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 CONSTITUTIONAL LAW SCHOLARS LEE C. BOLLINGER, ERWIN CHEMERINSKY, SHERRY F. COLB, MICHAEL C. DORF, DANIEL FARBER, JOANNA L. GROSSMAN, LEAH LITMAN, MARTHA MINOW, JANE S. SCHACTER, SUZANNA SHERRY, GEOFFREY R. STONE, DAVID A. STRAUSS, AND LAURENCE H. TRIBE AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Amici, listed in Appendix A, are constitutional law scholars who teach and write in the field of constitutional law, including on limits on the regulation of abortion. They share an interest in promoting the stability of this Court's abortion jurisprudence as well as its continuity with the constitutional law governing related rights.

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs in accord with Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

For nearly 50 years, the Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment protects a woman's fundamental right to decide whether to have an abortion. *See Roe v. Wade*, 410 U.S. 113, 153-54 (1973).[2] Accordingly, in *Roe*, the Court held that prior to viability, a State cannot ban abortion or impose an undue burden on a woman's right to an abortion but may impose other, less burdensome restrictions. *See ibid.* This central holding was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which made clear that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." 505 U.S. 833, 846, 879 (1992).

Despite this clear and repeatedly reaffirmed precedent, Mississippi enacted the Gestational Age Act, which prohibits abortions performed at or after 15 weeks' gestation, except in cases of medical emergency or severe fetal abnormalities. *See* Miss. HB 1510 (2018). As Mississippi acknowledges, the Act prohibits abortions prior to viability. *See e.g.*, Petrs. Br. 5, 9, 38. The Fifth Circuit correctly held that the Act is an unconstitutional ban on abortion prior to viability, contrary to the "unbroken line" of abortion cases "dating to *Roe v. Wade*," which "have established (and affirmed, and re-affirmed) a woman's right to

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[2] *Amici* acknowledge that transgender men and non-binary persons can become pregnant and may need abortion care. We refer here and elsewhere to "women" seeking abortion simply in recognition that the majority of people seeking abortions are women.

choose an abortion before viability." *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019), *cert. granted in part*, 209 L. Ed. 2d 748 (May 17, 2021).

Mississippi thereafter petitioned this Court for writ of certiorari, requesting that the Court resolve a "conflict" in its abortion precedent. *See* Pet. for Cert. at 2-3, 5, 14-15, 33-34. In its opening brief, Mississippi departs from its petition, recognizing that no so-called "conflict" exists. Instead, Mississippi acknowledges that "[t]his case is made hard only because [of] *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*," and then boldly requests that this Court "overrule those decisions." Petrs. Br. 1 (citations omitted).[3]

There are many reasons to uphold *Roe* and *Casey* and to affirm the Fifth Circuit's decision overturning Mississippi's flagrantly unconstitutional law. This brief addresses two of them. First, this Court correctly held in *Roe* and *Casey* that a woman's right to an abortion is clearly rooted in and protected by the Fourteenth Amendment's Due Process Clause. *See Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 153. Overturning that precedent would mark a stunning reversal of the Due Process jurisprudence this Court has built over the past several decades, calling into question a host of other fundamental Due Process rights.

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[3] Mississippi's departure from its petition for writ of certiorari alone is grounds for dismissal of Mississippi's writ "as improvidently granted." *See Visa v. Osborn*, 137 S. Ct. 289, 289-90 (2016) (dismissing writs where the "petitioners 'chose to rely on a different argument' in their merits briefing" after "[h]aving persuaded [the Supreme Court] to grant certiorari" (alteration in original)).

It would also place individual women and their families at the mercy of state legislatures, denying them the basic right to determine their reproductive destinies.

Second, *stare decisis* requires that the Court uphold *Roe* and *Casey*, and the viability line drawn therein. *Stare decisis* is the cornerstone of the Court's jurisprudence and the bedrock of its legitimacy, and there is no justifiable reason to abandon this principle here. The viability line is logical and workable, and one of many lines this Court has drawn to protect constitutional liberties.

