No. 19-1392

IN THE

Supreme Court of the United States

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

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

For 30 years, no party has had to defend *Roe v. Wade*, 410 U.S. 113 (1973). No party has ever had to defend *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Finally forced to defend those cases, respondents drive home the stark reality: *Roe* and *Casey* are indefensible. At each turn, respondents' "effort to defend" *Roe* and *Casey* "underscores" the overwhelming case for rejecting those decisions. *Citizens United v. FEC*, 558 U.S. 310, 382 (2010) (Roberts, C.J., concurring).

Respondents do not claim that constitutional text or structure establishes a right to abortion. And they do not seriously argue that *Roe* and *Casey* are correct as an original matter. Their defense of *Casey* is to repeat its reasoning. Resp.Br.17-22. But *Casey*'s reasoning is "not just wrong" but "exceptionally ill founded." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019). *Casey* reasoned that general interests in personal autonomy support a constitutional right to abortion. Yet this Court has repudiated that approach of "deduc[ing]" rights "from abstract concepts of personal autonomy." *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997). To tie due process to the accumulated wisdom of the people rather than "the policy preferences" of judges, this Court demands that an asserted fundamental right, "careful[ly] descri[bed]," be "deeply rooted in this Nation's history and tradition." *Id.* at 720, 721. A right to abortion has no such roots. Pet.Br.12-13. Like *Roe*, *Casey* cast the Constitution and precedent aside to recognize a unique due-process right that ends a human life. "*Casey* said it" is no defense because *Casey* is gravely wrong.

Respondents do not claim that abortion jurisprudence is workable. Pet.Br.19-22. They claim only that a viability rule is workable. Resp.Br.22-23. But even that is not so. Viability has no relationship to the state interests that abortion affects, so a viability rule cannot workably account for those interests. Pet.Br.41-42. And it is clear why respondents go no deeper on workability: they do not want to defend the workability of *Casey*'s undue-burden standard. The fact that—in the first case squarely calling upon this Court to overrule *Casey*—respondents cannot bring themselves to defend the "standard of general application" that *Casey* announced, 505 U.S. at 876 (plurality opinion), tells this Court all it needs to know about the workability of its abortion caselaw.

Respondents do not dispute that *Roe* and *Casey* have damaged democratic self-governance, the Nation, the law, and this Court. Pet.Br.23-28. Indeed, respondents amplify these points when they excoriate this Court's special test for evaluating facial challenges to abortion laws. Respondents condemn that "rights-by-numbers test" as irreconcilable with the rules this Court applies elsewhere in the law. Resp.Br.47, 49-50. In spotlighting this Court's departure from neutral rules of law in abortion cases, respondents confirm the strong grounds for overruling.

Respondents urge that no factual developments support abandoning *Roe* and *Casey*. Resp.Br.23-36. Yet respondents deny the decades of leaps forward in policy, society, medicine, and science that have continued to "unmask[ ]" how baseless and arbitrary *Roe* and *Casey* are. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part). When *Roe* was decided, this Court refused even to say when human life begins, many laws and policies

promoting equality were yet to come, and women composed but a small part of legislative bodies. It is not the same world today. And respondents' factual account would not aid them even if it were true. Overruling does not require any change in facts. *Roe* and *Casey* were egregiously wrong when they were decided. A factual standstill would just mean that they are as wrong now as they were decades ago.

Respondents urge that abortion is critical to women's success and health. Resp.Br.36-41. Yet respondents disregard the ubiquity of safe-haven laws that eliminate parenting burdens altogether, discount that the Act here includes a health exception, downplay laws that promote women's career and family success, and diminish contraceptive advances. Pet.Br.29-30, 34-35. Respondents even claim that abortion has driven women's success—while disparaging that success as "incremental." Resp.Br.41. That incredible view writes off the robust career and family success that innumerable women have achieved without relying on abortion.

Last, respondents contend that there is no sound alternative approach to judicial review of abortion laws other than the one imposed by *Roe* and *Casey*. Resp.Br.41-50. But there is a sound alternative: return the matter to the people. That approach—with abortion restrictions assessed under rational-basis review—is used on almost every important issue this country faces. Rational-basis review is familiar to courts and easy to apply. Unlike some areas of law where the right alternative may present a hard question, here it does not: rational-basis review is "what should replace" *Roe* and *Casey*. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J.,

concurring). And the other alternatives the State identified are far superior to *Roe* and *Casey*.

