to its asserted interests. It submitted a declaration from Dr. Maureen Condic, which contended that fetal pain may be possible after 15 weeks. Pet. App. 76a–77a. The State also submitted a medical article that concludes that abortion-related deaths are exceedingly rare, and that abortion has become safer at all stages of pregnancy since *Roe* and *Casey*. Linda Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology 729, 733–34, 736 (2004), D. Ct. Dkt. 85-6.

After discovery concluded, the Providers moved for summary judgment. JA7. Mississippi did not rebut the Providers' evidence that viability is not possible before at least 23–24 weeks of pregnancy. Mem. in Opp'n to Pls.' Mot. for Summ. J. at 1–2, D. Ct. Dkt. 85. Indeed, the district court noted that Mississippi "concede[d] established medical fact and acknowledge[d] it ha[d] been 'unable to identify any medical research or data that shows a fetus has reached the "point of viability" at 15 weeks LMP.'" Pet. App. 45a.

Applying *Casey*'s viability rule to the undisputed facts, the district court held the 15-week ban unconstitutional and entered a permanent injunction against its enforcement. Pet. App. 40a–55a.

2. A panel of the Fifth Circuit unanimously affirmed. "In an unbroken line dating to *Roe v. Wade*," the court of appeals explained, "the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability." Pet. App. 1a–2a. In concurrence, Judge Ho agreed that a "good faith reading" of *Roe* and *Casey* required the Fifth Circuit to affirm the judgment of the district court, and that any other outcome would require overturning *Casey*'s central holding. Pet. App. 20a, 26a (Ho, Circuit J., concurring). The Fifth Circuit denied the State's petition for rehearing en banc. Pet. App. 38a–39a.

3. In the summer of 2020, Mississippi sought certiorari, asking the Court "merely . . . to reconcile" supposed conflicts "in its own precedents" regarding "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. Cert. i, 5. The

State stressed that "the questions presented in [its] petition do not require the Court to overturn *Roe* or *Casey*." *Id.* at 5. The State added in a footnote, however, that if its Ban could not be upheld under *Casey* and *Roe*, "the Court should not retain erroneous precedent." *Id.* at 5–6, n.1. In the spring of 2021, the Court granted certiorari limited to the State's question regarding pre-viability prohibitions on abortion. JA60.

SUMMARY OF ARGUMENT

Every version of the State's argument amounts to the same thing: a request that the Court scuttle a half-century of precedent and invite states to ban abortion entirely. Insofar as the Court considers this argument, the Court should reject it.

I. In *Casey*, this Court carefully considered every argument Mississippi makes here for overruling *Roe*. After doing so, the Court reaffirmed the "most central principle" of its abortion jurisprudence: that states cannot prohibit abortion until viability. *Casey*, 505 U.S at 871. After balancing individuals' liberty interests and countervailing state interests, the Court reasoned that, until fetal life can be sustained outside the woman's body, the decision whether to continue or end the pregnancy must remain hers. *See id.* at 870.

Thirty years later, *stare decisis* presents an even higher bar to upending this "rule of law and [] component of liberty." *See id*. at 871. *Casey* is precedent on top of precedent—that is, precedent not just on the issue of whether the viability line is correct, but also on the issue of whether it should be abandoned. And

time and again, the Court has reaffirmed that it is "imperative" to retain a "woman's right to terminate her pregnancy before viability." *Id.* at 869, 871; *see also June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in the judgment).

There is no special justification for a different outcome now. Mississippi does not meaningfully engage with the personal autonomy and bodily integrity interests that underpin constitutional protection for the right to decide whether to continue a pregnancy. And once one recognizes that there is a liberty interest here that demands heightened protection, it is clear that the viability line safeguards that interest in a principled and workable way. Nor has any legal or factual change occurred that justifies giving any less protection for that liberty interest today. To the contrary, the years since *Casey* have only reinforced the importance of access to legal abortion for gender equality.

II. Mississippi is forced into its extreme position because it has nothing serious to offer in place of the viability line. Instead, the impractical and unstable alternatives the State proposes confirm that the Court was right in *Casey* to retain the viability line. There is no heightened scrutiny framework (stripped of the viability rule) that lower courts could administer against the inevitable cascade of state abortion bans that would follow if the Court does anything here other than affirm. Nor could the Court apply the State's version of an "undue burden" approach without gutting *Casey* and *Roe*. The very essence of those decisions is the right of *every* individual to decide

whether to continue a pre-viability pregnancy to term. The only way, therefore, to avoid inflicting profound damage to individual autonomy and women's equal status in society is to adhere to the considered judgment of the Court's prior decisions.

ARGUMENT

Mississippi asks the Court to take the grave step of overruling a rule of law it has repeatedly reaffirmed, having mentioned the notion only in a threadbare footnote in its petition for certiorari. *See* Pet. Cert. 5–6 n.1. There is a serious question whether the State's request to overrule *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973), is even properly before this Court. The Court has sometimes dismissed petitions as improvidently granted where parties, after "[h]aving persuaded [it] to grant certiorari on [an] issue, . . . chose to rely on a different argument in their merits briefing." *Visa Inc. v. Osborn*, 137 S. Ct. 289, 289–90 (2016) (mem.) (internal quotation marks and citation omitted; first alteration in original). It has similarly declined to consider arguments where, as here, those arguments were mentioned "[o]nly in a brief footnote of [the] petition." *Fry v. Pliler*, 551 U.S. 112, 120–21 (2007); *see also Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 615–16 (2013) (Roberts, J., concurring) (noting that majority correctly declined to reconsider important precedent when respondent suggested reconsideration only "in one sentence in a footnote, with no argument").

Under these circumstances, it would be appropriate to dismiss this case. Alternatively, the Court

could simply do what the State requested in its petition: "clarify," under this Court's existing precedents, "whether abortion prohibitions before viability are always unconstitutional." Pet. Cert. 14. The answer to that question is undoubtedly "yes," as this Court has repeatedly held.

If the Court nevertheless considers the State's merits brief on its own terms, the Court should affirm.

I. There is No Justification for Overruling *Casey* and *Roe*.

Mississippi seeks to overrule *Casey* and *Roe* so that states can ban abortion at any stage of pregnancy. "At minimum," Mississippi asks the Court to discard the central principle of those decisions: the viability line. Petrs. Br. 11; *see also* Petrs. Br. 38–45. The Court should refuse to do so.

A. The Viability Line is the "Central Principle" of *Casey* and *Roe*.

In an "unbroken" line of cases spanning five decades, this Court has consistently held that the Constitution guarantees "the right of the woman to choose to have an abortion before viability." *Casey*, 505 U.S. at 846, 870.

In *Roe*, the Court considered the point at which state interests, including the interest in fetal life, were sufficient to "override the rights of the pregnant woman." 410 U.S. at 162. After painstakingly evaluating the "medical and medical-legal history" of abortion and the "logical and biological justifications" of viability, the Court settled on the viability line. *Id.* at

117, 162–63; *see also id.* at 129–52, 160–61. Before that point, the Court concluded, no state interest is strong enough to outweigh the woman's liberty interest in deciding whether to carry her pregnancy to term. *See id.* at 164–65. In the 1980s, the Court "twice reaffirmed [the viability line] in the face of great opposition." *Casey*, 505 U.S. at 870 (discussing *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419–20 (1983)); *see also Webster v. Reprod. Health Servs.*, 492 U.S. 490, 529 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("[V]iability remains the 'critical point.'")).

