No. 19-1392

IN THE

Supreme Court of the United States

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

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,

Respondents.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

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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INTRODUCTION

On a sound understanding of the Constitution, the answer to the question presented in this case is clear and the path to that answer is straight. Under the Constitution, may a State prohibit elective abortions before viability? Yes. Why? Because nothing in constitutional text, structure, history, or tradition supports a right to abortion. A prohibition on elective abortions is therefore constitutional if it satisfies the rational-basis review that applies to all laws.

This case is made hard only because *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), hold that the Constitution protects a right to abortion. Under those cases, a state law restricting abortion may not pose an "undue burden" on obtaining an abortion before viability. 505 U.S. at 877 (plurality opinion). And "[b]efore viability," this Court has said, a State may not maintain "a prohibition of abortion," *id.* at 846—despite the State's "important interests" in protecting unborn life and women's health, *Roe*, 410 U.S. at 154. Both courts below understood *Roe* and *Casey* to require them to strike down Mississippi's Gestational Age Act because it prohibits (with exceptions for life and health) abortion after 15 weeks' gestation and thus before viability.

Roe and *Casey* are thus at odds with the straightforward, constitutionally grounded answer to the question presented. So the question becomes whether this Court should overrule those decisions. It should. The *stare decisis* case for overruling *Roe* and *Casey* is overwhelming.

Roe and *Casey* are egregiously wrong. The conclusion that abortion is a constitutional right has no

basis in text, structure, history, or tradition. *Roe* based a right to abortion on decisions protecting aspects of privacy under the Due Process Clause. 410 U.S. at 152-53. But *Roe* broke from prior cases by invoking a general "right of privacy" unmoored from the Constitution. Notably, *Casey* did not embrace *Roe*'s reasoning. *See* 505 U.S. at 846-53. And *Casey*'s defense of *Roe*'s result—based on the liberty this Court has afforded to certain "personal decisions," *id.* at 851, 853—fails. *Casey* repeats *Roe*'s flaws by failing to tie a right to abortion to anything in the Constitution. And abortion is fundamentally different from any right this Court has ever endorsed. No other right involves, as abortion does, "the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). So *Roe* broke from prior cases, *Casey* failed to rehabilitate it, and both recognize a right that has no basis in the Constitution.

Roe and *Casey* have proven hopelessly unworkable. Heightened scrutiny of abortion restrictions has not promoted administrability or predictability. And heightened scrutiny of abortion laws can never serve those aims. Because the Constitution does not protect a right to abortion, it provides no guidance to courts on how to account for the interests in this context. A court cannot "objectively ... weigh[ ]" or "meaningful[ly] ... compare" the "imponderable values" involved. *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in judgment). Heightened scrutiny—be it the undue-burden standard or another heightened standard—is also "a completely unworkable method of accommodating" the state interests "in the abortion context." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 454 (1983) (O'Connor, J.,

dissenting). While crediting States with important interests, *Roe* and *Casey* impede States from advancing them. Before viability the undue-burden standard has been understood to block a State from prohibiting abortion to assert those interests. And that standard forces a State to make an uphill climb even to adopt regulations advancing its interests. That is flawed. If a State's interests are "compelling" enough after viability to support a prohibition, they are "equally compelling before" then. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting).

Roe and *Casey* have inflicted significant damage. Those cases "disserve[ ] principles of democratic self-governance," *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547 (1985), by "plac[ing]" one of the most important, contested policy issues of our time largely "outside the arena of public debate and legislative action," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Far from bringing peace to the controversy over abortion, *Roe* and *Casey* have made matters worse. *See*, *e.g.*, Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N.C. L. Rev. 375, 385-86 (1985) ("Heavy-handed judicial intervention [in *Roe*] was difficult to justify and appears to have provoked, not resolved, conflict."). Abortion jurisprudence has placed this Court at the center of a controversy that it can never resolve. And *Roe* and *Casey* have produced a jurisprudence that is at war with the demand that this Court act based on neutral principles. Abortion caselaw is pervaded by special rules—the undue-burden standard, the large-fraction test, and more—that feed the perception that "when it comes to abortion" this Court does not "evenhandedly apply[ ]" the law.

Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting). *Casey* retained *Roe*'s central holding largely on the view that overruling it would hurt this Court's legitimacy. 505 U.S. at 864-69. The last 30 years show the opposite. *Roe* and *Casey* are unprincipled decisions that have damaged the democratic process, poisoned our national discourse, plagued the law—and, in doing so, harmed this Court.

The march of progress has left *Roe* and *Casey* behind. Those cases maintained that an unwanted pregnancy could doom women to "a distressful life and future," *Roe*, 410 U.S. at 153, that abortion is a needed complement to contraception, *Casey*, 505 U.S. at 856, and that viability marked a sensible point for when state interests in unborn life become compelling, *id.* at 860. Factual developments undercut those assessments. Today, adoption is accessible and on a wide scale women attain both professional success and a rich family life, contraceptives are more available and effective, and scientific advances show that an unborn child has taken on the human form and features months before viability. States should be able to act on those developments. But *Roe* and *Casey* shackle States to a view of the facts that is decades out of date.

Reliance interests do not support retaining *Roe* and *Casey*. Almost all of this Court's abortion cases have been fractured, with many Justices questioning *Roe*'s central premises. The people have long been "on notice" of "misgivings" on this Court about *Roe* and *Casey*. *Janus v. AFSCME*, 138 S. Ct. 2448, 2484 (2018). And where, as with the undue-burden standard, precedents "do[ ] not provide a clear or easily applicable standard," "arguments for reliance based on [their] clarity are misplaced." *Ibid.* (internal quotation marks omitted). That abortion has remained a

wholly unsettled policy issue also undermines reliance on *Roe* and *Casey*. *Casey* maintained that societal reliance interests favored retaining *Roe*. 505 U.S. at 855-56. Developments since *Roe* tell a different story. Innumerable women and mothers have reached the highest echelons of economic and social life independent of the right endorsed in those cases. Sweeping policy advances now promote women's full pursuit of both career and family. And many States have already accounted for *Roe* and *Casey*'s overruling.

Overruling *Roe* and *Casey* makes resolution of this case straightforward. The Mississippi law here prohibits abortions after 15 weeks' gestation, with exceptions for medical emergency or severe fetal abnormality. That law rationally furthers valid interests in protecting unborn life, women's health, and the medical profession's integrity. It is therefore constitutional. If this Court does not overrule *Roe* and *Casey*'s heightened-scrutiny regime outright, it should at minimum hold that there is no pre-viability barrier to state prohibitions on abortion and uphold Mississippi's law. The court of appeals' judgment affirming a permanent injunction of the State's law should be reversed.

OPINIONS BELOW

The court of appeals' opinion (Petition Appendix (App.) 1a-37a) is reported at 945 F.3d 265. The court of appeals' order denying rehearing en banc (App.38a-39a) is unreported. The district court's decision granting summary judgment to respondents (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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Fourteenth Amendment's Due Process Clause provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Mississippi's Gestational Age Act, Miss. Code Ann. § 41-41-191, is reproduced at App.65a-74a.

STATEMENT

1. Enacted in 2018, Mississippi's Gestational Age Act prohibits abortion after 15 weeks' gestation, with exceptions for medical emergency or severe fetal abnormality. App.70a; *see* App.65a-74a.

The Act sets forth several findings. To start, the Legislature found that the United States is one of few countries that permit elective abortions after 20 weeks' gestation. App.65a. After 12 weeks' gestation, 75% of all nations "do not permit abortion" "except (in

most instances) to save the life and to preserve the physical health of the mother." *Ibid.*

Next, the Legislature made findings about fetal development. App.65a-66a. At 5-6 weeks' gestation, "an unborn human being's heart begins beating." App.65a. At about 8 weeks' gestation, he or she "begins to move about in the womb." *Ibid.* At 9 weeks, "all basic physiological functions are present," as are teeth, eyes, and external genitalia. App.66a. At 10 weeks, "vital organs begin to function" and "[h]air, fingernails, and toenails ... begin to form." *Ibid.* At 11 weeks, an unborn human being's diaphragm is developing, "and he or she may even hiccup." *Ibid.* At 12 weeks' gestation, he or she "can open and close ... fingers," "starts to make sucking motions," and "senses stimulation from the world outside the womb." *Ibid.* He or she "has taken on the human form in all relevant respects." *Ibid.* (internal quotation marks omitted).