This case provides a vivid illustration that *Roe* and *Casey* are irredeemable. The Gestational Age Act—which was enacted by large legislative majorities—adopts a modest restriction to pursue important interests. It limits abortion in Mississippi by one week, with exceptions for life and health. It leaves ample time for each woman who would now obtain an abortion in that week to still obtain one. The Act operates when an unborn child has fully taken on the human form, when risks to women's health are higher, and when the common abortion procedure is especially brutal. Yet *Roe* and *Casey* led the courts below to hold—in line with every lower-court decision on a similar law—that the Constitution bars the State from reducing abortion's availability from 16 weeks' gestation to 15 weeks' gestation. That is indefensible. There is no credible argument that the Constitution offers a view on—let alone precludes—such a one-week limitation. That is where *Roe* and *Casey* have brought us. This Court should overrule *Roe* and *Casey*, uphold the Act, and reverse the judgment below.

ARGUMENT

I. This Is The Case To Set Abortion Precedent Right.

Roe and *Casey* are so clearly wrong that respondents could not hope to show that they are correct as a matter of constitutional text, structure, history, or tradition. Pet.Br.12-13, 14-18, 39-41. Respondents also could not hope to show that *Roe* and *Casey* have made the law clear or protected state interests. Pet.Br.19-22. Nor could respondents contest that *Roe*

and *Casey* have damaged democratic self-governance, the country, the law, and this Court. Pet.Br.23-28; 24 States Br.18-31; Becket Br.5-14.

Unable to defend *Roe* and *Casey* on the merits or contest several strong grounds for overruling them, respondents discourage this Court from even confronting those decisions. This effort backfires.

Respondents claim that the Gestational Age Act prohibits abortion rather than regulates it, so this Court can ignore problems with *Casey*'s undue-burden standard and address only what respondents call *Casey*'s central holding: that all pre-viability prohibitions on abortion are unconstitutional. Resp.Br.12-15. Respondents push this view to justify their failure to defend the undue-burden standard's flaws. *E.g.*, Resp.Br.22-23 (defending viability rule—but not undue-burden standard—as workable). They say nothing to defend that standard—*Casey*'s central innovation—even as they insist that this Court retain *Casey*.

Respondents' effort to evade the issue fails. *Casey* called the "undue burden" standard the new "standard of general application" for abortion restrictions. 505 U.S. at 876 (plurality opinion). It held that a law is an "undue burden" if it "prevent[s]" abortion "as surely as if" abortion had been "outlawed." *Id.* at 893-94. So if respondents are right that *Casey* directs that all pre-viability prohibitions on elective abortion are unconstitutional, then it does so because each such prohibition constitutes an "undue burden"—which means that the undue-burden standard is squarely at issue in this case. *Casey* would have otherwise had no occasion to "reaffirm[ ]" (Resp.Br.9) a rule barring all pre-viability prohibitions, because *Casey* addressed

only what, on respondents' view, were regulations rather than prohibitions.

Respondents themselves argue that "*any* abandonment of viability"—the "central" holding of *Roe* and *Casey*—"would be no different than overruling *Casey* and *Roe* entirely." Resp.Br.14, 43 (emphasis in original). Their own arguments belie their effort to shield the undue-burden standard from critical examination.

Respondents' suggestion that "it would be appropriate to dismiss this case" is just as unfounded. Resp.Br.11-12. The question whether to overrule *Roe* and *Casey* is squarely before this Court. The question presented is "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. i. Respondents agree that that question recites *Roe* and *Casey*'s "central" holding. *E.g.*, Resp.Br.14. All of the State's merits arguments, including on overruling, answer that question. Pet.Br.11-48. These points distinguish the cases cited by respondents. *Visa Inc. v. Osborn*, 137 S. Ct. 289, 289-90 (2016) (party asked Court to resolve one question and then after review was granted asked Court to resolve a different question); *Fry v. Pliler*, 551 U.S. 112, 120-21 (2007) (declining to resolve unpresented question on which Court did not grant review); *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 615-16 (2013) (Roberts, C.J., concurring) (respondent raised issue in footnoted sentence at merits stage).