In *Casey*, the Court again reaffirmed this "essential holding." 505 U.S. at 846, 870–71. Viability, the Court explained, is "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." *Id.* at 870. Because survival outside the woman's body is not possible until then, "viability marks *the earliest point* at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860 (emphasis added).[3]

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[3] Although the term "women" is used here and elsewhere, people of all gender identities may also become pregnant and seek abortion care. *See Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021).

The centrality of the viability line to *Casey* is reflected in the Court's own elaboration of its three-part holding: *First*, the Court recognized the woman's right to decide "to have an abortion *before viability* and to obtain it without undue interference from the State," because "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion *or* the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* at 846 (emphasis added). *Second*, the Court confirmed "the State's power to restrict abortions *after fetal viability*" if the law contains a health and life exception. *Id.* (emphasis added). *Third*, it held "that the State has legitimate interests from the outset of the pregnancy" in maternal health and fetal life, and thus can regulate abortion in a manner that does not impose an undue burden on the woman's right. *Id.* The Court emphasized that "[t]hese principles do not contradict each other; and we adhere to each." *Id.* Indeed, *Roe*'s "central" holding—that, until viability, the individual's right to determine whether to continue a pregnancy categorically outweighs the state's interests, including in fetal life—is mentioned in *Casey*'s plurality opinion no fewer than 19 times.

Treating the issue as settled, the Court has reiterated the viability line many times since. *See June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) ("*Casey* reaffirmed 'the most central principle of *Roe v. Wade*,' 'a woman's right to terminate her pregnancy before viability.'" (quoting *Casey*, 505 U.S. at 871)); *Gonzales v. Carhart,* 550 U.S. 124, 146 (2007) ("Before viability, a State 'may not prohibit any woman from making the ultimate

decision to terminate her pregnancy.'" (quoting *Casey*, 505 U.S. at 879)); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) ("[B]efore 'viability . . . the woman has a right to choose to terminate her pregnancy.'" (quoting *Casey*, 505 U.S. at 870)).

B. None of the State's Arguments Provides a Basis for Overruling the Viability Line.

"*Stare decisis* 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." *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (internal quotation marks and citation omitted). Adherence to precedent not only "avoids the instability and unfairness that accompany disruption of settled legal expectations," *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality), but instills public confidence that court decisions 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). For those reasons, "*stare decisis* is a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014).

Stare decisis presents an even higher bar for upending precedent in this case. In the years leading up to and including *Casey*, this Court was repeatedly asked to overrule *Roe* and, in particular, to abandon

the viability line.[4] But the Court consistently refused to do so. *See Casey*, 505 U.S. at 844, 853, 857–58. After carefully considering every argument for overruling *Roe*—including criticisms of its constitutional analysis and substantive due process in general and claims related to advances in science and medicine—the Court decided to preserve *Roe*'s central holding that "the woman has a right to choose to terminate her pregnancy" up until viability. *Id.* at 870. Accordingly, *Casey* is controlling precedent not only on the substantive liberty right at stake but also on the question of whether to overrule *Roe* and abandon the viability line. The issue now before the Court is whether *Casey*'s analysis of the constitutional and institutional considerations was "egregiously wrong" on *both* counts. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part).

The State falls far short of making any such showing. "[T]he vitality of [] constitutional principles . . . cannot be allowed to yield simply because of disagreement with them." *Casey*, 505 U.S. at 867 (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955)). All the more when the Court expressly foresaw the "inevitable efforts to overturn [*Roe*'s essential holding] and to thwart its implementation," *id.* at 868, and stressed that "the Court could not pretend to []

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[4] *See, e.g.*, Resp'ts. Br., Casey, 1992 WL 12006423, at **33, 105–17 (Apr. 6, 1992) (arguing that *Roe*'s use of "viability to define the contours of [the] right [to abortion] is at bottom arbitrary"); Petrs. Br., Webster, 1989 WL 1127643, at *13 (Feb. 23, 1989) (similar).

reexamin[e] the prior law with any justification beyond a present doctrinal disposition to come out differently," *id.* at 864.

1. *The Viability Line Is Well Grounded in the Constitution and the Court's Broader Jurisprudence.*

a. Mississippi's principal submission is that the Court should return the individual right to end a pregnancy to the same legal status as, for example, the right to practice as an optician: subject to any restriction or prohibition that can be viewed as rationally related to any legitimate state interest. Petrs. Br. 1–2, 5, 36–38; *see Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 491 (1955). According to Mississippi, "nothing" in constitutional text or tradition supports any individual right—ever—to obtain an abortion. Petrs. Br. 1. Every argument Mississippi now reprises was presented in *Casey*. *See* Resp'ts. Br., Casey, 1992 WL 12006423, at *108–14. And as this Court has explained so many times before, none is correct.

The right to decide whether to continue a pregnancy is grounded in the Fourteenth Amendment's protection against deprivation of a person's liberty without due process of law. U.S. Const. amend. XIV, § 1. As the Court has explained, "[t]he controlling word in the cases before us is 'liberty,'"—and liberty includes "the right to make family decisions and the right to physical autonomy." *Casey*, 505 U.S. at 884; *see also, e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Rochin v. California*, 342 U.S. 165, 172–

73 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 25–31 (1905). Thus, for example, the Court has recognized that the right to liberty protects against state-forced intrusions into the body, *Rochin*, 342 U.S. at 172–73, as well as the ability to decide whether to accept medical treatment, *Riggins*, 504 U.S. at 135; *Cruzan*, 479 U.S. at 279. Similarly, the Court has held that liberty includes the individual's right to use contraception. *See Eisenstadt*, 405 U.S. at 453; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977).

In recent years, multiple decisions have reinforced the principle that "physical autonomy" and "bodily integrity" are integral components of liberty. *Casey*, 505 U.S. at 857, 884; *see Sell v. United States*, 539 U.S. 166, 178–79, 183 (2003); *Ferguson v. City of Charleston*, 532 U.S. 67, 78 & 78 n.14 (2001) (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The Court has also extended *Casey*'s analysis of "constitutional protection [for] personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003) (citing *Casey*, 505 U.S. at 851); *see also, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 665–66, 675 (2015); *United States v. Windsor*, 570 U.S. 744, 772 (2013); *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

In light of these precedents, that the specific words "pregnancy" or "abortion" do not appear in the Constitution's text is of no moment. The constitutional question here is whether general principles

grounded in the Constitution apply to the specific situation at hand. They do. As the Court explained in *Casey*, recognizing a fundamental liberty interest in ending a pregnancy logically follows from cases recognizing a liberty right in bodily integrity and in making decisions related to "intimate relationships, the family, and . . . whether or not to beget or bear a child." 505 U.S. at 857; *see also generally* Constitutional Law Scholars Br.; Am. Civil Liberties Union Br.

Indeed, the word "contraception" does not appear in the Fourteenth Amendment either. Yet Mississippi concedes that "*Griswold* . . . finds grounding in text and tradition." Petrs. Br. 15.