The Legislature then identified several state interests concerning abortion. First, the State "'has an interest in protecting the life of the unborn.'" App.66a (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion)). Second, the State has interests in protecting the medical profession. App.66a-67a. Most abortion procedures performed after 15 weeks' gestation, the Legislature found, are dilation-and-evacuation procedures that "involve the use of surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb." App.66a. The Legislature found that this "is a barbaric practice" when performed for nontherapeutic reasons and is "demeaning to the medical profession." App.66a-67a. And third, the State has "legitimate

interests from the outset of pregnancy in protecting the health of women." App.68a. Dilation-and-evacuation abortions risk "[m]edical complications." App.67a. These include: "pelvic infection; incomplete abortions (retained tissue); blood clots; heavy bleeding or hemorrhage; laceration, tear, or other injury to the cervix; puncture, laceration, tear, or other injury to the uterus; injury to the bowel or bladder; depression; anxiety; substance abuse; and other emotional or psychological problems." *Ibid.* Abortion also carries "significant physical and psychological risks" to women that "increase with gestational age." *Ibid.* After 8 weeks' gestation, abortion's risks "escalate exponentially." *Ibid.* In abortions performed after 15 weeks' gestation, "there is a higher risk of requiring a hysterectomy, other reparative surgery, or blood transfusion." App.67a-68a.

In light of those findings, the Act provides: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion" when "the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." App.70a. The Act also generally requires (with the same exceptions) a physician to "determin[e]" "probable gestational age" before any abortion and to file a report (omitting a patient's identifying information) with the State Department of Health addressing abortions performed after 15 weeks' gestation. App.70a-71a. The Act permits sanctions, civil penalties, and additional enforcement. App.71a-72a.

2. Respondents Jackson Women's Health Organization and its medical director filed this lawsuit challenging the Act's legality. App.63a. They allege that

they provide abortions up to 16 weeks' gestation and that the organization is the State's sole abortion clinic. D. Ct. Dkt. 23 at 7 ¶ 16, 20 ¶ 51.

The district court issued a TRO blocking the Act. App.62a-64a. It limited discovery to "whether the 15-week mark is before or after viability." App.60a. The court reasoned that the Act functions as a prohibition on abortions after 15 weeks' gestation, that under *Roe* and *Casey* a State "cannot 'support a prohibition of abortion'" before viability regardless of "any interests" the State may have, and that the Act's lawfulness thus "hinges on a single question: whether the 15-week mark is before or after viability." App.59a, 60a (quoting *Casey*, 505 U.S. at 846). The court denied the State discovery on matters such as pre-viability fetal pain. App.60a-61a; App.56a-57a; *see* App.75a-100a (declaration provided as offer of proof on fetal pain).

After discovery, the court granted summary judgment to respondents and permanently enjoined the Act. App.40a-55a. The court reasoned: Supreme Court precedent establishes that "States may not ban abortions prior to viability." App.45a; *see* App.42a-44a. The Act is a "ban" on abortions at or before 15 weeks' gestation. App.55a; *see* App.48a. And 15 weeks' gestation "is prior to viability." App.45a; *see* App.44a-45a, 53a. So "the Act is unlawful." App.45a. The court declined to assess whether the State's interests could justify the Act. App.47a-48a. The court also stated: "the Mississippi Legislature's professed interest in 'women's health' is pure gaslighting" (App.46a n.22); the Act "is closer to the old Mississippi—the Mississippi bent on controlling women and minorities" (*ibid.*); and "[t]he Mississippi Legislature has a history of disregarding the constitutional rights of its citizens" (App.50a n.40).

3. The Fifth Circuit affirmed. App.1a-37a. As relevant here, the court of appeals explained that under *Casey* "no state interest can justify a pre-viability abortion ban," that 15 weeks' gestation is before viability, and that by prohibiting abortion after 15 weeks' gestation the Act "undisputedly prevents the abortions of some non-viable fetuses." App.8a, 11a-12a. The court rejected the argument that the district court should have weighed the State's interests in assessing the Act's validity. App.9a-13a. Because the Act "is a prohibition on pre-viability abortion," App.12a, the court explained, it is unconstitutional under Supreme Court precedent, App.13a. Judge Ho concurred in the judgment. He stated: "Nothing in the text or original understanding of the Constitution establishes a right to an abortion." App.20a. But he believed that "[a] good faith reading" of Supreme Court precedent required affirmance. *Ibid.*; *see* App.22a-29a, 37a. He added, however, that the district court's opinion "displays an alarming disrespect for ... millions of Americans." App.21a. The Fifth Circuit denied rehearing. App.38a-39a.

4. This Court granted certiorari, limited to the first question presented by the State's petition: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. i; *see* JA60.

SUMMARY OF ARGUMENT

I. This Court should hold that a State may prohibit elective abortions where, as here, a rational basis supports doing so. The Constitution does not protect a right to abortion or limit States' authority to restrict it. On a sound view of the Constitution, a state law restricting abortion is valid if it satisfies the rational-basis review that applies to all laws. Rational-basis

review is not applied to abortion laws because this Court's precedents subject such laws to heightened scrutiny. This Court should overrule those precedents. Those precedents are grievously wrong, unworkable, damaging, and outmoded. Reliance interests do not support retaining them. This Court should conclude that the Act rests on a rational basis and so is constitutional. The Act reasonably furthers valid interests in protecting unborn life, women's health, and the medical profession's integrity. The judgment below should be reversed.

II. At minimum, this Court should reject viability as a barrier to prohibiting elective abortions and reject the judgment below. A viability rule has no constitutional basis, it harms state interests, and it produces other severe negative consequences.

ARGUMENT

I. This Court Should Hold That A Pre-Viability Prohibition On Elective Abortions Is Constitutional Where, As Here, A Rational Basis Supports The Prohibition.

The Constitution does not protect a right to abortion. It does not place limits—beyond those that apply to all laws—on state authority to restrict elective abortions. Under our Constitution, then, a State may prohibit elective abortions if a rational basis supports doing so. The question presented arises only because this Court's precedents hold that abortion restrictions are subject to heightened scrutiny. The lower courts could not do anything about that, but this Court can. This Court should overrule those precedents, uphold the Act, and reverse the judgment below.

A. The Constitution Does Not Protect A Right To Abortion Or Limit The States' Authority To Restrict Abortion.

The Constitution does not protect a right to abortion. The Constitution's text says nothing about abortion. Nothing in the Constitution's structure implies a right to abortion or prohibits States from restricting it. *See*, *e.g.*, U.S. Const. art. I, § 10 (denying States several powers but not the power to restrict abortion).

A right to abortion is not a "liberty" that enjoys substantive protection under the Due Process Clause. U.S. Const. amend. XIV, § 1. That Clause "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted). History does not show a deeply rooted right to abortion. Rather, history shows a long tradition—up to, at, and long after ratification of the Fourteenth Amendment—of States restricting abortion. At the end of 1849, 18 of the 30 States had statutes restricting abortion; by the end of 1864, 27 of the 36 States had them; and, at the end of 1868, the year the Fourteenth Amendment was ratified, 30 of the 37 States had such laws, as did 6 Territories. James S. Witherspoon, Reexamining *Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's J.L. 29, 33 (1985). At the Fourteenth Amendment's ratification, moreover, many States restricted abortion broadly (and without regard to viability). *See*, *e.g.*, *id.* at 34 (placing at 27 the number of States that, at the end of 1868, had statutes that "prohibited attempts to induce

abortion before quickening"). The public would have understood that, consistent with the Fourteenth Amendment, States could restrict abortion to pursue legitimate interests and could do so throughout pregnancy. And when *Roe v. Wade*, 410 U.S. 113 (1973), was decided, most States had "restrict[ed] ... abortions for at least a century." *Id.* at 174 (Rehnquist, J., dissenting); *see id.* at 175 n.1 (listing 36 States' or Territories' laws restricting abortion), 176 n.2 (listing 21 States whose abortion laws in 1868 were in effect 100 years later).