Answering the question presented, moreover, requires identifying the constitutional standard that applies to abortion restrictions, which "fairly include[s]" the question whether *Roe* and *Casey* align with that standard and (if they do not) whether they

should be overruled. S. Ct. R. 14.1(a); *see Hubbard v. United States*, 514 U.S. 695, 715 (1995) (overruling where question presented did not mention overruling, 513 U.S. 959 (1994)); *id.* at 713 n.12 (plurality opinion) (invoking "fairly included" rule). And the petition raised the prospect of overruling precedent, Pet.5 n.1, asked this Court to clarify tensions in its precedents, Pet.5-6, and argued that *Roe* and *Casey* are flawed, Pet.14-20—all arguments the State still advances.

Respondents do not dispute any of those points. Far from it: they maintain that the only way to rule for the State on the question presented is to overrule *Roe* and *Casey*'s "central" holding—that States "categorically" "cannot prohibit abortion until viability"—and that doing that "would be no different than overruling *Casey* and *Roe* entirely." Resp.Br.9, 14, 43; *see* BIO 15-17. That concedes that the question presented fairly includes the question whether to overrule *Roe* and *Casey*. The question is "properly before this Court." Resp.Br.11.

Respondents' effort to narrow this case—or avoid any decision—shows what they know: that *Roe* and *Casey* are deeply flawed and that those flaws have finally been presented to the one tribunal that can do something about them. This Court has before it the strongest arguments for and against overruling—from the parties, the United States, and 130 *amicus* briefs exploring every relevant issue. The fundamental question at issue here will keep returning until this Court addresses it. This is the case to confront—and reject—*Roe* and *Casey*.

II. This Court Should Overrule Its Abortion Precedents And Reject A Viability Rule.

Respondents do not contest significant faults in *Roe* and *Casey* or in a viability rule itself. *Supra* Part I. The arguments they make—on *Casey*'s reasoning, factual developments, reliance interests, and alternative legal standards—confirm the overwhelming case for overruling *Roe* and *Casey*.

A. This Court's Abortion Precedents And A Viability Rule Are Egregiously Wrong.

Roe, *Casey*, and a viability rule have no constitutional basis. Pet.Br.12-13, 14-18, 39-41. Respondents do not contend that a right to abortion has a basis in text or structure. The arguments they offer instead are unavailing. Resp.Br.17-22; *cf.* U.S.Br.21-28.

First, respondents argue that a right to abortion "logically follows" from due-process precedents protecting "physical autonomy," "bodily integrity," and a right to make "personal decisions." Resp.Br.17-19. This is *Casey*'s reasoning repeated. The State has explained why it is gravely wrong. Pet.Br.15-17.

Outside the abortion context, this Court extends special due-process protection to interests, "careful[ly] descri[bed]," that are "objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted). That approach anchors substantive due process to the time-tested insight of the American people, rather than leaving it to be molded by the "policy preferences" of an unelected judiciary. *Id.* at 720. A right to abortion has no basis in history or tradition. Pet.Br.12-13, 15-16. And "abstract concepts of personal autonomy" cannot

establish a right to abortion. *Glucksberg*, 521 U.S. at 725. Respondents' answer to these settled due-process principles is to disregard them. *E.g.*, Resp.Br.18-19 (claiming that "general principles grounded in the Constitution" are enough). Respondents just echo *Casey*. Resp.Br.17-22. Similarly, although respondents claim that a viability line is "principled," for support they only quote *Casey*, Resp.Br.21-22, without addressing its failure to justify that line, Pet.Br.40-41.

The weight of this Court's substantive-due-process caselaw is thus solidly against *Roe* and *Casey*. And that point is fortified by another that shows how dramatically those cases departed from precedent: this Court has never endorsed another privacy or liberty interest that involves purposefully ending a human life. Pet.Br.16-17. This point defeats respondents' reliance on contraception cases. Resp.Br.19; *see Carey v. Population Services International*, 431 U.S. 678, 690 (1977) ("Nor is the interest in protecting potential life implicated in state regulation of contraceptives."). And it dooms the United States' suggestion that overruling *Roe* and *Casey* would "threaten" certain liberty and privacy rights. U.S.Br.25-26. None of the rights cited by the United States involves ending a human life—and all find grounding in text or history. Pet.Br.13, 15-17. If "personal autonomy" does not establish a fundamental right to purposefully end one's own life, *Glucksberg*, 521 U.S. at 727-28, it does not establish a fundamental right to purposefully end another's life.