The State argues that *Griswold* vindicated only "the textually and historically grounded Fourth Amendment protection against government invasion of the home" and "our history and tradition of safeguarding 'the marriage relationship.'" Petrs. Br. 15–16. But *Griswold* involved no home invasion, and *Eisenstadt* subsequently held that the same protection is not limited to married couples. *See Eisenstadt*, 405 U.S. at 453. Moreover, this Court long ago rejected Mississippi's narrow interpretation of *Griswold*, stating that *Griswold* cannot "be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Carey*, 431 U.S. at 687.

Mississippi also protests that the right to abortion is "different in kind from" other liberty interests because it implicates a state interest in fetal life. Petrs. Br. 16–17. But *Roe* already took any such difference into account. *See* 410 U.S. at 159. *Casey*, too, considered the argument that "abortion, which involves the purposeful destruction of the fetus, is different from all other medical procedures." Resp'ts. Br., Casey, 1992 WL 12006423, at *31. And the Court held that although the state's interests may support regulation of abortion, the state cannot "resolve the[] philosophic questions in such a definitive way that a woman lacks all choice in the matter." *Casey*, 505 U.S. at 850. Simply put, there can be no error in "the recognition afforded by the Constitution to the woman's liberty" to decide whether to end a pregnancy, because the "State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims." *Id*. at 857–58.

Nor does it matter that some states prohibited abortion at the time *Roe* was decided or when the Fourteenth Amendment was adopted. Petrs. Br. 13. If that were a basis for overruling precedent, then *Brown v. Board of Education,* 347 U.S. 483 (1954), would have to go, for the same Congress that enacted the Fourteenth Amendment also segregated the D.C. public school system. So would *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Loving v. Virginia,* 388 U.S. 1 (1967). Some believe *Heller* similarly lacks any historical foundation. *See* 554 U.S. at 683–87 (Breyer, J., dissenting). The list could go on and on.

At any rate, history and tradition provide ample support for the conclusion that "liberty" encompasses

an individual's right to end a pre-viability pregnancy. The Court has long recognized that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person." *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251–52 (1891). Further, the common law permitted abortion up to a certain point in pregnancy, and many states maintained that common law tradition as of the late 1850s. *See Roe*, 410 U.S. at 140 (concluding that, for much of history and particularly during nineteenth century, "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today"); *see also generally* Historians Br.

In short, the key insight of *Casey* and *Roe* is that the decision whether to end a pregnancy has deep constitutional roots in the fundamental rights to bodily integrity and personal autonomy in matters of family, medical care, and faith. *Casey*, 505 U.S. at 857–59. Resolving now to allow the government to control this intimate personal decision to the same extent as ordinary economic and social regulation would result in a radical displacement of personal liberty in favor of the power of the state.

b. Once it is determined that deciding whether to continue a pregnancy implicates constitutional interests in bodily integrity and personal autonomy above and beyond ordinary economic and social matters, some line must be drawn to balance the individual's interests against the state's valid interests. *Casey* properly recognized that viability is a principled point at which to strike that balance.

Before viability, there is no "realistic possibility of maintaining and nourishing a life outside the womb, so that" a state's interest in fetal life could then "override[] the rights of the woman." *Id.* at 870. If a state could ban abortion during this period, it would "extinguish[]" "the urgent claims of the woman to retain the ultimate control over her destiny and her body. *Id.* at 869. Thus, before viability, states may *regulate* abortion to advance their interest in fetal life, even early in pregnancy, by enacting laws designed to persuade people to carry a pregnancy to term. *Id.* at 872, 882. But viability is "*the earliest point* at which the State's interest in fetal life is constitutionally adequate to justify a legislative *ban* on nontherapeutic abortions." *Id.* at 860 (emphases added).[5]

2. *The Viability Line Is Clear and Has Proven Enduringly Workable.*

As *Casey* recognized, the viability line "has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable." 505 U.S. at 855. Indeed, federal courts

[5] The claim that legal changes outside the United States have undermined *Casey* and *Roe* is incorrect. Petrs. Br. 31. To the contrary, the overwhelming global legal trend is towards liberalization of abortion access. *See generally* Int'l and Comparative Legal Scholars Br.; United Nations Mandate Holders Br. Moreover, in countries with legal traditions and democratic values most comparable to the United States, such as Great Britain and Canada, abortion is legal until at least viability. *See* Int'l and Comparative Legal Scholars Br. And many countries that have limits earlier in pregnancy continue to permit abortion for broad social and health reasons after that point, functionally allowing abortion later in pregnancy and making their laws entirely different from the Ban. *See id.*

have applied the viability rule with remarkable uniformity and predictability for five decades, finding pre-viability bans on abortion invalid regardless of whether those bans operated at 6, 12, or 20 weeks and regardless of the reasons states alleged to justify them. *See, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (invalidating 6-week ban under "Supreme Court precedent holding that states may not prohibit pre-viability abortions"); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (similar, invalidating 12-week abortion ban); *Isaacson v. Horne*, 716 F.3d 1213, 1231 (9th Cir. 2013) (similar, invalidating 20-week abortion ban); *see also infra* p. 41.n.26.

Mississippi nevertheless contends that *Roe* and *Casey* are "hopelessly unworkable." Petrs. Br. 14, 19. But, in truth, Mississippi's arguments aim at the application of *Roe* and *Casey* to abortion *regulations*—not bans. *See* Petrs. Br. 19–21, 24–25. In particular, the State claims that *Casey*'s undue burden test suffers from "administrability problems." Petrs. Br. 22. This case, however, involves an abortion ban and thus does not require the Court to apply the undue burden test.

3. *No Factual Changes Support Abandoning the Viability Line.*

Every factual argument Mississippi and its amici raise has been made to the Court before—indeed, more than once—including as part of requests to discard the viability line. Further, the State's own data and evidence establish that, to the extent there have been any factual changes since *Casey*, those changes

reinforce the Court's previous decisions and the importance of access to legal abortion for women's health, lives, and equal status in society.

(a) *Viability as a Meaningful Line*

The State and its amici criticize viability as "arbitrary" and dependent on medical and scientific advancements that could move it earlier. *See* Petrs. Br. 43. These arguments are neither new, nor do they demonstrate any changed facts that would warrant overruling *Casey*.

First, the State's argument that viability may move earlier was considered and properly rejected in *Casey*. When Pennsylvania made the same argument in that case, the Court agreed that viability at 28 weeks was "usual at the time of *Roe*," that a fetus is "sometimes" viable at 23 or 24 weeks "today," and that viability may move to "some moment even slightly earlier in pregnancy . . . if fetal respiratory capacity can somehow be enhanced in the future." *Casey*, 505 U.S. at 860. But the Court concluded that these facts "have no bearing" on the viability rule itself, as it "in no sense turns on" when viability may occur. *Id*. "*Whenever* it may occur," viability "marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on" abortion. *Id.* (emphasis added). As such, the Court explained, viability is "a rule of law and a component of liberty we cannot renounce." *Id.* at 871; *see also id*. at 860, 869–70.

Second, no changed factual circumstances related to viability exist on this record in any event. Medical

consensus and the undisputed facts in this case establish that viability occurs no earlier than 23–24 weeks of pregnancy, JA18–20, 31, 34–35 (Carr-Ellis Decl. ¶¶ 11–15; Badell Decl. ¶¶ 4, 14)—precisely the time identified thirty years ago in *Casey*. 505 U.S. at 860. Further, those facts establish that life-sustaining treatment is generally not even possible for babies born before 22 weeks because of physiological limitations. JA33 (Badell Decl. ¶ 11). The record thus squarely refutes any claims that the viability line constantly moves, or that it is on the cusp of shifting significantly earlier.