For these reasons, among others, *amici* respectfully request that the Court reject Mississippi's arguments and affirm the Fifth Circuit's decision.

ARGUMENT

I. The Right to Decide to Have an Abortion Is Well-Grounded in the Constitution.

Mississippi's efforts to portray this Court's abortion rights jurisprudence as anomalous threaten the very notion of limited government under the Constitution. The rights recognized under the Fourteenth Amendment's Due Process Clause—deeply rooted in principles of liberty derived from the Magna Carta—are "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)).

This Court has long held that fundamental liberties under the Due Process Clause consist of "freedom from bodily restraint" and "to enjoy those privileges long recognized … as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Obergefell v. Hodges*, 576 U.S. 644, 663-64 (2015) (citing *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972); *Griswold v. Connecticut,* 381 U.S. 479, 484-86 (1965)). In *Roe*, the Court recognized that this liberty interest "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" and therefore, provides a woman with a fundamental right to an abortion. 410 U.S. at 153-54. *Casey* reaffirmed this core principle, holding that the decision to have an abortion, like other fundamental Due Process liberty rights, "involv[es] the most intimate and personal choice[] a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment." 505

U.S. at 851. It was in acknowledgement of this fundamental right, that *Roe* and *Casey* held that a State cannot prohibit a woman from terminating her pregnancy at any point prior to the viability of the fetus. *Casey*, 505 U.S. at 869-70; *Roe*, 410 U.S. at 163-64.

In a departure from its petition for certiorari, Mississippi explicitly asks the Court to overturn *Roe* and *Casey*, arguing that the right to an abortion is "unmoored" from the Constitution and that "nothing in text, structure, history, or tradition makes abortion a fundamental right or denies States the power to restrict it." Petrs. Br. 2, 13; *see also id.* at 13-16. Such assertions are false. As this Court has held, *Roe* "invoked the reasoning and the tradition of the precedents … granting protection to substantive liberties of the person" under the Due Process Clause, and *Casey* was firmly grounded in the "dimension of personal liberty that *Roe* sought to protect." *Casey*, 505 U.S. at 853; *see also Roe*, 410 U.S. at 153.

Further, *Roe* and *Casey*'s application of tradition and history—unlike the narrow application of such principles for which Mississippi advocates—is in accordance with the Court's Due Process jurisprudence for the past several decades. To reject this methodology and therefore, the holdings in *Roe* and *Casey*, would call into question the Court's Due Process precedent, undermining a host of other fundamental rights long acknowledged by the Court.

A. The Right to an Abortion Fits Within a Fundamental Liberty Interest under the Due Process Clause.

For over a century, this Court has held that the Due Process Clause contains a substantive component that protects individuals against unwarranted governmental intrusion and "serves to prevent governmental power from being 'used for purposes of oppression.'" *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986) (quoting *Murray's Les v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)). During that time, this Court has repeatedly acknowledged that the Clause provides individuals with certain unenumerated, fundamental rights grounded in liberty, a concept older than our Constitution itself. *See*, *e.g.*, *Kerry v. Din*, 576 U.S. 86, 91-92 (2015) (pointing to, for example, Blackstone's description of rights stemming from the Magna Carta, including "personal security," "consist[ing] in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation," and the "personal liberty of individuals" "consist[ed] in the power of locomotion … without imprisonment or restraint") (alterations in original) (quoting 1 W. Blackstone, Commentaries on the Laws of England 125, 130 (1769)).[4]

"[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by

[4] In acknowledging unenumerated rights, the Court also abides by and gives effect to the plain meaning of the Ninth Amendment. *See Roe,* 410 U.S. at 153 (citing Ninth Amendment); *Casey,* 505 U.S. at 848 (same)*; see also The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (Randy E. Barnet ed., Cato, vol. 1, 1989; George Mason Press, vol. 2, 1993); Daniel A. Farber, *Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights*

the precise terms" of the Constitution's guarantees, but instead "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