Second, respondents claim that history "provide[s] ample support for the conclusion that 'liberty' encompasses" the right "to end a pre-viability pregnancy." Resp.Br.20-21. That claim is not credible. Respondents contend that "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." Resp.Br.21. But respondents do not dispute that by the Fourteenth Amendment's ratification in 1868, most States restricted abortion—and did so broadly and without regard to viability. Pet.Br.12-13, 39-40. This tradition of States restricting abortion defeats any claim of a deeply rooted right to abortion. Pet.Br.12-13. Respondents are wrong even on the historical claim they make: The common law had long condemned and restricted abortion. Dellapenna Br.7-12, 26-30; *Memphis Center for Reproductive Health v. Slatery*, — F.4th —, 2021 WL 4127691, at *24-29 (6th Cir. Sept. 10, 2021) (Thapar, J., concurring in judgment in part and dissenting in part). Even if the common law's restrictions had been more lenient than what States later adopted, that would not show a *right* to abortion. Finally, the common law's focus on quickening—which *Roe* placed well before viability—confirms that a viability line has no basis in history. Pet.Br.39-40.

Respondents add that if restrictions in effect at ratification "were a basis for overruling precedent," then some notable decisions "would have to go." Resp.Br.20. But contemporaneous laws matter when the question is whether an *un*enumerated right is so deeply rooted in history to warrant special protection under the Due Process Clause. Each decision that respondents cite has a textual basis outside the Due Process Clause—the Equal Protection Clause, the Second Amendment, the Sixth Amendment—so each has constitutional footing regardless of ratification-era statutes.

Respondents also suggest that *Roe* and *Casey* have a heightened claim to *stare decisis* effect. Resp.Br.9-

10, 15-17. To the extent that respondents argue that *Casey* is "precedent" on whether *Roe* should be retained, Resp.Br.9-10, 16, that claim fails. *Casey*'s *stare decisis* analysis is gravely wrong, unworkable, and anomalous—as the State explained, *e.g.*, Pet.Br.26-27, 30-31, 34-36, and as respondents fail to rebut. Beyond that, two cases that show so little regard for precedent warrant less—not more—precedential respect. *Roe* departed sharply from precedent to reach its holding. Pet.Br.15-17. And far from respecting *Roe*, *Casey* discarded *Roe*'s trimester framework, replaced its legal standard, recast its reasoning, and overruled two of the Court's major post-*Roe* abortion decisions—all in a fractured decision that saw most Members of this Court refuse to say that *Roe* was correctly decided. What *Casey* did hold onto was *Roe*'s most dramatic departure from precedent—its holding that the Constitution protects a right to abortion. Two egregiously wrong decisions that dispense with so much precedent do not have a stronger *stare decisis* claim: they have a singularly weak claim.

Last, respondents say that applying rational-basis review to abortion laws treats abortion as no more important than "ordinary economic and social matters." Resp.Br.21. But rational-basis review applies to innumerable matters that are central to dignity and autonomy. *E.g.*, *Kimel v. Florida Board of Regents*, 528 U.S. 62, 83 (2000) (age discrimination); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367-68 (2001) (accommodation of disabilities). Not treating abortion as a fundamental right treats it as the Constitution does most important issues: for the people to decide. *E.g.*, *Glucksberg*, 521 U.S. at 728-35 (assisted suicide); *San Antonio Independent School*

District v. Rodriguez, 411 U.S. 1, 33-35, 55 (1973) (education).

B. Factual Progress Has Overtaken This Court's Abortion Precedents And A Viability Rule.

Respondents devote nearly a third of their argument to urging that "no factual changes support abandoning the viability line." Resp.Br.23 (capitalization omitted); *see* Resp.Br.23-36; *cf.* U.S.Br.14-18. Respondents are wrong, but their factual account would not help them even if it were true. Overruling precedent does not require any change in facts. "A case may be egregiously wrong when decided, or may be unmasked as egregiously wrong based on later legal or factual understandings or developments, or both." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part) (citations omitted). *Roe* and *Casey* were egregiously wrong when decided. Pet.Br.12-13, 14-18, 39-41. Legal developments—none of which respondents dispute—cement both decisions as outliers that defy the bulk of this Court's precedents. Pet.Br.28. And, as the State explained, factual developments further show *Roe* and *Casey* to be all the more egregious. Pet.Br.29-31. Respondents' factual account asks this Court to turn away from decades of progress and to disregard that *Roe* and *Casey* were gravely wrong to take such an important issue from the people.