Nor can a right to abortion be justified under *Obergefell v. Hodges*, 576 U.S. 644 (2015), which recognized a fundamental right to marry. *Obergefell* applied the understanding that when a right "is fundamental as a matter of history and tradition"—like marriage—then a State must have "a sufficient justification for excluding the relevant class" from exercising it. *Id.* at 671. That understanding has no relevance here, where the question is not "who [may] exercise[ ]" a fundamental right to abortion but whether the Constitution protects such a right at all. *Ibid.*

Because nothing in text, structure, history, or tradition makes abortion a fundamental right or denies States the power to restrict it, that "power[ ]" is "reserved to the States." U.S. Const. amend X. Judicial review of abortion restrictions should be limited to the rational-basis review that applies to all laws. *Glucksberg*, 521 U.S. at 728. A state law restricting abortion is constitutional if it is "rationally related to legitimate government interests." *Ibid.*

B. This Court Should Overrule Its Precedents Subjecting Abortion Restrictions To Heightened Scrutiny.

This Court's abortion precedents depart from a sound understanding of the Constitution. In *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), this Court held that abortion is a right specially protected by the Fourteenth Amendment, and so laws restricting it must withstand heightened scrutiny. *Casey* described *Roe*'s "essential holding," which the lower courts thought dispositive here, to include a rule that, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." 505 U.S. at 846; *see* App.6a-13a; App.43a, 47a-48a.

This Court should overrule *Roe* and *Casey*. *Stare decisis* is "at its weakest" with constitutional rulings, *Knick v. Township of Scott*, 139 S. Ct. 2162, 2177 (2019), and the case for overruling here is overwhelming. *Roe* and *Casey* are egregiously wrong. They have proven hopelessly unworkable. They have inflicted profound damage. Decades of progress have overtaken them. Reliance interests do not support retaining them. And nothing but a full break from those cases can stem the harms they have caused.

1. This Court's Abortion Precedents Are Egregiously Wrong.

Roe and *Casey* are egregiously wrong. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (whether a precedent is "grievously or egregiously wrong" is a lead *stare decisis* consideration). As just explained, their

conclusion that abortion is a constitutional right triggering heightened scrutiny, *Casey*, 505 U.S. at 869-79 (plurality opinion); *Roe*, 410 U.S. at 155-56, has no basis in text or structure, and history and tradition show that abortion is not a right protected by the Due Process Clause. *Supra* Part I-A.

Roe grounded a right to abortion on a constitutional "right of privacy" recognized in cases preceding it. 410 U.S. at 152-53. This was profoundly erroneous. The Constitution does not protect a general "right of privacy." It protects aspects of privacy through specific textual prohibitions on government action (*e.g.*, U.S. Const. amend. I, IV) or structural features that limit government power (such as federalism and the separation of powers). No textual prohibition or structural feature guarantees a right to abortion. And although this Court's cases provide that the "liberty" protected by the Due Process Clause may sometimes embrace certain unenumerated privacy interests, those interests would need grounding in history and tradition—which a right to abortion lacks. *See Glucksberg*, 521 U.S. at 723-24 (the substantive-due-process question is not whether an interest is "consistent with this Court's substantive-due-process line of cases," but whether it is supported by "this Nation's history and practice"). Consistent with these points, *Griswold v. Connecticut*, 381 U.S. 479 (1965), on which *Roe* relied and which applied the most expansive approach to the right of privacy among pre-*Roe* cases, finds grounding in text and tradition. In invalidating a state law regulating the use of contraceptives, *Griswold* vindicated the textually and historically grounded Fourth Amendment protection against government invasion of the home—which would likely have been necessary to prosecute under the

statute. *E.g.*, *id.* at 480, 484-85. *Griswold* also vindicated our history and tradition of safeguarding "the marriage relationship"—which raises privacy interests "older than the Bill of Rights." *Id.* at 486. *Roe* departed from prior cases by invoking a sweeping general "right of privacy" unmoored from constitutional text, structure, history, and tradition.

Casey did not embrace *Roe*'s right-of-privacy reasoning, and instead grounded *Roe*'s holding on an "explication of individual liberty" that focused on the constitutional protection that this Court's cases have afforded "to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 505 U.S. at 851, 853; *see id.* at 846-53. This effort shares the flaws of *Roe*'s reasoning. The Constitution does protect certain liberty interests in these categories—just as it protects certain privacy interests. But those interests need grounding in text, structure, history, or tradition. And although certain liberty interests in these categories can claim the backing of history and tradition, a right to abortion cannot. Again, history shows that when the Fourteenth Amendment was ratified—and for a century thereafter—the public would have understood that it left States free to legislate comprehensively on abortion. *Supra* Part I-A.

Beyond all of these points is another that fundamentally distinguishes abortion from any privacy or liberty interest that this Court has ever recognized. None of the privacy or liberty interests embraced in this Court's cases involves, as abortion does, "the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). Abortion is thus "different in kind from" other interests "that the Court has protected under the rubric of personal or family

privacy and autonomy." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting). *Roe* itself acknowledged that "[t]he pregnant woman cannot be isolated in her privacy." 410 U.S. at 159. *Casey* too recognized that abortion is "a unique act." 505 U.S. at 852. But the Court in both cases failed to confront what that means—that a right to abortion cannot be justified by a right of privacy or a right to make important personal decisions. Nowhere else in the law does a right of privacy or right to make personal decisions provide a right to destroy a human life. *Cf. Obergefell*, 576 U.S. at 679 ("[T]hese cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties."); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (similar). So *Roe*'s departure from the Constitution and past cases—and *Casey*'s *stare-decisis*-focused adherence to that departure, *see* 505 U.S. at 853; *infra* Part I-B—fail to account for the material difference between a right to abortion and interests recognized in other cases.

These features—that a right to abortion has no basis in constitutional text, structure, history, or tradition, and that such a right is fundamentally different from any right recognized by this Court—show that *Roe* and *Casey* were "poorly reasoned." *Janus v. AFSCME*, 138 S. Ct. 2448, 2479 (2018). Abortion restrictions should be subject only to the rational-basis review that applies to every law.

Some have attempted to defend a right to abortion under equal-protection principles. *See*, *e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some

generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). Of course, the "fact that the justification" for *Roe* "continues to evolve" itself "undermin[es] the force of *stare decisis*." *Knick*, 139 S. Ct. at 2178. And this reconstruction of *Roe* lacks merit. This Court's cases "establish conclusively" that "the disfavoring of abortion ... is not *ipso facto* sex discrimination." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272-73 (1993). Abortion restrictions like the one here do not "treat anyone differently from anyone else or draw any distinction between persons." *Vacco v. Quill*, 521 U.S. 793, 800 (1997) (rejecting equal-protection challenge to prohibition on assisting suicide). And far from evincing an inherently discriminatory purpose, "there are common and respectable reasons for opposing [abortion], other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue." *Bray*, 506 U.S. at 270. Indeed, the Act here promotes women's health, and it protects unborn girls and boys equally. *See* App.66a-68a, 70a. Attempts to re-ground *Roe* on equal-protection footing fail.

Roe and *Casey* are, in sum, irreconcilable with constitutional text and "historical meaning"—which provides compelling grounds to overrule them. *Ramos*, 140 S. Ct. at 1405; *see Crawford v. Washington*, 541 U.S. 36, 42, 68-69 (2004) (overruling where precedent "stray[ed] from the original meaning"); *Collins v. Youngblood*, 497 U.S. 37, 50 (1990) (overruling where precedent "depart[ed] from" original meaning).

2. This Court's Abortion Precedents Are Hopelessly Unworkable.

This Court's abortion jurisprudence has proved "unworkable." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009); *see*, *e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (this Court "has never felt constrained to follow precedent" that has proved "unworkable").