Based on such an understanding, this Court has long held that this liberty interest under the Due Process Clause establishes a right to one's own bodily integrity, free from unreasonable state intrusion. *See generally Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."). States therefore may not, for instance, forcibly extract confessions to alleged crimes, *see Brown v. Mississippi*, 297 U.S. 278 (1936); use a stomach pump on an individual against his or her will, *see Rochin v. California*, 342 U.S. 165 (1952); compel an individual to undergo surgery to extract evidence, *see Winston v. Lee*, 470 U.S. 753 (1985); or require prisoners to take antipsychotic drugs unless a set of particular conditions are met, *see Washington v. Harper*, 494 U.S. 210, 221-22 (1990). This Court also acknowledged in *Meyer v. Nebraska*, and in subsequent decisions, that the liberty interest protected by the Due Process Clause includes "the right of the individual to … establish a home and bring up children." 262 U.S. at 399 (holding that a state statute forbidding foreign

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Americans Don't Know They Have (Basic Books 2007); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987).

language instruction to elementary school children was unconstitutional).[5]

In *Roe*, the Court—guided by the meaning of the liberty interest expounded in these prior decisions—ultimately concluded that "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action … is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153 (connecting the abortion right to the Court's prior decisions regarding personal privacy and liberty rights, including cases involving marriage, procreation, contraception, family relationships, and child rearing and education). The Court reaffirmed a woman's fundamental right to decide whether or not to terminate her pregnancy in *Casey*, which similarly relied on the Court's understanding and application of the liberty interest through such precedents. *See* 505 U.S. at 847-48, 851 (holding that the decision whether to have an abortion, like the

[5] *See also*, *e.g.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that a state law requiring every parent to send their child to public school "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942) (finding that the liberty interest protects criminal offenders from state-mandated sterilization on the basis that the ability to procreate is "one of the basic civil rights of man," a "basic liberty" with respect to which one would be "forever deprived," if such a law were upheld); *Griswold*, 381 U.S. at 482 (holding that a law forbidding married couples from using contraceptives infringed on the "intimate relation of husband and wife and their physician's role in one aspect of that relation" and thereby "invade[d] the area of protected freedoms" under the Fourteenth Amendment); *Eisenstadt*, 405 U.S. at 453 (upholding "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

right to make "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," is a fundamental right rooted in the Due Process Clause, as it is a matter of "personal liberty which the government may not enter").

Nor has this Court treated the abortion right as aberrational. Following *Casey*, the Court has continued to hold that the Due Process Clause's liberty interest provides a basis for fundamental rights in areas of personal, family decision-making and one's bodily autonomy. *See*, *e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing a "right to liberty under the Due Process Clause [that] gives [individuals] the full right to engage in [private sexual conduct in one's home] without intervention of the government"); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (invalidating a statute allowing any person to petition the court for child visitation as violative of the Due Process rights of petitioner mother, on the basis that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court"); *see also Obergefell*, 576 U.S. at 675 (holding that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty").

Such decisions all further reaffirm that "the reasoning in *Roe* relating to the woman's liberty" firmly establishes that a woman has a right to an abortion. *Casey*, 505 U.S. at 852-53.

B. History and Tradition, as Applied in Accordance with the Court's Due Process Jurisprudence, Support Holding that the Abortion Right Is Fundamental.

1. Mississippi recognizes that the "Constitution … protect[s] certain liberty interests" in categories such as "marriage, procreation, contraception, family relationships, child rearing, and education," *Casey*, 505 U.S. at 851, but argues that "those interests need grounding in text, structure, history, or tradition." Petrs. Br. 16. Accordingly, Mississippi argues that "although certain liberty interests in these categories can claim the backing of history and tradition, a right to abortion cannot," claiming that "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." *Ibid.*

The rigid use of history and tradition for which Mississippi advocates is contrary to this Court's approach to Due Process liberty interests in the vast majority of the decisions it has reached over the course of the last several decades. For one, the Court has rejected Mississippi's position that the specific rights the Due Process Clause protects are finite and definitively determined as of the time of the Fourteenth Amendment's ratification. As *Casey* acknowledged, "[i]t is … tempting" "to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified." 505 U.S. at 847. "But such a view would be inconsistent with our law." *Ibid.* If this were not the case, a whole host of

rights including interracial marriage and freedom of religious expression would be called into question.[6]