Viability as a "Meaningful Line." In defending viability as a "meaningful line," Resp.Br.24 (capitalization omitted), respondents ignore the central reason why viability is arbitrary: it has no constitutional or principled basis. Pet.Br.39-41. And other lines—such as 15 weeks' gestation—would be at least as

clear and "meaningful." Respondents merely echo *Casey*'s circular defense of viability and say that viability remains around the same point identified in *Casey*. Resp.Br.24-25. At best that means that viability is as arbitrary today as it was in 1973 and 1992. And factual changes (ignored by respondents) underscore its arbitrariness: a viability line makes factors that are constitutionally irrelevant—such as the state of medicine—constitutionally decisive. Pet.Br.43.

Women's Health. Through the democratic process, States regularly and without controversy protect the lives and health of their citizens. The Act here, for example, is only "one element of a broad scope of laws enacted by the Mississippi Legislature to further the State's interests in improving the health and welfare of women and children." Gipson Br.13; *see id.* at 6-13 (discussing family-planning services, prenatal healthcare, adoption and foster care, and financial support). Yet on abortion—which unites state interests in protecting women's health and unborn life—this Court's precedents uniquely limit the States and cut off the democratic process. In addressing women's health, Resp.Br.25-31, respondents urge this Court to keep this issue from that process—yet their arguments confirm that this debated policy issue should be returned to the people.

Respondents say that the Court in *Roe* and *Casey* knew that abortion's risks increase as pregnancy progresses. Resp.Br.26-27. But this Court in 1973 and 1992 could not have known the powerful recent evidence from which a State can conclude that abortion presents serious health risks. *E.g.*, AAPLOG Br.7-29 (detailing risks based on evidence largely from the past 20 years); D. Ct. Dkt. 85-6 at 3 (summary-judgment record) (risk of death spikes 38% "for each

additional week of gestation"). Respondents dispute that abortion presents "health harms," Resp.Br.27-28, but there is powerful evidence to the contrary. *Compare*, *e.g.*, Resp.Br.27 n.6 (disclaiming mental-health risks), *with* AAPLOG Br.26 (studies show that "women who had an abortion had an 81% increased risk of mental-health problems"); *see generally* AAPLOG Br.7-29. These disputed questions of health are for legislatures.

Respondents finally argue that "permitting states to prohibit abortion before viability would harm the health of people who need to end a pregnancy." Resp.Br.28; *see* Resp.Br.28-31. But this case concerns *elective* abortions. Pet. i. The Act has a medical-emergency exception. App.70a. And respondents' claims on the comparative risks of abortion and childbirth, Resp.Br.28, are vigorously contested, *see*, *e.g.*, Elliot Institute Br.12-20. Again, "legislatures are better suited to make the necessary factual judgments in this area." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). Respondents also speculate that some women would be unable to access abortion "before 15 weeks or before any particular pre-viability point." Resp.Br.29; *see* Resp.Br.29-31. But over 90% of abortions occur by 15 weeks' gestation already. Pet.Br.47-48. And if States are permitted to adopt pre-viability restrictions, those restrictions will encourage changes in reproductive and other planning.

Fetal Development. As respondents do with women's health, so too with fetal development: they urge this Court to keep the people on the sidelines as knowledge of unborn life marches forward. In noting that medicine and science have progressed, the State pointed out that knowledge of "when the unborn are

sensitive to pain" has advanced. Pet.Br.30 (internal quotation marks omitted). Respondents claim that the State's "factual claims about fetal development, including fetal pain, have been brought to the Court many times." Resp.Br.31; *see* Resp.Br.31-32. Yet the 15-year-old brief that respondents cite barely addresses fetal pain. And respondents' remaining, decades-old material could not have accounted for recent, significant advances in knowledge on fetal pain. Condic Br.10-26. States should be able to account for those advances.

Respondents invoke abortion advocates to claim a "medical consensus" against the view that the unborn can experience pain before viability. Resp.Br.32-33. Numerous medical authorities disagree. *E.g.*, App.79a-100a (reviewing authorities). The unborn develop "neural circuitry capable of detecting and responding to pain" by 10-12 weeks' gestation. App.76a ¶ 3. And recent research has found that "the cortex is not required for either consciousness or suffering." App.87a ¶ 26 (emphases omitted); *cf.* Condic Br.15-16 (noting changed view of prominent neuroscientist who contributed to fetal-pain report on which respondents rely, Resp.Br.33).