First, heightened scrutiny of abortion restrictions has not promoted administrability, clarity, or predictability—core features of a workable legal standard. *See*, *e.g.*, *Payne*, 501 U.S. at 827 (*stare decisis* aims to "promote[ ] the evenhanded, predictable, and consistent development of legal principles"). Thirty years under *Casey*'s undue-burden standard shows this. There is no objective way to decide whether a burden is "undue." *Casey*, 505 U.S. at 877 (plurality opinion). This Court accordingly divides deeply in case after case not just over what result *Casey* requires, *see*, *e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), but also over what *Casey* even means. *Compare*, *e.g.*, *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2120-32 (2020) (plurality opinion) (finding undue burden based on one view of *Casey*), *with id.* at 2135-42 (Roberts, C.J., concurring in judgment) (finding undue burden despite a different view of *Casey*), *and with id.* at 2154-65 (Alito, J., dissenting) (rejecting finding of undue burden and voting to remand for trial, on a view of *Casey* different from the plurality's). And this administrability problem will plague any heightened-scrutiny regime for reviewing abortion restrictions. Because the Constitution does not protect a right to abortion in the first place, it provides no guidance on how to gauge or balance the interests in this context. The "imponderable values" here are ones that a court cannot "objectively ... weigh[ ]" or

"meaningful[ly] ... compare." *Id.* at 2136 (Roberts, C.J., concurring in judgment).

This Court has overruled precedent in circumstances like these. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court overruled a federalism precedent that required courts to examine whether a governmental function is "traditional, integral, or necessary." *Id.* at 546 (internal quotation marks omitted). Such a constitutionally unmoored inquiry, this Court explained, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Ibid.* The same is true for the inquiry whether an abortion restriction satisfies a heightened standard. Just as the Constitution does not speak to whether a governmental function is "traditional," it does not speak to whether a burden on abortion is "undue." Indeed, soon after *Roe* it was clear that policing the limitations that an abortion right imposes on state authority would be "a difficult and continuing venture." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 92 (1976) (White, J., concurring in part and dissenting in part). Experience under *Casey* shows that that venture cannot produce a workable, administrable, predictable jurisprudence.

Second, heightened scrutiny is an unworkable mechanism for accommodating state interests in the abortion context. Workability extends beyond whether a precedent is administrable and predictable: this Court also asks whether a precedent workably accounts for the interests at stake. *See*, *e.g.*, *Garcia*, 469 U.S. at 531, 546 (overruling precedent that had sought to serve "federalism principles" where that precedent could not "be faithful to the role of federalism in a democratic society"). Although the

undue-burden standard aimed to better honor States' interests and allow them greater leeway to legislate on abortion than did strict scrutiny, *e.g.*, *Casey*, 505 U.S. at 875 (plurality opinion), it has failed at the task—as any heightened-scrutiny standard would fail. The undue-burden standard broadly diminishes a State's pre-viability interests in protecting unborn life, women's health, and the medical profession's integrity. It impedes a State from prohibiting abortion to pursue those interests and forces a State to make an uphill climb even to adopt modest regulations pursuing them. *See also infra* Part II-A.

The workable approach to accommodating the competing interests here is to return the matter to "legislators, not judges." *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in judgment). Abortion policy is as suited to legislative judgment as it is unsuited to judicial refereeing. The question of how the law should treat abortion "is fraught with judgments of policy and value over which opinions are sharply divided." *Maher v. Roe*, 432 U.S. 464, 479 (1977). Under our Constitution, such issues "are to be resolved by the will of the people." *Thornburgh*, 476 U.S. at 796 (White, J., dissenting). That is all the more important when medical and other advances matter so much. Legislatures should be able to respond to those advances, which they cannot do in the face of flawed precedents that are anchored to decades-stale views of life and health. *See also infra* Parts I-B-4, II-A. The task will be hard for legislators and the people too. But the Constitution leaves the task of debate and compromise to them. When important, imponderable values are at stake, and when the Constitution does not take sides on which value prevails, the matter is for legislatures—

"[i]rrespective of the difficulty of the task." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 456 n.4 (1983) (O'Connor, J., dissenting).

Casey maintained that *Roe* "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 (internal quotation marks omitted). Although *Roe* requires "judicial assessment of state laws" on abortion, *Casey* stated, "the required determinations fall within judicial competence." *Ibid.* This is wrong, as the last 30 years make clear. *Roe* supplied workability only in the sense that, by employing strict scrutiny, it predictably required invalidating nearly any pre-viability state abortion law of substance. *Casey* recognized that *Roe*'s disregard for state interests had to be abandoned—which is to say, *Casey* recognized that *Roe* failed to workably account for state interests. *See id.* at 871-76 (plurality opinion). *Casey* tried to improve upon *Roe* by replacing strict scrutiny with the undue-burden standard. But that standard too defeats important state interests rather than accounts for them. *See also infra* Part II-A. And *Casey* exacerbated the workability problems under *Roe*. By replacing strict scrutiny with another heightened-scrutiny regime, *Casey* waved in the administrability problems that have plagued abortion caselaw ever since. Again, last year the five Justices supporting the Court's judgment in *June Medical* could not agree on what *Casey* means, and the five Justices who agreed on what *Casey* means could not agree on the judgment. *Roe* and *Casey* are irredeemably unworkable.

3. This Court's Abortion Precedents Have Inflicted Severe Damage.

Roe and *Casey* have caused "significant negative jurisprudential [and] real-world consequences," *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part), and will continue to do so until this Court overrules them. *See also Payne*, 501 U.S. at 825-27.

First, this Court's abortion jurisprudence "disserves principles of democratic self-governance." *Garcia*, 469 U.S. at 547. The Constitution generally leaves to "the States" and "the people" the power to address important policy issues. U.S. Const. amend. X. Yet *Roe* and *Casey* block the States and the people from fully protecting unborn life, women's health, and their professions. As long as those cases stand, the people and their elected representatives can never achieve, through person-to-person engagement and deliberation, any real compromise on the hard issue of abortion. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."). This Court's precedents wall off too many options and force people to look to the Judiciary to solve the abortion issue—which, 50 years shows, it cannot do. *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 536, 537 (6th Cir. 2021) (Sutton, J., concurring) ("judicial authority over" abortion results in "a warping of democracy and a perceived manipulation of the decision-making process").

Second, abortion jurisprudence has harmed the Nation. "The issue of abortion is one of the most contentious and controversial in contemporary American

society." *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring). Although *Casey* sought to "call[ ] the contending sides" to end that controversy, 505 U.S. at 867, the controversy has not abated. Unlike *Miranda* warnings, for example, a right to abortion has not become an "embedded," manageable part of "our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Our national discourse remains marked by heated, zero-sum disputes about abortion, abortion engulfs confirmation hearings, and "[d]ay after day, week after week, and year after year, regardless of the case being argued and the case being handed down, the issue that brings protesters to the plaza of the Supreme Court building is abortion." Dahlia Lithwick, Foreword: *Roe v. Wade* at Forty, 74 Ohio St. L.J. 5, 11 (2013). The national fever on abortion can break only when this Court returns abortion policy to the States—where agreement is more common, compromise is often possible, and disagreement can be resolved at the ballot box. *E.g.*, A. Raymond Randolph, Before *Roe v. Wade*: Judge Friendly's Draft Abortion Opinion, 29 Harv. J.L. & Pub. Pol'y 1035, 1060 (2006) ("The legislature can make choices among these variants, observe the results, and act again as observation may dictate. Experience in one state may benefit others ... .").

Third, abortion jurisprudence is at war with the constitutional demand that this Court act based on neutral principles of law. This Court's abortion cases are pervaded by special rules that apply largely or only in the abortion context. This Court applies a special standard of scrutiny (the undue-burden standard), *Casey*, 505 U.S. at 876-78 (plurality opinion); it applies a special test for facial constitutional challenges (the large-fraction test), *id.* at 895; and

ordinary principles of statutory interpretation often "fall[ ] by the wayside" when this Court "confront[s] a statute regulating abortion," *Gonzales*, 550 U.S. at 153. Members of this Court have called out many other examples. *E.g.*, *Whole Woman's Health*, 136 S. Ct. at 2350-53 (Alito, J., dissenting) (severability); *Danforth*, 428 U.S. at 100-01 (White, J., concurring in part and dissenting in part) (same); *June Medical*, 140 S. Ct. at 2171-73 (Gorsuch, J., dissenting) (appellate review of factual findings); *id.* at 2173-75 (standing); *id.* at 2176-78 (prospective injunctive relief); *id.* at 2178-79 (treatment of factbound prior decisions).