Indeed, Mississippi affirmatively conceded below that the Ban prohibits abortion months before viability. JA58; *see also* Pet. App. 45a. The State's concession was undoubtedly a reflection of the medical consensus—including statements by its own health department. JA58. But it was also strategic: Mississippi argued in its petition for certiorari that the Ban was "an ideal case for examining a state's pre-viability interests" *because* 15 weeks is not even "close to the viability line." Pet. Cert. 34. The State's own litigation position forecloses its assertion that the viability line is arbitrary and unknowable.

(b) *Women's Health*

Mississippi raises nothing about women's health that this Court has not addressed before. Nor are there any changed facts since *Casey* relevant to women's health that could favor the State. If anything, legal abortion has become safer, including after 15 weeks, while childbirth, which always carries

significant risks, has unfortunately grown comparatively more dangerous in the United States in recent years.

First, in *Casey*, this Court rejected the claim that a state should be able to *prohibit* abortion before viability because a woman needs protection and cannot herself weigh the risks of ending versus continuing a pregnancy. *See* 505 U.S. at 846. There is simply "no authority for making an exception to th[e] general liberty [to make decisions] regarding one's own health for abortion." *Isaacson*, 716 F.3d at 1235 (Kleinfeld, J., concurring in the judgment) (invalidating 20-week abortion ban). Accordingly, though the State "may enact *regulations* to further the health or safety of a woman seeking an abortion"—as it may with any medical care—it is up to the woman herself to weigh the risks of pre-viability abortion as compared to continued pregnancy and childbirth. *Casey*, 505 U.S. at 878 (emphasis added); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (statutory "objective itself is illegitimate" if its "objective is to exclude or '*protect*' members of one gender in reliance on fixed notions concerning [that gender's] roles and abilities") (internal quotation marks and citation omitted) (emphasis added).

Second, the State presents no facts this Court has not seen before. Mississippi relies on statistics showing that, although legal abortion remains exceedingly safe throughout pregnancy, including in the second trimester, the risks increase as compared to the first trimester; and that the relative risk of death increases with each week of pregnancy. *See, e.g.*, Petrs. Br. 8; Bartlett, D. Ct. Dkt. 85-6. But, as far back as

Roe, the Court has been aware that risk "increases as [] pregnancy continues." 410 U.S. at 150, 163. Similarly, in *Casey*, the Court acknowledged the legitimate interest of the state in protecting women's health throughout pregnancy, 505 U.S. at 846, considered the safety of legal abortion as pregnancy progresses, *id.* at 860, and nevertheless rejected an explicit request to abandon the viability line, *see id.*; *see also id.* at 870–71; Resp'ts. Br., Casey, 1992 WL 551421, at **16–17 (citing incremental increase in abortion risk with weeks of pregnancy). And the claims of the State's amici about the alleged health harms of legal abortion have all been made to this Court before, *see, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316–17 (2016), and are roundly rejected by overwhelming medical consensus, *see generally* Am. Coll. of Obstetricians & Gynecologists ("ACOG") and Leading Med. Orgs. Br.[6]

Third, Mississippi's own evidence shows that abortion has only become *safer* since *Roe* and *Casey*. Specifically: (1) "[i]n the 25 years following the legalization of abortion in 1973, the risk of death from legal abortion declined dramatically by 85%," Bartlett at 733, D. Ct. Dkt. 85-6; (2) when comparing the relative risk of dying from legal abortion in the time periods 1972–1979 and 1988–1997, "the risk of death

[6] The claim that abortion harms women's mental health has been roundly rejected by medical consensus. *See, e.g.*, Nat'l Acad. Scis., Eng'g & Med., *The Safety and Quality of Abortion Care in the United States* 150 (2018) ("[T]he rates of mental health problems for women with an unwanted pregnancy were the same whether they had an abortion or gave birth."); *see also generally* ACOG Br.

declined *at all gestational ages*" in the later time-period, *id.* at 731 (emphasis added); and (3) "[l]egal induced abortion-related deaths occur only rarely," with a rate of 0.7 per 100,000 legally induced abortions for all women obtaining abortions, *id.* at 729, 736.

Finally, permitting states to prohibit abortion before viability would harm the health of people who need to end a pregnancy. The only alternative to abortion is continued pregnancy and childbirth—which carries substantial risks. At the time of *Casey*, the risk of death during childbirth was roughly ten times greater than that of legal abortion. ACOG Br., Casey, 1992 WL 12006402, at *2 (Mar. 6, 1992). "[C]hildbirth is [now] 14 times more likely than abortion to result in death." *Whole Woman's Health*, 136 S. Ct. at 2315; *see also generally* ACOG Br. The comparative risk is even higher in Mississippi, where it is about *75 times* more dangerous to carry a pregnancy to term than to have an abortion.[7] As in the United States generally, Black women in Mississippi disproportionately bear that risk. *See generally* ACOG Br.; Birth Equity Orgs. Br.[8]

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[7] *See* Miss. Dep't of Health, Miss. Maternal Mortality Report 2013–2016, 5, 25 (Mar. 2021), https://perma.cc/H362-RN2Q (reporting 33.2 pregnancy-related deaths per 100,000 live births); CDC, Abortion Surveillance (2018), https://perma.cc/X2KW-MDSA (reporting 0.44 deaths per 100,000 legally induced abortions in the United States from 2013–2017).

[8] *See also* Miss. Maternal Mortality Report at 5 (reporting 51.9 deaths per 100,000 live births for Black women compared to 18.9 deaths per 100,000 live births for white women).

Mortality aside, forcing a person to continue a pregnancy would impose well-documented and substantial physical health risks and emotional harms. *See* ACOG Br. For instance, approximately one-third of all deliveries in the United States today involve a caesarean-section, a major abdominal surgery with serious risks of complications. *See id.*

Banning abortion would also result in forcing some people to attempt to end their own pregnancies. *See generally* ACOG Br. Those without the resources to end a pregnancy safely would be exposed to increased health risks and deterred from seeking aftercare for fear of investigation or even arrest and prosecution. *See id.*

And make no mistake: there will *inevitably* be individuals who are unable to access abortion before 15 weeks or before any particular pre-viability point in pregnancy. A moment's reflection shows why this is so.

To begin, a person who is considering ending a pregnancy has every incentive to access abortion before 15 weeks. Delay means a person remains pregnant and continues to experience the symptoms of pregnancy. *See generally* ACOG Br. Abortion also generally becomes more complex and more expensive as pregnancy progresses. *See generally id.* For these reasons and others, nearly every person who obtains

an abortion in the second trimester would have preferred to access an abortion earlier.[9]

For most of the tens of thousands of people each year who obtain an abortion after 15 weeks, however, accessing abortion care earlier is not possible.[10] More than half of second-trimester abortion patients miss the window for a first-trimester abortion simply because of delays in recognizing or suspecting they are pregnant.[11] Late recognition of pregnancy is especially common for young people, people using contraceptives, or people who are pregnant for the first time.[12] Others who seek abortion in the second trimester do so because health conditions develop or worsen as the pregnancy progresses, or because of significant changes in their life over the course of their pregnancy. *See generally*, *e.g.,* ACOG Br. Second-trimester patients may also not seek abortion

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[9] Lawrence B. Finer, et al., *Timing of Steps and Rasons for Delay in Obtaining Abortions in the United States*, 74 Contraception 334, 341 (2006) (91% of second-trimester patients reported wanting to access abortion earlier).