Nor does this Court, when looking to history and tradition as part of the determination as to whether the Due Process Clause provides for a certain liberty right, merely look to whether the specific protection in question—for example, the right to have an abortion—has been protected or restricted through the existence of state legislation for any particular period of time during our nation's history, as Mississippi suggests. Petrs. Br. 12-13 (arguing that history and tradition do not support a right to abortion on the basis that a number of state laws in existence between 1849 and 1868 had restricted abortion). Instead, the Court is "guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth *broad principles* rather than specific requirements." *Obergefell*, 576 U.S. at 664 (emphasis added). Such an analysis therefore recognizes that the "outlines of the 'liberty' specially protected by the Fourteenth Amendment," are "perhaps not capable of being fully clarified," but which may at least be "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal

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[6] *See*, *e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-42 (1943) (Due Process right to freedom of speech and religious worship); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Due Process right to interracial marriage); *Turner v. Safley*, 482 U.S. 78, 94-99 (1987) (inmates' Due Process right to marry); *see also Griswold*, 381 U.S. at 482 ("The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.").

tradition." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

For example, in *Cruzan*, when this Court acknowledged that competent individuals have a liberty interest in refusing unwanted, life-sustaining medical treatment under the Due Process Clause, the Court did not simply ask whether state legislatures had demonstrated an interest in protecting such a right through the passage of laws permitting individuals to refuse such treatment, but instead analyzed, *inter alia*, how the broader right of bodily integrity was historically treated under the common law tort of battery and through the development of the informed consent doctrine, in addition to evaluating the Court's prior decisions involving the broader right to bodily integrity under the Due Process Clause. *See Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269-79 (1990).

Further, Mississippi's proposed history-only approach to recognition of Due Process rights runs contrary to the Court's acknowledgement time and again that "the concept of due process of law is not final and fixed," as "these limits are derived from considerations that are fused in the whole nature of our judicial process." *Rochin*, 342 U.S. at 170; *see also Obergefell*, 576 U.S. at 663-64 ("The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, 'has not been reduced to any formula.'") (quoting *Poe,* 367 U.S. at 542 (Harlan, J., dissenting)). Instead, this evaluation that is "duly mindful of reconciling the needs both of continuity and of change in a progressive society." *Rochin*, 342 U.S. at 172; *see Obergefell*, 576 U.S. at 664 ("History and tradition guide and discipline this inquiry but do not set

its outer boundaries. . . . That method respects our history and learns from it without allowing the past alone to rule the present.").

For decades, the Court has employed a similar approach when evaluating whether the Due Process Clause provides for particular liberty rights.[7] To adopt Mississippi's rigid view of history and tradition would require a marked departure from this Due Process jurisprudence, calling into question not only *Roe* and *Casey*, but the Court's other decisions regarding fundamental Due Process liberty interests.

2. An application of history and tradition that is consistent with the Court's approach to evaluating fundamental Due Process liberty rights, supports finding a woman has a fundamental Due Process right to an abortion.

In *Roe*, the Court surveyed the history of attitudes regarding abortion, dating back to ancient Greece and prohibitions of the practice at common law and under

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[7] *See*, *e.g.*, *Meyer*, 262 U.S. at 400-01 (acknowledging the "supreme importance" of education and acquisition of knowledge when holding a ban against foreign language instruction to public school children was unconstitutional under the Due Process Clause); *Rochin*, 342 U.S. at 170-73 (applying the general Due Process principle that convictions cannot offend a "sense of justice," and specific applications of that principle—including cases holding that otherwise relevant and credible evidence cannot be obtained by improper means—in determining that the government cannot forcibly extract evidence from one's stomach); *Obergefell*, 576 U.S. at 665-71 (rejecting a narrow view of the right to marry in the context of determining whether this right extends to same-sex marriage, pointing to the Court's precedents defining the right to marry more broadly by "identif[ying] essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond").