Too many Members of this Court, in too many cases, over too many decades have called out this special-rules problem to dismiss it. "The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it." *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). This all contributes to a perception of the Court that does "damage to the Court's legitimacy." *Casey*, 505 U.S. at 869. The Judiciary should not apply "the law of abortion." *Webster v. Reproductive Health Services*, 492 U.S. 490, 541 (1989) (Blackmun, J., concurring in part and dissenting in part). It should apply *the law*—in abortion cases as in every other case.

Fourth, abortion jurisprudence has had an "institutionally debilitating effect" on the Judiciary. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). The *Roe*/*Casey* regime endlessly injects this Court into "a hotly contested moral and political issue." *Id.* at 796

(White, J., dissenting). Continued judicial involvement here contributes to public perception of this Court as a political branch, *cf. Beal v. Doe*, 432 U.S. 438, 461 (1977) (Marshall, J., dissenting) ("The [Court's] abortion decisions are sound law and *undoubtedly good policy*.") (emphasis added), and has subjected this Court to pressure that only political bodies should receive. This flows inevitably from this Court's taking an "expansive role" on a policy matter that should be left to the political process. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting); *see* Randolph, 29 Harv. J.L. & Pub. Pol'y at 1061 (Judge Friendly observed that heightened judicial involvement in abortion, "however popular at the moment with many high-minded people, would ultimately bring the courts into the deserved disfavor to which they came dangerously near in the 1920's and 1930's").

Casey retained *Roe*'s central holding largely on the view that overruling it would hurt this Court's legitimacy. 505 U.S. at 864-69. According to *Casey*, this Court's legitimacy derives from "substance and perception": the Court must not just make "principled" decisions but must do so "under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." *Id.* at 865-66. The Court thought it could not achieve that in overruling *Roe*: it lacked (it thought) "the most compelling reason" to overrule and so it would look like it was doing so "unnecessarily and under pressure." *Id.* at 867.

The last 30 years show that assessment to be wrong. As explained, *Roe* and *Casey* are profoundly unprincipled decisions that have damaged the democratic process, poisoned our national discourse, plagued the law, and harmed the perception of this

Court. Retaining those precedents harms this Court's legitimacy. This Court can thus offer the Nation an overwhelming case for overruling *Roe* and *Casey*. And a principled affirmation that the Constitution leaves most issues to the people—and that abortion is such an issue—would be a powerful example to the Nation of this Court's "commitment to the rule of law." *Id.* at 869.

Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). For the reasons given above, these aims are served by overruling *Roe* and *Casey*. And consider one more. Under *Roe* and *Casey* the Judiciary mows down state law after state law, year after year, on a critical policy issue. That is dangerously corrosive to our constitutional system. *Cf. United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (recognizing that "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either," and that "[t]he public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches"). Invalidating a state law should always be a grave matter. *See, e.g.*, *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (brackets omitted). If an area of this Court's

constitutional jurisprudence requires this Court to strike down state law after state law, that jurisprudence needs a firm constitutional basis. Abortion jurisprudence has no such basis. The matter should be returned to the States and the people.

4. Legal And Factual Progress Have Overtaken This Court's Abortion Precedents.

Legal and factual developments have "eroded" *Roe* and *Casey*'s "underpinnings." *Janus v. AFSCME*, 138 S. Ct. 2448, 2482 (2018).

Start with legal developments. First, *Roe* and *Casey* are irreconcilable with this Court's rigorous, now "established method of substantive-due-process analysis." *Glucksberg*, 521 U.S. at 720. That analysis forecloses from substantive-due-process protection interests that, like a right to abortion, are unmoored from (indeed, defeated by) history and tradition. *Supra* Part I-A. Second, since *Roe* and *Casey* this Court has refused to hold in any other context that liberty or privacy interests support a constitutional right to effect "the purposeful termination" of a human life (actual or "potential"). *Harris v. McRae*, 448 U.S. 297, 325 (1980); *see Glucksberg*, 521 U.S. at 728 (holding that a right to "assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause"). This reaffirms that the right to abortion is an outlier among this Court's cases. And third, the special-rules regime applied in abortion cases shows that *Roe* and *Casey* represent a stark departure from this Court's general approach of applying neutral rules of law. *Supra* Part I-B-3.

Now take factual developments. First, modern options regarding and views about childbearing have dulled concerns on which *Roe* rested. *Roe* suggested that, without abortion, unwanted children could "force upon" women "a distressful life and future." 410 U.S. at 153. But numerous laws enacted since *Roe*—addressing pregnancy discrimination, requiring leave time, assisting with childcare, and more—facilitate the ability of women to pursue both career success and a rich family life. *See*, *e.g.*, *infra* Part I-B-5. And today all 50 States and the District of Columbia have enacted "safe haven" laws, giving women bearing unwanted children the option of "leaving [the] newborn directly in the care of the state until it can be adopted." *McCorvey v. Hill*, 385 F.3d 846, 851 (5th Cir. 2004) (Jones, J., concurring); *see*, *e.g.*, Children's Bureau, HHS, Infant Safe Haven Laws 2 (2016), https://perma.cc/ZL5D-9X24.

Second, even if abortion may once have been thought critical as an alternative to contraception, *see Casey*, 505 U.S. at 856, changed circumstances undermine that view. Policy can effect dramatic expansions in access to contraceptives. *See*, *e.g.*, Laurie Sobel et al., The Future of Contraceptive Coverage 4 (Kaiser Family Foundation, Issue Brief, Jan. 2017), https://perma.cc/T7TY-FVTT ("By 2013, most women had no out-of-pocket costs for their contraception, as median expenses for most contraceptive methods, including the IUD and the pill, dropped to zero."). And failure rates for all major contraceptive categories have declined since *Casey*, *see*, *e.g.*, Aparna Sundaram et al., Contraceptive Failure in the United States: Estimates from the 2006-2010 National Survey of Family Growth, 49 Persps. on Sexual & Reprod. Health 7, 11 tbl.2 (2017), with some methods now approaching

zero, *see* CDC, Birth Control Methods (Aug. 13, 2020), https://perma.cc/6NCC-SDEV. Contraceptive developments undercut any claim that *Roe* is needed to enable "women to participate equally in the economic and social life of the Nation" by "facilitat[ing] ... their ability to control their reproductive lives." *Casey*, 505 U.S. at 856; *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 741 (2014) (Ginsburg, J., dissenting) (*Casey*'s "understanding" applies to broadened access to contraception).

Third, advances in medicine and science have eroded the assumptions of 30—and 50—years ago. *Casey* recognized that "time has overtaken some of *Roe*'s factual assumptions," including about abortion risks and the timing of viability. 505 U.S. at 860. *Casey* thought that those changes "have no bearing on the validity of *Roe*'s central holding, that 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." *Ibid.* Whatever the truth of that statement in 1992, events have left it behind. Advances in "neonatal and medical science," *McCorvey*, 385 F.3d at 852 (Jones, J., concurring), now show that an unborn child has "taken on 'the human form' in all relevant respects" by 12 weeks' gestation, App.66a (quoting *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007)). Knowledge of when the unborn are sensitive "to pain" has progressed considerably. *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015). And while the *Roe* Court thought there was no "consensus" among those "trained in ... medicine" as to whether "life ... is present throughout pregnancy," 410 U.S. at 159, the Court has since acknowledged that "by common understanding and scientific terminology, a fetus is a

living organism while within the womb," before and after viability, *Gonzales*, 550 U.S. at 147. Yet *Casey* and *Roe* still impede a State from acting on this information by prohibiting pre-viability abortions.

The United States finds itself in the company of China and North Korea as some of the only countries that permit elective abortions after 20 weeks' gestation. App.65a; *see*, *e.g.*, Center for Reproductive Rights, The World's Abortion Laws (2021), https://perma.cc/8TH8-WEDJ. That is not progress. The time has come to recognize as much.

5. Reliance Interests Do Not Support Retaining This Court's Abortion Precedents.

No legitimate reliance interests call for retaining *Roe* and *Casey*. *See*, *e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part) (the reliance inquiry "focuses on the legitimate expectations of those who have reasonably relied on the precedent").