[10] *See* Social Science Experts Br.; *see also* Elizabeth Nash, et al., *Mississippi Is Attacking Roe v. Wade Head On—the Consequences Could Be Severe*, Guttmacher Instit. (Aug. 17, 2021), https://perma.cc/4W48-R2TA (number of people who obtain abortion after 15 weeks each year).

[11] *See, e.g.*, Eleanor A. Drey, et al. *Risk Factors Associated With Presenting for Abortion in the Second Trimester*, 107 Obstetrics & Gynecology 128, 130 (2006).

[12] *See, e.g.*, Diana Greene Foster, et al., *Timing of Pregnancy Discovery Among Women Seeking Abortion*, Contraception 1–6 (2021); Amy Branum, et al., *Trends in Timing of Pregnancy Awareness Among US Women*, 21 Matern. Child Health J. 715–26 (2017).

care earlier because they are taking time to consult with family or a health professional before making this deeply personal decision.[13]

(c) *Fetal Development*

The State also contends that scientific advancements related to fetal development, including claims regarding fetal pain, require the Court to discard the viability line. *See* Petrs. Br. 30. Viability should be abandoned, Mississippi argues, so that courts can consider its claims that the fetus has "taken on the human form" by 12 weeks of pregnancy and that a fetus can experience pain prior to viability. Petrs. Br. 30. But as with the State's other claims, these arguments have been considered and rejected before. Further, the assertions about fetal pain are contrary to the overwhelming medical consensus that fetal pain is not possible until at least viability.

First, Mississippi's factual claims about fetal development, including fetal pain, have been brought to the Court many times. Texas's brief in *Roe* discussed fetal development in detail, at every stage of pregnancy, and claimed that conscious experience and sensitivity to touch was possible in the first trimester. Appellee Br., Roe, 1971 WL 134281, at *44 (Oct. 19, 1971). So too in *Webster*, in which the Court was asked to overrule *Roe* and abandon viability and did not. *See* 492 U.S. at 569 (Stevens, J., concurring

[13] *See, e.g.*, Elizabeth Janiak, *Abortion Barriers and Perceptions of Gestational Age Among Women Seeking Abortion Care in the Latter Half of the Second Trimester*, 89(4) Contraception 322–27 (2014).

in part and dissenting in part) (discussing potential for fetal pain).

Arguments about fetal development were also presented in *Casey*, where several amici made the claims made here that, because of ultrasonography and other medical advances, "[w]hat we know now . . . has dramatically increased our understanding of the humanity of the unborn child." *See* Am. Ass'n of Pro-Life Obstetricians & Gynecologists Br., Casey, 1992 WL 12006428, at *5 (Apr. 6, 1992). And arguments about fetal pain have been raised in more recent cases. *See Gonzales*, 550 U.S. at 159–160; *see also* Petrs. Br., Gonzales, 2006 WL 1436690, at **9a–10a (May 22, 2006) (discussing fetal pain); U.S. Rep. Charles T. Canady & Other Members of Congress Br., Stenberg, 2000 WL 228464, at *16 (Feb. 28, 2000) (claiming fetus can perceive pain by 13 weeks (citation omitted)). The Court has never accepted that any interest in fetal life can override a woman's fundamental liberty interest, pre-viability, to decide to end her pregnancy. And there is no basis for reprising those arguments yet again.

Second, the argument that conscious awareness, including the experience of pain, is possible before viability is even less supportable today than it was at the time of *Casey*. In the last decade, numerous major medical organizations have rejected this claim for multiple reasons, including because the experience of pain requires a functioning cortex, and the requisite function and connections to the cortex do not exist until at least 24 weeks. *See generally* Soc'y for Maternal-Fetal Med. Br. This medical consensus reflects

the conclusions of a multi-disciplinary team of physicians and scientists from all relevant fields after a years-long examination of all peer-reviewed data relevant to the issue. *See* Royal College of Obstetricians and Gynaecologists, Fetal Awareness: Review of Research and Recommendations for Practice, at viii–x, 1–2 (Mar. 2010). Hundreds of brain imaging studies published in peer-reviewed journals in recent decades have further cemented this consensus. *See generally* Soc'y for Maternal-Fetal Med. Br.

Accordingly, in the thirty years since *Casey*, no major medical organization has accepted the views of the State and its amici about pre-viability fetal pain. That is because Mississippi relies on a definition of pain that international consensus rejects, and because it relies on the scientifically untenable position that the cortex is not necessary for conscious awareness of pain. *See id.*; *see also e.g., Whole Woman's Health All. v. Rokita*, 2021 WL 3508211, at *64 (S.D. Ind. Aug. 10, 2021) (describing opinion about fetal pain offered by Dr. Condic—the same expert the State proffered here—as a "'fringe view' within the medical community"); *EMW Women's Surg. Ctr. v. Meier*, 373 F. Supp.3d 807, 823 (W.D. Ky. 2019) (rejecting contention that fetal pain is possible before 24 weeks as contrary to consensus of medical community), *aff'd* 960 F.3d 785 (6th Cir. 2020).[14]

[14] The arguments of the State and its amici about fetal pain equate pain with physiological reactions, such as reflex responses. Again, these arguments were made in previous cases. *See, e.g.,* S. Ctr. for Law & Ethics Br., Webster, 1989 WL 1127661, at *12 (Feb. 23, 1989); Bernard N. Nathanson, M.D.,

Third, assertions about fetal development and fetal pain are, in truth, rooted in philosophic arguments that abortion is "inhumane" and can be banned entirely. *See, e.g.*, Appellants Br., Jackson Women's Health Org., 2019 WL 1208918, at *26 (5th Cir. Mar. 6, 2019). But as the Court explained in *Casey*, because pregnancy so intensely impacts a woman's bodily integrity, these philosophic arguments cannot be resolved in such a "way that a woman lacks all choice in the matter," 505 U.S. at 850, and her liberty interests are categorically stronger than any state interest before viability, *id.* at 852–53.

(d) *Availability of Contraception and Other Policy Changes.*

Mississippi claims that modern contraception and policy changes have "dulled concerns" about women's equal status in society, rendering abortion unnecessary. Petrs. Br. 29. These claims are both false and paternalistic.

First, the State misunderstands the nature of the right at issue, which is the ability to decide if, when, and how many children to have. No policy change has, or even could, render such decisions unnecessary for the millions who make them each year. Indeed,

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Br., Webster, 1988 WL 1026213, at **43–45 (Feb. 23, 1988). And the arguments are at odds with science: Medical consensus is clear that experiencing pain requires conscious awareness; for example, reflex responses can occur even under anesthesia. *See generally* Soc'y for Maternal-Fetal Med. Br.

one in four women have made the decision to end a pregnancy in their lifetimes.[15]

Second, Mississippi is wrong on the facts. Contraception is not universally accessible or affordable in the United States, particularly for young people and people who are poor or living with low incomes. *See generally* Nat'l Women's Law Ctr. ("NWLC") Br.; Economists Br. Nor is contraception ever fail-safe. *See generally* NWLC Br.