This Court need not resolve who is right on fetal pain. It need only recognize that knowledge changes and that the Constitution does not bind States to a long-outdated view of the facts. In *Roe*, the appellants told this Court that in early pregnancy, "embryonic development has scarcely begun," Appellants Br.20, 1971 WL 128054, and this Court in turn concluded that "the fetus, at most, represents only the potentiality of life," *Roe v. Wade*, 410 U.S. 113, 162 (1973). This Court has since recognized that "a fetus is a living organism while within the womb, whether or not

it is viable outside the womb." *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007). The people should be able to account for decades of advancements in knowledge. *See* American College of Pediatricians Br.10-25.

Last, respondents say that "assertions about fetal development and fetal pain are, in truth, rooted in philosophic arguments that abortion is 'inhumane' and can be banned entirely." Resp.Br.34. But the view that scientific evidence on fetal development supports restricting abortion has far more basis than *Roe* and *Casey*'s own philosophic "judgment that viability is the point at which the state interest becomes compelling." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 795 n.4 (1986) (White, J., dissenting). And saying that this is a matter of differing philosophies admits it is one for legislatures.

Policy Changes. In addressing policy changes, Resp.Br.34-36, respondents fight a simple truth: It is not the same world it was in 1973 and 1992.

The State explained that concerns driving *Roe* and *Casey* have been allayed by changes in options on childbearing and by contraceptive advances. Pet.Br.29-30. Respondents call this "paternalistic." Resp.Br.34. But it was *Roe* that expressed concern that unwanted children could "force upon" women "a distressful life and future." 410 U.S. at 153. And it was *Casey* that suggested that by serving as a backup to contraception, abortion enabled "women to participate equally in the economic and social life of the Nation" by facilitating "their ability to control their reproductive lives." 505 U.S. at 856. In asking whether *stare decisis* calls for adhering to a precedent, this Court looks to the reasons the precedent itself offered.

Citizens United v. FEC, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring) ("*Stare decisis* is a doctrine of preservation, not transformation."). Rather than confront those reasons, respondents say that the State "misunderstands the nature of the right at issue, which is the ability to decide if, when, and how many children to have." Resp.Br.34; *see* Resp.Br.34-35, 40. That boundless understanding of the right at issue defies this Court's precedent, *supra* Part II-A, and embraces the absolute right to abortion that *Roe* itself rejected, 410 U.S. at 153-54.

Respondents say that contraception is not "universally accessible or affordable" or "fail-safe." Resp.Br.35. But the point is that contraceptive advances "undercut" any claim that a constitutional right to abortion is necessary for women to "control their reproductive lives" and participate fully in economic and social life. Pet.Br.30. Respondents do not dispute that by 2013 "most women had no out-of-pocket costs for their contraception" or that "failure rates for all major contraceptive categories have declined since *Casey*," "with some methods now approaching zero." Pet.Br.29-30. The United States claims that failure rates reach 10%—but to do that it must include notoriously ineffective methods (like withdrawal) with other methods. *See* U.S.Br.16-17.

Respondents urge that "many indicators of gender equality continue to lag." Resp.Br.35. But they do not dispute (for example) that more women than men now enroll in law school and medical school, that women's college enrollment has continued to climb, or that record numbers of women serve in state legislatures and Congress. 240 Women Scholars & Professionals Br.32-35; Women Legislators Br.13-16. Nor do respondents contest that laws enacted since *Roe*

"facilitate the ability of women to pursue both career success and a rich family life." Pet.Br.29; *see* Pet.Br.34-35. Respondents fail even to mention the universality after *Casey* of safe-haven laws. Pet.Br.29. Yet those laws—along with adoption more broadly—alleviate what respondents say is the main reason for abortion: that a woman "cannot parent another child at the time." D. Ct. Dkt. 7 at 4 n.3 (TRO brief). And no sound evidence shows that women's advancement depends on abortion. *E.g.*, 240 Women Scholars & Professionals Br.17-35. If anything, the evidence suggests a correlation between abortion and both child poverty and declining happiness. *See id.* at 35-41.