First, abortion jurisprudence's claim to reliance is undermined by how fractured and unsettled that jurisprudence has always been. *See*, *e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63-64, 66 (1996) (considering fractured nature of precedent in *stare decisis* analysis); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390 (1937) ("the close division by which" a prior decision was reached is a ground for reconsidering that decision). *Roe* was decided over two "spirited dissents challenging" the decision's "basic underpinnings." *Payne*, 501 U.S. at 828-29; *accord Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019)

(overruling a decision that had "come in for repeated criticism over the years from Justices of this Court and many respected commentators"). And in the decades since *Roe*, this Court's abortion cases have consistently been "decided by the narrowest of margins," with "Members of the Court" repeatedly "question[ing]" *Roe* and later *Casey*. *Payne*, 501 U.S. at 828-30. *Casey* was itself sharply fractured. It was led by a three-Justice joint opinion that no other Justice joined in full and was issued against four Justices' votes to overrule *Roe*. This fracturing persists. Again, just last year in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), the five Justices supporting the Court's judgment could not agree on why—indeed, those five Justices could not even agree on how to read *Casey*, the lead precedent to which lower courts must look to decide abortion cases. *Compare id.* at 2120-32 (plurality opinion), *with id.* at 2135-39 (Roberts, C.J., concurring in judgment).

This fractured, unsettled jurisprudence shows that any reliance on *Roe* and *Casey* is not reasonable. To start, it shows that people have long been "on notice" of "misgivings" on this Court about *Roe* and *Casey*. *Janus*, 138 S. Ct. at 2484. Next, where, as here, precedent "does not provide a clear or easily applicable standard," "arguments for reliance based on its clarity are misplaced." *Ibid.* (internal quotation marks omitted). *Roe* and *Casey* do not supply a workable legal standard to begin with. *Supra* Part I-B-2. And the fractured, confusion-sowing nature of this Court's abortion cases exacerbates that problem. Indeed, within months of this Court's decision in *June Medical*, the courts of appeals had already divided over whether the Chief Justice's opinion supplies the controlling legal standard. *See Planned Parenthood of*

Indiana & Kentucky, Inc. v. Box, 991 F.3d 740, 751-52 (7th Cir. 2021) (declining to treat the Chief Justice's opinion as controlling and recognizing that two other circuits have held otherwise). Add to all this the Court's use of special rules in the abortion context: This Court's cases cannot produce reasonable reliance when "governing legal standards are open to revision in every case." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 787 (1986) (White, J., dissenting). *Roe* and *Casey* thus fail to "promote[ ] the evenhanded, predictable, and consistent development of legal principles"—and so cannot "foster[ ] reliance." *Payne*, 501 U.S. at 827.

Second, reliance on *Roe* and *Casey* is undermined by the reality that abortion has for 50 years continued to be a wholly unsettled policy issue. *Roe* did not announce a rule that has governed quietly and unquestioned for decades. Soon after *Roe*, Congress considered constitutional amendments aimed at overturning it. *E.g.*, H.J. Res. 427, 93d Cong., 119 Cong. Rec. 7569, 7591 (1973); S.J. Res. 3, 98th Cong., 129 Cong. Rec. 671-75 (1983). Many States have enacted laws exploring *Roe*'s bounds ever since. The legitimacy, limits, and policy responses to this Court's abortion cases have been contested continuously for five decades. This too saps any claim that reliance interests support *Roe* and *Casey*. This Court has overruled precedent even where "[m]ore than 20 States ha[d] statutory schemes built on [it]" and "[t]hose laws underpin[ned] thousands of ongoing contracts involving millions of employees." *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting). Overruling *Roe* and *Casey*, by contrast, would leave the States with exactly as much authority to protect abortion as they have now.

Third, *Roe* and *Casey* do not raise reliance interests in the traditional sense at all. This Court has invoked reliance interests most strongly where upending a precedent could broadly undercut reasonable expectations that have formed the basis for long-term plans and commitments that cannot readily be unwound, as "in cases involving property and contract rights." *Payne*, 501 U.S. at 828. *Casey* itself appeared to acknowledge that a judicially announced right to abortion does not call up any traditional form of reliance. 505 U.S. at 855-56. Abortion, it said, is "customarily ... an unplanned response to ... unplanned activity," and arguably "reproductive planning could take virtually immediate account of" a change in the law. *Id.* at 856.

Casey maintained that reliance interests favored retaining *Roe* because, "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." *Ibid.* But given the many flaws in *Roe* and *Casey*, the possibility that contraception might fail is a weak ground for retaining them—particularly given contraceptive advances since *Casey*. *Supra* Part I-B-4. Further, this Court is not in a position to gauge such societal reliance. That reality may help explain why some of this Court's most important—and societally impactful—decisions overruling precedent do not even mention reliance. *E.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954).

Casey added: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." 505 U.S. at 856. This again is not an

assessment that this Court is in a position to make. And the only authority that *Casey* cited for this claim says that women's "growing labor force participation and college attendance" began "long before abortion became legal" and that the "relationship between lowered fertility among women and their higher labor force participation rates" is "complex and variable" and "not subject to generalization." Rosalind Pollack Petchesky, Abortion and Woman's Choice 109, 133 n.7 (rev. ed. 1990). *Casey*'s assessment would, moreover, be greeted coolly by many women and mothers who have reached the highest echelons of economic and social life independent of the right bestowed on them by seven men in *Roe*. Many laws (largely post-dating *Roe*) protect equal opportunity—including prohibitions on sex and pregnancy discrimination in employment (*e.g.*, Pregnancy Discrimination Act (1978), *see* 42 U.S.C. § 2000e(k)), guarantees of employment leave for pregnancy and birth (*e.g.*, Family and Medical Leave Act of 1993, *see* 29 U.S.C. § 2612), and support to offset the costs of childcare for working mothers (*e.g.*, child-and-dependent-care tax credit, *see* 26 U.S.C. § 21). *Casey* gives no good reason to believe that decades of advances for women rest on *Roe*, and evidence is to the contrary.

Casey said that the reliance inquiry "counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." 505 U.S. at 855. Repudiating the rule of *Roe* and *Casey* would not itself bar a single abortion. It would simply let the people resolve the issue themselves through the democratic process. Indeed, many States have already accounted for *Roe* and *Casey*'s overruling: some by statutorily codifying the right endorsed in those cases or otherwise providing broad

access to abortion, *e.g.*, Cal. Health & Safety Code § 123460 *et seq.*; Ill. Comp. Stat., ch. 775 § 55/1-1 *et seq.*; N.Y. Pub. Health Law §§ 2599-aa, 2599-bb; others by adopting restrictions that cannot stand under *Roe* and *Casey* but would take effect if they were overruled, *e.g.*, Idaho Code § 18-622; Miss. Code Ann. § 41-41-45. Our Constitution "is made for people of fundamentally differing views." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). A post-*Roe* world will honor that foundational feature.

* * *

Stare decisis's "greatest purpose is to serve a constitutional ideal—the rule of law." *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). Adhering to *Roe* and *Casey* "does more to damage this constitutional ideal than to advance it." *Ibid.* This Court should overrule *Roe* and *Casey*.

C. This Court Should Conclude That The Act Satisfies Rational-Basis Review And So Is Constitutional.

Overruling *Roe* and *Casey* makes resolving the question presented straightforward: An abortion restriction is constitutional if it satisfies the same rational-basis review that applies to all laws. Under rational-basis review, a court asks only whether the law at issue is "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). The Act satisfies that standard.

The Act itself identifies three valid state objectives and it rationally relates to each one. First, the State asserted its "interest in protecting the life of the unborn." App.66a. This Court has endorsed that interest. *E.g.*, *Casey*, 505 U.S. at 846. The Act rationally

relates to that interest by generally prohibiting abortion after 15 weeks' gestation. App.70a. The Legislature could reasonably believe that this would save unborn lives.