Further, many indicators of gender equality continue to lag behind the ideal Mississippi imagines. Pregnancy and caregiver discrimination persist and remain difficult to root out. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731, 736 (2003); *see also generally* NWLC Br. Women—whether they be lawyers or other professionals or blue-collar workers—still bear the disproportionate share of child-raising duties. *See generally* NWLC Br. Women are more likely to be poor than men, they continue to be underpaid compared to men, their lifetime earnings (unlike men's) decrease after having children, and they remain underrepresented at the highest levels of power, including in Congress, on the judiciary, in private law firms, and in the boardroom. *See generally id.*; Organizations of Women Lawyers Br.

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[15] Rachel K. Jones, et al., *Abortion Incidence and Service Availability in the United States, 2017*, Guttmacher Instit. (Sept. 2019), https://perma.cc/66E8-XUY5; Data Center: Number of Abortions, Guttmacher Instit., https://perma.cc/84EK-VLRX (providing data for number of abortions in previous decades).

Third, the State's suggestion that gains in women's status somehow support taking away their right to make basic decisions about their lives and their bodies is nonsensical. Even if the claim that the United States had achieved full gender equality were true (it is not), those gains were made *while* the Court has steadfastly reaffirmed the right to abortion. *See generally, e.g.*, Economists Br. Further, that policy changes may have decreased discrimination against pregnant people and provided limited support to parents through unpaid leave and a modest tax credit, *see* Petrs. Br. 35, is no justification for overriding an individual's decision to end a pre-viability pregnancy.

4. *The Right to Decide Whether to Continue a Pregnancy Before Viability Remains Critical to Women's Equal Participation in Society.*

Even if contested, constitutional rights that have "become embedded" in "our national culture" are entitled to heightened *stare decisis* effect. *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *see also South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("[T]he respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity."); *Gamble*, 139 S. Ct. at 1969 (similar). Indeed, it is critical that such precedent hold firm in the face of efforts to "thwart [the] implementation" of a longstanding right. *Casey*, 505 U.S. at 867.

Such is the case here. *Casey* recognized that "for two decades of economic and social developments,

people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." *Id.* at 856. That is even truer today, as women's own experiences, social science research, and federal jurisprudence have further cemented that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.*

In particular, young women (of all socioeconomic backgrounds), women of color, and women who are poor or living with low incomes are more likely to experience unplanned pregnancies and accordingly are more likely to need abortion care.[16] In fact, more than half of people who obtain abortion care are in their twenties; most are already parents.[17] The most common reasons for ending a pregnancy include concerns about economic security, the desire to finish an education, and responsibilities to current children or other family members. *See generally* Social Science Experts Br.[18]

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[16] *See* Nat'l Acads. of Scis., Eng'g, & Med., *The Safety and Quality of Abortion Care in the United States*, at 29–31; Jessica E. Morse et al., *Reassessing Unintended Pregnancy: Toward a Patient-Centered Approach to Family Planning*, 44 Obstetrics & Gynecology Clinics 27, 27 (2017).

[17] Induced Abortion in the United States, Guttmacher Instit. (Sept. 2019), https://perma.cc/35ZJ-KZAW.

[18] *See also e.g.*, M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13(29) BMC Women's Health

Consider just one person's reflection in a brief to the Court: "Becoming a first-generation professional would have been impossible without access to safe and legal abortion services." Michelle Coleman Mayes, et al., & 350 Other Legal Professionals Br., June Med. Servs., 2019 WL 6650222, at **8–9 (Dec. 2, 2019). "The ability to make my own choice, to even have a choice" made college available "as a path to being able to provide a better life for . . . future children." *Id.*; *see also generally* Abortion Stories Br.

That the right guaranteed by *Casey* and *Roe* is critical to women's equality is clear from the impact on those who make the decision to end a pregnancy but are denied the ability to do so. Women who are denied an abortion:

- must endure the comparatively greater risks to their health of continued pregnancy and childbirth;[19]
- may lose educational opportunities;[20]

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at 6 (2013); Carr-Ellis Decl. in Supp. of Pls. Mot. for T.R.O. ¶ 11, D. Ct. Dkt. 5-1.

[19] *See, e.g.*, Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics and Gynecology 215–19 (2012).

[20] *See, e.g.*, Lauren J. Ralph et al., *A Prospective Cohort Study of the Effect of Receiving Versus Being Denied an Abortion on Educational Attainment*, 29(6) Women's Health Issues 455–64 (2019) (among high school graduates, people denied a wanted abortion were less likely to complete postsecondary degrees compared to those who received a wanted abortion); Jennifer Manlove & Hannah Lantos, *Data Point: Half of 20- to 29-Year-Old Women Who Gave Birth in Their Teens Have a High School*

- face decreased opportunities to pursue their full career potential and take an active role in civic life;[21]
- are more likely to experience violence from the man involved in the pregnancy;[22]
- are more likely to experience economic insecurity and raise their existing children in poverty;[23]

Diploma, Child Trends (Jan 11, 2018), https://perma.cc/QU2U-FW8V (young people who give birth are much less likely to obtain high school diploma relative to their counterparts).

[21] *See, e.g.*, Christine Dehlendorf, et al., *Disparities in Abortion Rates: A Public Health Approach*, 103 Am. J. of Pub. Health 1772, 1775 (2013) ("[U]nintended childbirth is associated with decreased opportunities for education and paid employment . . . "); Adam Sonfield, et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children* 14–15, Guttmacher Instit. (Mar. 2013), https://perma.cc/TKD3-6YV3.

[22] *See, e.g.*, Sarah C.M. Roberts, et al., *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion*, 12(144) BMC Med. at 5 (2014).

[23] *See, e.g.*, Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the U.S.*, 108 Am. J. Pub. Health 407, 409, 412–13 (2018); Sarah Miller, *The Economic Consequences of Being Denied an Abortion*, Nat'l Bur. Econ. Res. Working Paper 26662 (2020), https://perma.cc/PB6H-4UEG; Diana Greene Foster, et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. Pediatrics 183–89 (2019).

- are more likely, as pregnant women and mothers, to experience economic harms, despite modest changes to workers' protections.[24]

In response to these well-documented facts, the law has increasingly recognized that women's ability to control if, when, and how many children they have is critical to gender equality. *See, e.g.*, *Morales-Santana*, 137 S. Ct. at 1692–93 (laws based on "[s]tereotypes about women's domestic roles" and other "generalizations about the different talents, capacities, or preferences of males and females" are "anachronistic"); *Hibbs*, 538 U.S. at 731, 736 ("the pervasive sex-role stereotype that caring for family members is women's work" undergirds "subtle discrimination" against women as "mothers [and] mothers-to-be" "that may be difficult to detect on a case-by-case basis," and which damages women's professional opportunities); *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) ("Physical differences" between sexes may not be relied upon "to create or perpetuate the legal, social, and economic inferiority of women"); *cf. Nat'l Coal. for Men v. Selective Serv. Sys.*, 141 S. Ct. 1815 (June 7, 2021) (Sotomayor, J., joined by Breyer

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[24] *See, e.g.*, Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women at Work* 7, McKinsey & Co. (2012), https://perma.cc/2642-UG6B (pregnant women are less likely to be hired and more likely to be denied promotions because of employers' preconceptions about their career plans); *see generally* Reva Siegel, *The Pregnant Citizen, from Suffrage to the Present*, Geo. L.J. 19th Amend. Special Ed. 19, 30–31, n.193–94 (2020) ("[R]esearch shows that pregnant women are negatively stereotyped, viewed as less competent and committed, and are less likely to be hired.") (discussing "motherhood penalty" and collecting studies).

and Kavanaugh, J.J., concurring). These understandings have been essential to the incremental advancements the Nation has made since *Casey* towards gender equity.[25]

Accepting Mississippi's request to abandon the viability line would turn back the clock for generations who have never known what it means to be without the fundamental right to make the decision whether to continue a pregnancy. Any answer to the question presented other than a categorical "yes" would shatter the understanding women have held close for decades about their bodies, their futures, and their equal right to liberty.