C. Reliance Interests Do Not Support Retaining This Court's Abortion Precedents Or Embracing A Viability Rule.

Reliance interests do not support retaining *Roe* and *Casey*. Pet.Br.31-36. A judicially imposed right to abortion does not raise any traditional form of reliance—as respondents do not dispute. Pet.Br.34; *see* Ethics and Public Policy Center Br.10-11, 14-15. The reliance arguments that respondents make are unavailing. Resp.Br.36-41; *cf.* U.S.Br.18-19.

Respondents suggest that a right to abortion has "become embedded" in our "national culture" and that *Roe* and *Casey*'s "antiquity" supports retaining them. Resp.Br.36. But becoming "embedded" in our national culture at least means becoming "wide[ly] accept[ed]," *Dickerson v. United States*, 530 U.S. 428, 443 (2000)—something that *Roe* and *Casey* have never achieved, Pet.Br.23-24. Abortion—as both a jurisprudential and policy matter—is as divisive and unsettled as ever. Pet.Br.23-24, 31-33. Here the passage of time

("antiquity") shows the impossibility of a judicially managed right to abortion. *See* Pet.Br.22, 32.

Respondents also claim that it "is even truer today" (Resp.Br.37) that people have organized their lives "in reliance on the availability of abortion in the event that contraception should fail." *Casey*, 505 U.S. at 856. Respondents do not explain how that can be "truer today" when contraception is more effective and accessible than when *Casey* was decided. Pet.Br.29-30. And although unplanned pregnancies persist, Resp.Br.37, a reason for that is abortion's availability. 240 Women Scholars & Professionals Br.35-37. Contraceptive advances and the ubiquity of safe-haven laws undercut respondents' claims about the benefits of obtaining an abortion and the burdens of being denied one. Resp.Br.38-40. And powerful evidence rebuts respondents' assessment of those benefits and burdens. 240 Women Scholars & Professionals Br.17-41.

Respondents add that "the law has increasingly recognized that women's ability to control if, when, and how many children they have is critical to gender equality." Resp.Br.40. But the cases they cite do not rest on, require, or even involve a right to abortion, Resp.Br.40-41—which confirms that enforcing equality does not require such a right either. *Cf.* Pet.Br.17-18 (explaining that—as respondents do not contest—equal-protection principles cannot establish a right to abortion). Women's extensive political participation and share of the population ensure that they strongly influence public policy—and would do so without a judicially managed right to abortion. Women Legislators Br.19-20.

Last, respondents claim that women have advanced only "incremental[ly]" under *Roe*, yet insist that a constitutional right to abortion is "critical" to women's advancement and that its absence would "shatter[ ]" women. Resp.Br.40-41. What a demeaning view of women. It is false, but not new. *Roe*'s author claimed that overruling *Roe* would "cast[ ] into darkness the hopes and visions" of "millions of women." *Webster v. Reproductive Health Services*, 492 U.S. 490, 557 (1989) (Blackmun, J., concurring in part and dissenting in part). That claim, picked up by respondents, boils down to the view that millions of women have a meaningful life only because 50 years ago seven men in *Roe* saved them from despair—and that women's success comes at the cost of ending innumerable human lives. That is the debased view that *Roe* and *Casey* have produced. It is time to get rid of them.

D. At Minimum This Court Should Reject A Viability Rule.

Respondents do not dispute that the Act satisfies rational-basis review or that rational-basis review would provide effective "tools" for the Judiciary to "manage" legal challenges to abortion restrictions. Resp.Br.50; *see* Pet.Br.36-38. Respondents instead attack two alternatives to rational-basis review discussed in the State's brief. Resp.Br.41-50; *cf.* U.S.Br.29-32. The best way to resolve this case is, to be sure, to uphold the Act under rational-basis review. Pet.Br.45, 48. That standard is familiar to courts, easy to apply, and predictable. *E.g.*, *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1781-82 (2019) (*per curiam*) (upholding law under that standard). Short of adopting rational-

basis review, however, the alternatives identified by the State are superior to a baseless, damaging, and arbitrary viability rule.