Second, the State asserted its interest "in protecting the health of women." App.68a. That interest is legitimate. *E.g.*, *Casey*, 505 U.S. at 846. The Act identifies several "risks" to women that increase as pregnancy progresses. App.67a; *see ibid.* (listing possible medical complications). In abortions performed after 15 weeks' gestation, the Legislature added, "there is a higher risk of requiring a hysterectomy, other reparative surgery, or blood transfusion." App.67a-68a. By limiting abortion after 15 weeks' gestation, App.70a, the Legislature could have reasonably believed that it was averting these harms to some women.

Third, the State asserted its interest in protecting the medical profession's integrity. App.66a-67a. That interest is legitimate. *E.g.*, *Gonzales*, 550 U.S. at 157. The Act rationally relates to it. The Legislature found that most abortion procedures performed after 15 weeks' gestation "involve the use of surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb." App.66a. The Legislature concluded that this "is a barbaric practice" when performed for nontherapeutic reasons and is "demeaning to the medical profession." App.66a-67a. The Legislature could reasonably believe that prohibiting abortions after 15 weeks' gestation would protect the profession by reducing potential exposure to a demeaning, harmful practice.

Any of these interests justifies the Act. It does not matter that another State might weigh these interests differently. Under rational-basis review, "making

an independent appraisal of the competing interests involved" goes "beyond the judicial function." *Harris v. McRae*, 448 U.S. 297, 326 (1980). And it does not matter if the Act "is not perfectly tailored to" its "end[s]"—rational-basis review does not require such precision. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019) (*per curiam*); *see also Glucksberg*, 521 U.S. at 728 n.21 (rejecting as irrelevant the contention "that Washington could better promote and protect [its interests] through regulation, rather than prohibition"). The Act satisfies rational-basis review, so it is constitutional. The court of appeals' judgment should be reversed.

II. At Minimum This Court Should Hold That Viability Is Not A Barrier To Prohibiting Elective Abortions And Should Reject The Judgment Below.

Even if this Court does not reject heightened scrutiny for abortion restrictions, it should reject any rule barring a State from prohibiting elective abortions before viability and should reject the judgment below.

A. This Court Should Reject Viability As A Barrier To Prohibiting Elective Abortions.

The courts below understood *Roe* and *Casey* to erect a bright-line rule that "no state interest can justify a pre-viability abortion ban." App.8a. Because the Act prohibits some pre-viability abortions, the lower courts reasoned, it is unconstitutional under *Roe* and *Casey*—regardless of any interests the State may have. App.8a-13a; App.44a-48a; *cf. Casey*, 505 U.S. at 879 (plurality opinion) (identifying "the central holding of *Roe*" as: "a State may not prohibit any woman

from making the ultimate decision to terminate her pregnancy before viability"). Other lower courts have taken the same approach to similar laws.

This Court should reject a rule that a State may not prohibit any elective abortions before viability. Such a rule rests on flawed reasoning that has no constitutional or principled basis. It fails to accommodate state interests. It inflicts severe negative consequences. It is not well grounded in precedent.

First, a viability rule is baseless. Like a right to abortion itself, a viability rule has no basis in the Constitution. *Supra* Part I-A. Nothing in constitutional text or structure protects a right to an abortion before viability or prevents States from restricting abortion before viability.

Even if the "liberty" secured by the Due Process Clause did protect some right to abortion, nothing in constitutional history or tradition supports tying such a right to viability. History shows that when the Fourteenth Amendment was ratified the American public understood that States could prohibit abortion before viability. By the end of 1868, the year the Fourteenth Amendment was ratified, most States prohibited attempts to induce abortion before quickening—which *Roe* understood to be 6-12 weeks before viability. *E.g.*, James S. Witherspoon, Reexamining *Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's J.L. 29, 33-34 (1985) (finding that at the end of 1868, 30 of the 37 States had statutes restricting abortion, and 27 of those 30 States prohibited attempts to induce abortion before quickening); *Roe*, 410 U.S. at 132 (quickening usually occurs at 16-18 weeks of pregnancy); *id.*

at 160 (viability usually occurs at 24-28 weeks of pregnancy).

This Court's cases do not provide persuasive support for a viability rule. *Roe* concluded that the State's interest in unborn life becomes "compelling" at viability "because the fetus then presumably has the capability of meaningful life outside the womb." 410 U.S. at 163. *Casey* added: viability "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." 505 U.S. at 870 (plurality opinion). Each explanation boils down to a circular assertion: when an unborn child can live outside the womb then the State's interest is compelling because the unborn child can live outside the womb. That explanation "mistake[s] a definition for a syllogism" and is linked to nothing in the Constitution. John Hart Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920, 924 (1973). All *Casey* adds to *Roe* is to emphasize "the independent existence of the second life." But that adds no content and fails to explain why (limited) independence matters or should serve as the centerpiece of a constitutional framework. Independence is a particularly flawed justification. Even after viability, an unborn life will remain dependent: viability contemplates the ability to live *with* "artificial aid." *Roe*, 410 U.S. at 160. Indeed, well after birth any child will be highly dependent on others for survival. It makes no sense to say that a State has a compelling interest in an unborn girl's life when she can survive somewhat independently but not when she needs a little more help.

In explaining why viability has "an element of fairness," *Casey* said: "In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." 505 U.S. at 870 (plurality opinion). But this provides no basis for a *viability* line. Innumerable other points before viability could be deemed to promote fairness just as well. Respondents do not provide abortions after 16 weeks' gestation—weeks before viability. That undercuts any suggestion that viability is central to fairness. Given the difficult line-drawing that the competing interests call for—and on which the Constitution gives no guidance—only legislatures can properly decide what is fair in this context.

Second, a viability rule disserves the state interests recognized in this Court's cases. This Court's cases credit States' interests in protecting women's health and unborn life "from the outset of ... pregnancy," *Casey*, 505 U.S. at 846, and "in protecting the integrity and ethics of the medical profession," *Glucksberg*, 521 U.S. at 731. But a viability rule hobbles a State from acting on those interests. No matter the value a State places on unborn life, it may never fully act on that judgment before viability. That is unsound. A State's interest, "if compelling after" one point in pregnancy, "is equally compelling before" that point. *Thornburgh*, 476 U.S. at 795 (White, J., dissenting). Nor can a State fully protect women. Although health risks increase as pregnancy progresses, App.67a, States must, under a viability rule, surmount a heightened-scrutiny bar whenever they seek to address pre-viability risks by restricting abortion. This prevents States from providing health benefits and protections that they can provide in other

contexts. *Cf. Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (emphasizing that this Court "has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty"). And a viability rule thwarts the state interest in maintaining the medical profession's integrity. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489-91 (1955) (affirming State's broad power when regulating "members of a profession"). No matter what a State learns—about fetal pain, about when unborn life takes on the human form, about women's health, about what effect performing abortions has on doctors—the State cannot fully act on that knowledge before viability.

Third, a viability rule produces significant negative consequences. Beyond defeating state interests in a sweeping way (as just explained), and beyond the grave consequences of *Roe* and *Casey* overall, *supra* Part I-B-3, a viability rule produces its own damaging consequences. For one, it "remove[s] the states' ability to account for advances in medical and scientific technology that have greatly expanded our knowledge of prenatal life." *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (internal quotation marks and brackets omitted). Again, a State cannot account for what it may learn about unborn life—about pain perception, how early a child fully takes on the human form, and more. *But see Webster v. Reproductive Health Services*, 492 U.S. 490, 552 (1989) (Blackmun, J., concurring in part and dissenting in part) (State's interest "increases ... dramatically" as "capacity to feel pain ... increases day by day"). In practical effect, a State must shut its eyes to these developments: a viability rule prevents it from fully acting on them.

For another, a viability rule makes constitutionally decisive such factors as the state of medicine and a woman's proximity and access to sufficient medical care. *See*, *e.g.*, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (faulting a framework that is "inherently tied to the state of medical technology that exists whenever particular litigation ensues"); *MKB Mgmt.*, 795 F.3d at 774 (a viability rule "tie[s] a state's interest in unborn children to developments in obstetrics, not to developments in the unborn"). A viability rule also means that a State was blocked from prohibiting particular abortions in 1973 but may today prohibit the same abortions. *See*, *e.g.*, *Edwards v. Beck*, 786 F.3d 1113, 1118 (8th Cir. 2015) (*per curiam*) ("scientific advancements" since *Roe* "have moved the viability point back"). The arbitrary nature of a viability rule is a terrible flaw in a judicially announced rule of constitutional law.