II. The State Offers No Alternative to the Viability Line that Could Sustain a Stable Right to Abortion.

A party asking this Court to take the grave step of overruling a rule of law—one that has been repeatedly reaffirmed—should at least propose and seriously develop an alternative legal framework. *Cf. Fulton v. City of Phila.*, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring). All the more so here. In recent years, several states have enacted laws

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[25] Although Mississippi relies on John Hart Ely's 1973 writings to support its arguments against *Casey*, Petrs. Br. 40, Ely praised *Casey*, recognizing that "[o]ur society has indeed built up expectations on the basis of [*Roe*], particularly as regards the aspirations of women." John Hart Ely, *Letter to Justices Kennedy, O'Connor, and Souter Concerning* Planned Parenthood v. Casey (1992), in On Constitutional Ground 305 (1996). In Ely's view, "overruling [*Roe*] [] would have been a terrible mistake . . . . [and] would weaken the Court's authority immeasurably." *Id.*

banning abortion at every pre-viability stage of pregnancy, from 6 weeks to 20 weeks—asserting a variety of alleged justifications for those bans.[26] *See, e.g.*, Texas et al. Br. at 32 n.2 (citing over 20 states' pre-viability bans); *see also, e.g., Whole Woman's Health v. Jackson*, No. 21A24, 594 U.S. ___ (Sept. 1, 2021) (considering six-week ban from Texas). Missouri, for example, has enacted a cascading ban that prohibits abortion at or after 8, 14, 18, and 20 weeks of pregnancy.[27] *See Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Parson*, 1 F.4th

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[26] Federal courts have blocked these bans. *See, e.g.*, *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 688–89 (8th Cir. 2021) (affirming preliminary injunction); *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) (affirming preliminary injunction); *Planned Parenthood S. Atlantic v. Wilson*, 2021 WL 1060123, at *12 (D.S.C. Mar. 19, 2021) (preliminary injunction); *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297, 1312–14 (N.D. Ga. 2020) (permanent injunction), *appeal filed*, No. 20-13024 (11th Cir. Aug. 11, 2020); *EMW Women's Surg. Ctr. v. Beshear*, 2019 WL 1233575, at *2 (W.D. Ky. Mar. 15, 2019) (temporary restraining order); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 804 (S.D. Ohio 2019) (preliminary injunction). Even in *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 527, 535 (6th Cir. 2021) (en banc), the court reversed a preliminary injunction of a law prohibiting some abortions prior to viability because it concluded that the law is *not* a pre-viability abortion ban.

Other states could move to revive bans on abortion at various points in pregnancy if the Court discards the viability line. *See, e.g.*, *Stenehjem*, 795 F.3d at 773 (6-week ban).

[27] Tennessee has a similar ban. *Memphis Ctr. for Reprod. Health v. Slattery*, No. 20-5969, __F.4th__ (6th Cir. Sept. 10, 2021) (affirming preliminary injunction).

552, 557 (8th Cir. 2021) (affirming preliminary injunction), *rehearing en banc granted, op. vacated* (July 13, 2021). Some states have gone further and already enacted complete bans on abortion.[28] At least a dozen, including Mississippi itself, have in place laws that are intended to spring into effect and ban abortion immediately when and if this Court overrules *Roe* and *Casey*.[29]

Yet Mississippi devotes just a few pages at the end of its brief to purported "alternatives" to the viability line. Its barebones discussion of its proposed alternatives highlights that *any* abandonment of viability would be no different than overruling *Casey* and *Roe* entirely.

A. "Any Level of Scrutiny"

Mississippi first proposes the Court hold that the Ban satisfies "any level of scrutiny" and "leave for another day" a decision of what level of scrutiny actually applies to pre-viability bans. Petrs. Br. 46. In place of the stable rule prohibiting pre-viability bans that courts have uniformly applied for a half-century, this proposal would leave women, state officials, and the lower courts at sea.

1. The states that have enacted abortion bans defend them on the same grounds that Mississippi puts

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[28] *Little Rock Family Planning Servs. v. Jegley*, 2021 WL 3073849 (E.D. Ark. July 20, 2021); *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019) (preliminary injunction).

[29] *See, e.g.*, Ark. Code § 5-61-304; La. Rev. Stat. § 40:1061; Miss. Code Ann. § 41-41-45; *see also* Ctr. for Reprod. Rts., What If Roe Fell, https://perma.cc/FA96-P76K.

forward here. In fact, Mississippi itself makes similar arguments to this Court as it made to the lower courts in support of its 6-week ban. *See* Appellants Br., Jackson Women's Health Org., 2019 WL 4238421, at **23–27 (5th Cir. Aug. 28, 2019). And Mississippi likely would make similar arguments in defense of a ban on abortion at virtually any point in pregnancy. For example, it urges the Court to hold that its interests in prohibiting pre-viability abortion are compelling at 15 weeks, because that is "when risks to women have increased considerably." Petrs. Br. 46. Yet its legislative findings state that "[a]fter 8 weeks' gestation, abortion's risks 'escalate exponentially.'" Petrs. Br. 8. Mississippi also claims its interest in "unborn life" is compelling at 15 weeks because that is when "basic physiological functions [of the fetus] are all present." Petrs. Br. 46. But according to its legislative findings, "[a]t 9 weeks, 'all basic physiological functions are present.'" Petrs. Br. 7; *compare also*, *e.g.*, Petrs. Br. 46 (asserting a compelling interest at 15 weeks because that is when "vital organs are functioning"), *with* Petrs. Br. 7 (stating "[a]t 10 weeks, 'vital organs begin to function'").

2. Stripped of the viability line, how would federal courts evaluate these arguments on a case-by-case basis? What state interests would count as compelling or otherwise sufficiently strong to categorically outweigh the individual liberty interest at stake? As *Casey* emphasized: "State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution." 505 U.S. at 845. Adopting the State's proposal would provide none.

The State's "strict scrutiny" argument here illustrates the point. It says that the Court should uphold laws prohibiting abortion before viability as the least restrictive means of serving states' interests. *See* Petrs. Br. 46. But, under any accepted understanding of strict scrutiny, the Ban cannot be a narrowly tailored means of advancing the State's interest in reducing abortion after 15 weeks—particularly when it coexists with other Mississippi laws that impede access to *earlier* abortion. Indeed, the State's own evidence highlights that reducing barriers to earlier abortion would be a less restrictive measure by which it could pursue its asserted interests. *See* Bartlett at 736, D. Ct. Dkt. 85-6.[30] So any decision from this Court upholding the 15-week ban under means-ends scrutiny would signal that anything goes—or at least that any ban would have a chance of surviving in court.