Respondents contend that holding that the Act satisfies any standard, but without specifying a standard, would leave litigants and the Judiciary "at sea." Resp.Br.43; *see* Resp.Br.43-45. But that is already so with the undue-burden standard. Upholding the Act as satisfying any level of scrutiny (including strict scrutiny) would not provide the clarity that rational-basis review would, but it would recognize that the State's interests are compelling at least by 15 weeks' gestation. *Contra Roe*, 410 U.S. at 163-64. Respondents add that if this Court holds that the State's interests are strong enough to support a prohibition at 15 weeks' gestation, then there is no way to say that the States' interests would not be strong enough at earlier stages. Resp.Br.43-45. But such line-drawing problems are already built into current caselaw. And saying that a State's interest becomes compelling at 15 weeks' gestation is just as plausible as saying that it becomes compelling at viability. Pet.Br.43-44. Finally, respondents argue that the Act does not satisfy strict scrutiny. Resp.Br.45. But respondents disregard the magnitude of the State's interests and the Act's focused scope. Pet.Br.46. Protecting unborn life and women's health are as compelling as "preserving public confidence in the integrity of the judiciary"—an interest this Court has found compelling. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015). By "restrict[ing]" only "a narrow slice of" abortions—the small number that occur in the one week after 15 weeks' gestation and do not fall within the Act's life or health exceptions—the State has furthered its interests in a narrowly tailored way. *Id.* at 452.

In addressing the undue-burden standard, Resp.Br.47-50, respondents do not dispute that the Act would limit the availability of abortions in Mississippi by only a week or that a small fraction of abortions (at most 4.5%) occur in that week. Pet.Br.47-48. Respondents contend that upholding the Act under the undue-burden standard would supply "no limiting principle." Resp.Br.49. But that is an objection to the undue-burden standard itself. Respondents also claim that without a viability line this Court would have to "draw a new line in a purely legislative manner." Resp.Br.47. But *all* line-drawing here is legislative—which is why the Judiciary should get out of the line-drawing business on abortion.

Respondents also fault the State's application of this Court's large-fraction test, calling the test a "rights-by-numbers test" that "is at odds with the recognition of constitutional rights in general." Resp.Br.47, 49. That is a powerful argument against the test this Court applies to facial challenges to abortion restrictions. But unless this Court rejects that test and the undue-burden standard, those standards apply—and 4.5% is not a large fraction. The Act leaves an ample window for each woman in that small group to obtain an abortion earlier. If the United States is right that the Act must fall because the fraction is 100% (and would be 100% in every case), U.S.Br.30-31, that is another reason to reject *Casey*. Pet.Br.48.

* * *

As precedent, *Roe* and *Casey* may have "fiat value"—force because of the "high authority" that issued them. Robert H. Jackson, Decisional Law and *Stare Decisis*, 30 A.B.A.J. 334, 334 (1944). But they

have no "intrinsic value based on individual quality." *Ibid.* That is why respondents' defense of a constitutional right to abortion must rely not on what the Constitution means but on what *Casey* said. This feature animates respondents' final tactic for pushing this Court to hold onto *Roe* and *Casey*: claims of "fallout," "chaos," "upheaval," and more—if this Court returns this issue to the people. Resp.Br.45, 46.

Those claims reflect the dark, zero-sum mindset that this Court's abortion jurisprudence has encouraged. *Cf.* Glendon/Snead Br.27-29. Respondents' dim view of the American people is not the one the Constitution embraces. On hard issue after hard issue, the democratic process and the people make this country work. The Constitution—established by and for the people—entrusts the people to find solutions on this important issue that "affect[s] everyone." Women Legislators Br.4; *see* Christian Legal Society Br.4-11. Respondents' claims also reflect the warped view of the judicial role that *Roe* and *Casey* have generated: the idea that it is the courts' job to superintend—and take sides on—a debated matter of policy on which the Constitution is silent. The Constitution did not establish a Judiciary that would deliver on such "sinister expectations"; it established a Judiciary that would uphold what "the people ... declared in the Constitution." The Federalist No. 78 (Hamilton).

Respondents proclaim that there "are no half-measures here." Resp.Br.50. It is true that the Judiciary cannot provide a workable half measure—it cannot produce an enduring compromise. But the people can. When this Court returns this issue to the people, the people can debate, adapt, and find workable solutions. It will be hard for the people too, but under the

Constitution the task is theirs—and the Court should return it to them now.

CONCLUSION

This Court should overrule *Roe* and *Casey*, uphold the Act, and reverse the judgment below.

Respectfully submitted.

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