English statutory law, ultimately finding that historical treatment of abortion supports a fundamental right to an abortion under the Due Process Clause. *See* 410 U.S. at 132-40 ("It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."). The Court also, as mentioned *supra*, analyzed the abortion right within the broader context of the right to privacy and the liberty interest under the Due Process Clause articulated in the Court's prior decisions, which it found supported the existence of the abortion right. *See id.* at 153.

In *Casey*, the Court similarly tied the abortion right to broader liberty interests protected in prior decisions by the Court, in particular, "the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child," as well as this Court's decisions regarding "personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." 505 U.S. at 857. As this Court explained, this is because a woman's choice to have an abortion, just like these other matters, "involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851.

As such, *Roe* and *Casey* are entirely consistent with the Court's approach to evaluating whether history and tradition support finding a particular Due Process liberty right is fundamental under the Constitution. *See Glucksberg*, 521 U.S. at 722 (citing *Casey*, among other cases); *Obergefell*, 576 U.S. at 663-64. Calling this fundamental right into question calls into serious question many other fundamental Due Process rights long recognized by this Court that were decided using similar analyses and which are rooted in the same liberty interests that underlie *Roe* and *Casey*.

For example, stripping a woman of her fundamental right to decide to have an abortion would therefore mean that the State, from the moment a woman's pregnancy begins, would be able to regulate the woman's body, the pregnancy, or her medical decisions, whenever the State is able to articulate how the law is "rationally" related to a legitimate state interest.[8] This is directly at odds with an entire line of cases holding that the broader liberty interest in one's bodily integrity supports one's ability to make his or her own medical decisions and decisions regarding family planning. *See* Section I.A, *supra*. And as *Casey* acknowledged, "[i]f indeed the woman's interest in deciding whether to bear and beget a child had not been

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[8] Mississippi advocates for precisely this outcome, *see* Petrs. Br. 36-38, ignoring that the State's competing interest in a woman's pregnancy can be balanced with that of the woman's without eliminating her fundamental right to decide to have an abortion, *see Casey*, 505 U.S. at 846 ("*Roe*'s essential holding, the holding we reaffirm … [is that] the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.").

recognized as in *Roe,* the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it." 505 U.S. at 859; *see id.* at 915 (Stevens, J., concurring in part and dissenting in part) ("The Constitution would be equally offended by an absolute requirement that all women undergo abortions as by an absolute prohibition on abortions.").

Given that this Court's "obligation is to define the liberty of all," this very notion of liberty is at stake if the Court does not hold it extends to the liberty of a woman to make personal choices about her body and destiny. *Casey*, 505 U.S. at 850. Mississippi, by virtue of arguing that a woman's right to an abortion is not fundamental and should therefore be subject to the least stringent level of judicial review at any point in her pregnancy, asks that the Court in essence, leave it entirely to the State to decide when an abortion is the right decision for a woman. *See* Petrs. Br. 36-37. However, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds," *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)—"[t]he same holds true for the power to control women's bodies," *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part).

The Court should therefore reject Mississippi's argument and reaffirm its holding in *Roe* and *Casey* that a woman has a fundamental liberty right to decide whether to have an abortion under the Fourteenth Amendment's Due Process Clause, with respect to which the State cannot unduly interfere prior to viability.

II. *Stare Decisis* Requires the Court to Reject Any Abrogation of the Right to Pre-Viability Abortion.

Stare decisis is essential to the "integrity of our constitutional system of government, both in appearance and in fact" as it "permits society to presume that bedrock principles are founded in the law rather in proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986); *see also Casey*, 505 U.S. at 854 ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."). To "overrule an important precedent is serious business." Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A. B. A. J. 334 (1944). To do so, the precedent "must be *egregiously* wrong as a matter of law." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (emphasis added). Further, the Court must consider whether the precedent has "caused significant negative jurisprudential or real-world consequences" and whether overruling such precedent would "unduly upset reliance interests." *Id.* at 1414-15.