The unprincipled nature of a viability rule harms the Judiciary. Under our Constitution, a legislature "may draw lines which appear arbitrary"—say, a 55-mile-per-hour speed limit. *Casey*, 505 U.S. at 870 (plurality opinion). But a court must "justify the lines [it] draw[s]." *Ibid.* A stages-of-pregnancy framework—like one anchored to viability—conflicts with the Judiciary's "need to decide cases based on the application of neutral principles." *City of Akron*, 462 U.S. at 452 (O'Connor, J., dissenting). There is no principled reason "why the State's interest in protecting potential human life"—or protecting women's health and the medical profession's integrity—"should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."

Webster, 492 U.S. at 519 (plurality opinion); *accord City of Akron*, 462 U.S. at 461 (O'Connor, J., dissenting) ("*[P]otential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. ... The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward."). A viability rule erects an arbitrary line that produces arbitrary results. That cannot stand from the Branch that must act based on principle. *Casey*, 505 U.S. at 865 ("a decision without principled justification would be no judicial act at all").

There is no persuasive reason for a viability rule. *Casey*'s defenses of a viability-centered heightened-scrutiny framework do not justify a rule that a State may not prohibit any abortions before viability. *Casey* itself upheld laws that would have prohibited some pre-viability abortions—including laws imposing a 24-hour waiting period and a parental-consent requirement. *See infra* Part II-B. And a viability rule cannot be reconciled with this Court's decision in *Gonzales* upholding a prohibition on an abortion procedure performed both before and after viability. 550 U.S. at 147. This Court has thus already "blur[red] the line ... between previability and postviability abortions." *Id.* at 171 (Ginsburg, J., dissenting). In articulating a viability line, moreover, this Court has considered the State's interest "in the protection of potential life," 505 U.S. at 871 (plurality opinion), but has not addressed its interest in preventing fetal pain—an interest backed by medical and scientific advances since *Roe*, *MKB Mgmt.*, 795 F.3d at 774.

Casey asserted that *Roe*'s viability line was "elaborated with great care." 505 U.S. at 870 (plurality

opinion). As already explained, that is not so. *Roe*'s (and *Casey*'s) defense of a viability-based regime is circular and without substance. And *Roe*'s canvassing of the historical treatment of abortion did not disclose a historical basis for a viability rule. 410 U.S. at 129-47. *Casey* maintained that "no line other than viability ... is more workable." 505 U.S. at 870 (plurality opinion). But even if viability did provide a measure of workability in a heightened-scrutiny framework (and it does not, *supra* Part I-B-2), that would not justify making it an unyielding barrier, regardless of the state interests involved, to prohibitions on abortions. Last, *Casey* said that the Court had twice reaffirmed a viability line "in the face of great opposition." 505 U.S. at 870 (plurality opinion). But that again does not support a firm rule that a State may not prohibit any abortions before viability.

This Court should reject a viability rule. Reasons for rejecting heightened scrutiny, *supra* Part I, apply here. And the poor reasoning, harm to state interests, and other negative consequences with a viability rule itself decisively favor rejecting it—and negate any precedential force that such a rule can claim.

B. This Court Should Reject The Judgment Below.

For reasons already given, the soundest way to resolve this case is to reject heightened scrutiny for abortion restrictions and reverse the judgment below under rational-basis review. *Supra* Part I; *see Citizens United v. FEC*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) ("It should go without saying ... that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right."). If this Court rejects a viability rule but is not prepared

to reject heightened scrutiny, however, it should still reverse the court of appeals' judgment. Two chief alternatives are addressed below.

First, if this Court does not adopt rational-basis review, it should hold that the Act satisfies any standard of constitutional scrutiny including strict scrutiny, reverse the judgment below, and leave for another day the question of what standard applies in the absence of a viability rule. The Court could hold that the State's interests in protecting unborn life, women's health, and the medical profession's integrity are, at a minimum, compelling at 15 weeks' gestation—when risks to women have increased considerably, App.67a-68a; when the child's basic physiological functions are all present, his or her vital organs are functioning, and he or she can open and close fingers, make sucking motions, and sense stimuli from outside the womb, App.66a; and thus when a doctor would be extinguishing a life that has clearly taken on the human form. The Court could hold that the Act serves those "compelling interest[s]" in a "narrowly tailored" way. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015). It prohibits abortions after 15 weeks' gestation except when a woman's health is at risk (the medical-emergency exception, App.70a) or when the unborn life is likely not to survive outside the womb (the severe-fetal-abnormality exception, *ibid.*; *see* App.69a).

Second, and alternatively, this Court could reject a viability rule, clarify the undue-burden standard, and reverse on the ground that the Act does not impose an undue burden. On this approach, the Court could hold that the undue-burden standard is "a standard of general application," *Casey*, 505 U.S. at 876 (plurality opinion), that does not categorically bar

prohibitions of pre-viability abortions. That holding would draw some support from the fact that *Casey* upheld restrictions on abortion that would prohibit some pre-viability abortions. *E.g.*, *id.* at 881-87 (joint opinion) (upholding 24-hour waiting period, which would prohibit pre-viability abortions sought the day before viability); *id.* at 899-900 (joint opinion) (upholding parental-consent provision, which would prohibit abortions for minors who could not secure consent or a judicial bypass). *Casey* upheld those provisions on the ground that they did not "constitute an undue burden." *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2137 (2020) (Roberts, C.J., concurring in judgment).

Applying that approach here, this Court could hold that a State may prohibit elective abortions before viability if it does not impose a substantial obstacle to "a significant number of women" seeking abortions. *Ibid.*; *cf. Casey*, 505 U.S. at 895 (assessing facial challenge by looking to whether abortion restriction "will operate as a substantial obstacle" "in a large fraction of the cases in which" it "is relevant"). Respondents allege that they do not perform abortions after 16 weeks' gestation, so the Act reduces by only one week the time in which abortions are available in Mississippi. D. Ct. Dkt. 23 at 20 ¶ 51. Under no sound measure of the Act's facial validity does it impose an unconstitutional burden. *See* D. Ct. Dkt. 5-1 at 2 ¶ 7; D. Ct. Dkt. 85-5 at 11 (providing data indicating that in 2017 at most 4.5% of the women who obtained abortions from respondents did so after 15 weeks' gestation). Indeed, given that the vast majority of abortions take place in the first trimester, a 15-week law like the Act does not pose an undue burden because it does not "prohibit any woman from making the ultimate

decision to terminate her pregnancy." *Gonzales*, 550 U.S. at 146; *see* CDC, Abortion Surveillance—Findings and Reports (Nov. 25, 2020), https://perma.cc/33EE-Z2PY ("The majority of abortions in 2018 took place early in gestation: 92.2% of abortions were performed at ≤ 13 weeks' gestation ... ."). It just prevents a woman from doing so when the health risks are magnified, when the unborn child has fully taken on "the human form," *Gonzales*, 550 U.S. at 160, and when the typical method of accomplishing it is (a State could conclude) as "brutal" and "gruesome" as what the Court permitted Congress to ban in *Gonzales*, *id.* at 182 (Ginsburg, J., dissenting). The Act also provides medical-emergency and severe-fetal-abnormality exceptions, which confirm that there is no undue burden. And if this Court believes that its existing approach to assessing facial challenges to abortion restrictions does not allow this result, that is another reason to reject *Casey* outright.

However this Court answers the question presented, it should reject the judgment below. At least it should reject a viability rule and uphold the Act. But the best resolution is overruling *Roe* and *Casey* and upholding the Act under rational-basis review. Only that approach will eliminate the grave errors of *Roe* and *Casey*, restore workability, pare back decades of negative consequences, and allow the people to address this hard issue.

CONCLUSION

"The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Webster*, 492 U.S. at 521 (opinion of Rehnquist, C.J.). *Roe* and *Casey*—and a

viability rule—do not meet that goal. And they never can. Retaining them harms the Constitution, the country, and this Court. This Court should hold that the Act is constitutional because it satisfies rational-basis review, overrule *Roe* and *Casey*, and reverse the judgment below.

Respectfully submitted.

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