The fallout would be swift and certain. As abortion bans are enforced—or the threat of enforcement looms—large swaths of the South and Midwest would likely be without access to legal abortion. Some people with the means to travel may be able to access legal abortion—but only after crossing multiple state lines. (Mississippians, for example, would have to travel at least two states away to reach the closest

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[30] Additionally, although Mississippi discusses an interest in "protecting" the medical profession by banning abortions performed using the dilation and evacuation procedure, Petrs. Br. 7–8, 37, the State prohibited that procedure two years prior to the Ban, *see* Miss. Code Ann. § 41-41-155, undermining any claim that the Ban is even related to such an interest.

place abortion would likely remain legal. *See generally e.g.*, Economists Br.) Others would end their own pregnancies outside the medical system, which could expose them and anyone who helps them to criminal investigation and prosecution. *See generally* Current & Former Prosecutors Br. Some would attempt abortion by unsafe or ineffective methods. *See generally* ACOG Br. Fear of arrest or prosecution could deter those who then need medical help from seeking it, endangering their health and safety. *See id.* For many, the barriers will simply be too high, and they will be forced to endure the substantial risks of continued pregnancy and childbirth. *See id.*

People would be harmed, and chaos would ensue, even in states that claim not to be prohibiting abortion directly. For example, Texas now has a law that exposes *anyone* who "aids or abets" an abortion as early as 6 weeks to the risk of being dragged into court to defend against massive fines. *See, e.g.*, S.B. 8 § 3 (codified at Tex. Health & Safety Code § 171.208(a)). Other states, including Mississippi, intend to follow suit, attempting to bring abortion care to a halt.[31]

Even broader upheaval would follow. State attempts to advance an interest in protecting fetal life by policing its residents' access to abortion beyond their borders would no doubt arise. So too would efforts to restrict certain forms of contraception, in pursuit of an interest in protecting potential life. *Cf. e.g.*,

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[31] *See, e.g.*, Stephen Groves, *GOP-Led States See Texas Law as Model to Restrict Abortions*, Associated Press (Sept. 2, 2021), https://perma.cc/H5ZF-YBK5.

Casey, 505 U.S. at 859 (some "forms of contraception" may implicate "postconception potential life").

B. "Undue Burden"

The State's proposal to uphold the 15-week ban under an "undue burden" analysis is equally unprincipled and unworkable. Mississippi suggests that states may prohibit abortion before viability if doing so does not prevent a "significant number" of people from obtaining abortion. Petrs. Br. 47. And the State maintains that the Ban meets this rights-by-numbers test because "4.5% of the women who obtained abortions [from the Providers in 2017] did so after 15 weeks." *Id.* This reasoning is incompatible with continuing to recognize an individual constitutional right to decide whether to continue a pregnancy and irreconcilable with this Court's treatment of other constitutional rights more generally. It would also require this Court to draw a new line in a purely legislative manner.

1. To begin, the State offers a half-hearted suggestion that its "undue burden" approach would "draw some support" from precedent. Petrs. Br. 47. But this proposal—just like Mississippi's first one—directly conflicts with *Casey*'s assurance that "adoption of the undue burden analysis *does not disturb* the central holding of *Roe v. Wade*" that "a State may not prohibit *any woman* from making the ultimate decision to terminate her pregnancy" up until viability. 505 U.S. at 879 (emphases added); *see also June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment).

The State's proposal further conflicts with *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), *Stenberg v. Carhart*, 530 U.S. 914 (2000), and *Gonzales v. Carhart*, 550 U.S. 124 (2007). Each holds that states may not prohibit pre-viability abortion *at any point* in the second trimester, even though, as was true then and is true today, most people obtain abortions in the first trimester.[32] And, contrary to the State's claims that *Gonzales* supports the validity of a pre-viability ban, Petrs. Br. 44, *Gonzales* upheld a prohibition of one rarely-used abortion method only because the Court found that the standard method used throughout the second trimester remained available. 550 U.S. at 150–54. Indeed, the restriction in *Gonzales* did not prohibit *any* person from obtaining an abortion until viability. *Compare Stenberg*, 530 U.S. at 938–39, 945–46. Accordingly, *Gonzales*, too, applied the rule announced decades earlier: laws that prohibit abortion at any point before viability "strike at the right itself" and cannot stand. 550 U.S. at 157–58 (quoting *Casey*, 505 U.S. at 874); *see also id*. at 158 ("The three premises of *Casey* must coexist.").

2. Mississippi also says that the Ban impacts "only one week" of procedures—referring to the fact

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[32] *Gonzales*, 550 U.S. at 156–60 (upholding prohibition on rarely-used second trimester method); *Stenberg*, 530 U.S. at 924 (invalidating prohibition on most common second trimester method, when "[a]pproximately 10% of all abortions are performed during the second trimester of pregnancy"); *Danforth*, 428 U.S. at 77–79 (invalidating prohibition on abortion procedure that accounted for majority of abortions after the first trimester).

that the Providers offer abortion services to 16 weeks. Petrs. Br. 47. But that is no limiting principle. Does the State really mean to suggest that if providers in another state offered care to 17 or 18 weeks, a 15-week ban would then be unconstitutional? What if other states banned abortion at different pre-viability points of pregnancy, and then amended those bans from year to year, based purely on whether abortion was currently available there at 10 weeks, 14 weeks, or 20 weeks? These questions are sure to arise in nearly every permutation. The recent enactment of Texas S.B. 8—and other states' pronouncements that they will consider similar laws—should make that plain.

More fundamentally, the State's brute number-crunching is at odds with the recognition of constitutional rights in general. The very essence of a constitutional right is that the government cannot outright prohibit a certain subset of people, no matter how small, from exercising that right.

The Second Amendment, for example, would not tolerate a ban on owning handguns in studio apartments, even if only 4.5% of people lived in such dwellings. The recognition of the right to self-defense in the home deprives legislatures of "the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. Campaign expenditures over $1,000,000 could not be prohibited on the ground that only a tiny percentage of Americans wanted to make such expenditures. *Cf. McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014). Warrantless investigatory stops and searches could not be sanctioned on a particular roadway on

the ground that few people in the state really need to travel along that thoroughfare. *Cf. City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Other examples abound. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating state statute prohibiting flag burning, with no mention of how many engage in such activity); *Eisenstadt*, 405 U.S. at 453 (holding unconstitutional prohibition on distribution of contraceptives to single people because, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child") (emphasis added).

* * *

There are no half-measures here. Each of the State's purported alternatives would upend the balance struck in *Casey* and ultimately extinguish "the woman's liberty to determine whether to carry her pregnancy to full term." 505 U.S. at 869–70. Put another way, upholding the Ban under either "alternative" rationale the State offers would lead to the same thing: attempts by half the states in the Nation to forbid abortion entirely, and a judiciary left without tools to manage the resulting litigation. The only way to avoid that outcome is to recognize, as the Court reaffirmed thirty years ago, that "a State's interest in the protection of [fetal] life falls short of justifying any plenary override of [the] individual liberty claims" at stake here. *Id.* at 857. Until viability, a state may regulate, but not ban, abortion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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