In *Casey*, the Court understood and considered these factors, and correctly held fast to the dictates of *stare decisis*. Indeed, *Casey* upheld both (i) the liberty right at issue in *Roe*, reaffirming *Roe*'s holding that the fundamental right to abortion is protected by the Fourteenth Amendment's Due Process Clause; and (ii) the viability line set forth in that decision, which sits at the very core of this liberty right. *Casey*, 505 U.S. at 869-71. As the Court recognized, overruling *Roe* would not only result in "an unjustifiable result under principles of *stare decisis*," but it would also "seriously weaken the Court's capacity to exercise the judicial

power and to function as the Supreme Court of a Nation dedicated to the rule of law." *Id.* at 853, 865 ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."). Whether "precedent on precedent" or just plain precedent, *stare decisis* requires upholding *Casey*, and *Roe* along with it.

As discussed herein, Mississippi offers no justifiable reason to overturn the constitutionally principled and workable holdings in *Roe* and *Casey*, and take down the cornerstone of this nation's jurisprudence—*stare decisis*—therewith. *See Ramos*, 140 S. Ct. at 1411 (Kavanaugh, J., concurring in part) (extolling the importance of showing "respect for the accumulated wisdom of judges who have previously tried to solve the same problem"); *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) ("Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function."). The Court should reject Mississippi's arguments and decline to overturn *Roe* and *Casey*.

A. *Stare Decisis* Is Tradition.

In asking the Court to overturn *Roe* and *Casey*, Mississippi argues that abortion rights are neither supported by history nor tradition. Petrs. Br. 1-2, 12. But it is *stare decisis* that embodies both those concepts and requires upholding *Roe* and *Casey*.

Stare decisis has been a bedrock principle of legal jurisprudence since the founding of this nation. *See* 1 William Blackstone, *Commentaries on the Laws of England* *69 (1765); *see also* Sir Edward Coke, *Institutes of the Laws of England* *51 (1642). Even in its earliest jurisprudence, the Court relied on precedent

drawn from cases decided immediately after the formation of the nation to support its decision-making. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 87-88 (1807); *see also Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711, 746 (1883); *Jackson ex dem. St. John v. Chew*, 25 U.S. (12 Wheat.) 153, 166 (1827). As Chief Justice Marshall explained in *Bollman*, "*[s]tare decisis* is one of [U.S. law's] favourite and most fundamental maxims" because it "exclude[s] all possibility of improper bias" and mandates that "precedent is … more to be relied on than my judgment." 8 U.S. (4 Cranch) at 87-88.

The Court has continued to acknowledge and rely upon this historical understanding of *stare decisis* as a cornerstone of its modern jurisprudence. *See, e.g.*, *Ramos*, 140 S. Ct. at 1411 (Kavanaugh, J., concurring) (citing Blackstone and the Federalist Papers for historical support on the importance of *stare decisis* as meaning "to stand by the thing decided and not disturb the calm"). In doing so, the Court has repeatedly and emphatically extolled the virtues of *stare decisis* in promoting evenhandedness and administrability, demonstrating the legitimacy of the courts, and fostering reliance on judicial decisions. *See ibid.* ("This Court has repeatedly explained that *stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'") (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *see also Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring) ("Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of judicial function."). Applying *stare decisis* and upholding *Casey* and *Roe* best pays homage to history and tradition—

not overturning these precedents as Mississippi presses this Court to do.

B. *Stare Decisis* Requires Upholding *Roe* and *Casey*'s Viability Line, Which Is Non-Arbitrary, Workable, and Constitutionally Principled.

1. The viability line already reflects this Court's thoughtful balancing of a woman's fundamental liberty interest in her decision to have an abortion with a State's interest in fetal life. As discussed *supra*, a woman's fundamental right to an abortion is entrenched in the Due Process Clause's guarantee of liberty. But the Court has recognized that a State may have a competing interest in potential human life. To resolve this conflict, a line had to be drawn. Specifically, in *Roe* and *Casey*, the Court had to decide when the State's interest in potential life is so strong that it could overcome a women's liberty to choose whether to carry a child to term—an undertaking fraught with "anxieties, … physical constraints, [and] pain that only [the woman] must bear." *Casey*, 505 U.S. at 852.

The Court logically drew that line at viability—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." *Casey*, 505 U.S. at 870; *see also* Justice Lewis F. Powell, Jr., *Memorandum re: Abortion Cases* 1 (Nov. 29, 1972), *in* Harry A. Blackmun Papers, Library of Congress, Manuscript Division, Box 151, Folder 4 [hereinafter Powell Memorandum] ("I have wondered whether drawing the line at 'viability'—if we conclude to designate a particular point of time—would not be more defensible in logic and biologically

than perhaps any other single time.").[9]

Mississippi argues that the viability line is "arbitrary." Petrs. Br. 44. But the Court in *Casey* correctly refused to overturn *Roe* based on cries of arbitrariness: "Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care." *Casey*, 505 U.S. at 870. The Court's reaffirmation of the viability line in *Casey* is in accordance with the Court's recognition, time and again, that to enforce certain constitutional guarantees, "it is necessary to draw a line." *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). These lines protect "the individual against arbitrary action of government," which is "[t]he touchstone of due process." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (alteration in original) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

Mississippi suggests that "difficult line-drawing" can only be properly undertaken by legislatures. Petrs. Br. 41. But judicial line-drawing is integral: without it, States would be left to interpret nebulous constitutional standards without concrete guidance, leading to a multitude of challenges to state practices, and forcing federal judges to effectively make legislative judgments on a case-by-case basis.[10] Judicial

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[9] *See also* David J. Garrow, *How Roe v. Wade Was Written*, 71 Wash. & Lee L. Rev. 893, 912 (2014) ("I rather agree with the view that the interest of the state is clearly identifiable, in a manner which would be generally understood, when the fetus becomes viable. At any point in time prior thereto, it is more difficult to justify a cutoff date.") (quoting Powell Memorandum, at 2).

[10] Mississippi's alternative request that the Court jettison viability as the point where States cannot prohibit abortions, *see* Petrs. Br. 38-45, explicitly invites the Court to draw a new judicial line to decide that question.

line-drawing is particularly critical when, as here, constitutionally protected liberties are at stake. As this Court has explained, "[i]t is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. . . . That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty." *Casey*, 505 U.S. at 851 (citations omitted).

Indeed, the Court engages in the essential exercise of line drawing to strike a balance between competing interests in many other contexts outside of abortion. For instance, in considering pretrial detention following a warrantless arrest, the Court has held that a "prompt" judicial determination of probable cause is one made within 48 hours. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Under the Sixth Amendment, the Court has decided that a crime punishable by more than six months in prison is not a petty offense but a serious crime implicating the right to a jury trial. *See Baldwin v. New York*, 399 U.S. 66, 68-74 (1970). And under First Amendment jurisprudence, the Court forbid the release of public school students to enroll religious class *on* school grounds, *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948), but permitted the release of public school students from school attendance to attend religious classes *off* school grounds, *Zorach v. Clauson*, 343 U.S. 306 (1952). The Court thus drew the line at religious instruction outside of public school classrooms. In short, line-drawing is a workable and necessary judicial function and is particularly essential here, where a constitutional liberty is at stake.

2. *Stare decisis* requires that the Court uphold *Roe* and its progeny and retain the viability line set

forth in *Roe*, reaffirmed by *Casey*, and time and again since.

As the Court explained in *Casey*, a woman's right to a pre-viability abortion is "the most central principle of *Roe v. Wade*" and sits at the very core of the liberty right recognized therein. *Casey*, 505 U.S. at 871; *Roe*, 410 U.S. at 163 (stating that, prior to viability, doctors and patients are "free to determine, without regulation by the State," that abortion is the appropriate course of action). This is "a rule of law and a component of liberty [the Court] cannot renounce." *Casey*, 505 U.S. at 871. The Court has repeatedly held the line at viability even "in the face of great opposition." *Id.* at 870; *see Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) ("[W]e now use 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health."); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" (quoting *Casey*, 505 U.S. at 879)); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declining to "revisit" the holding that "before viability … the woman has a right to choose to terminate her pregnancy" (omission in original; internal quotation marks and citation omitted)).

In *Casey*, the Court underwent a detailed *stare decisis* analysis, and ultimately concluded that "the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided." *Casey*, 505 U.S. at 860. None of the facts present at the time of *Casey* justified forsaking *stare decisis* by abandoning the viability line set forth in *Roe*, nor are any such facts present today.

For many years, the Court has had numerous opportunities to overturn the *Roe* and *Casey* right to abortion or to alter or abrogate the viability line. At each turn, it has refused to do so. Indeed, the Court has upheld the right to abortion regardless of the makeup of the Court or the continued public debate over the morality of abortion. *See, e.g.*, *Stenberg*, 530 U.S. at 920-21 ("[A]ware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose."); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 529 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("[V]iability remains the 'critical point.'" (citation omitted)).

As the Court has recognized, *Casey* and the viability line recognized therein "in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar." *Gonzales*, 550 U.S. at 146; *see also June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2120-21 (2020) (rejecting the application of "a different, less-deferential standard" and "apply[ing] the constitutional standards set forth in our earlier abortion-related cases, and in particular in *Casey* and *Whole Woman's Health*"); *Hellerstedt*, 136 S. Ct. at 2309 (overruling the lower court where the "articulation of the relevant standard [under *Casey* was] incorrect").

Moreover, as in *Casey*, "no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it." *Casey*,

505 U.S. at 860. This Court has repeatedly found that only "dramatic" changes in factual circumstances may support a departure from precedent. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 534 (2009) (Thomas, J., concurring). In fact, changing circumstances can only outweigh the force of *stare decisis* when "facts have so changed, or [have] come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. If the principle of *stare decisis* is "to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of [the sitting] Justices, for overturning settled doctrine." *Citizens United*, 558 U.S. at 408-09 (Stevens, J., concurring in part and dissenting in part).

At bottom, the Court in *Casey* understood that overruling *Roe* would only be based on a change in the Court's composition. 505 U.S. at 864 ("[T]he Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973."). And overruling prior law solely based on this "justification" would run afoul of the Court's longstanding view that it cannot overrule precedent on "the belief that a prior case was wrongly decided." *Ibid.* Given the careful reaffirmance of *Roe* in *Casey*, this Court's obligation to "define the liberty of all, not to mandate [its] own moral code" is even more important now than when the Court decided *Casey*. *Id.* at 850. Overturning the right to abortion would amount to a "surrender to political pressure" and would "subvert the Court's legitimacy beyond any serious question." *Id.* at 867.

Further, "*[s]tare decisis* has added force" when, as here "the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). The protection of the fundamental right to obtain an abortion prior to viability has profoundly impacted the educational and social lives of men and women for half a century and throughout multiple generations. Calling a woman's right to terminate a pre-viability pregnancy into question would upend lives across the country, affecting everything from reliance on the availability of an abortion in the face of an unplanned pregnancy to broader life decisions about professional pursuits and how to structure one's family and divide labor between spouses. *See* Mark Tushnet, *The New Constitutional Order* 91-92 (2003) (explaining that *Roe* is "so embedded in the nation's culture that overruling it would disrupt understandings not about abortion alone, but about the role of women in society").

Mississippi claims that women have now so progressed in the workplace that abortion is no longer needed to secure women's professional advancement. Petrs. Br. 4. Yet the right to access a legal abortion prior to viability is a critical piece of what has *allowed* women to make strides toward equality with their male counterparts both in the workplace and at home. Repudiating that right would jeopardize the progress that has been made. It would make achieving equality in the workplace and at home more difficult for future generations of women, as well as those women who are currently of reproductive age.

Mississippi's unfounded complaints about arbitrariness of the viability line ring hollow considering the lawlessness and confusion that would follow overturning *Roe* and *Casey*, as the State implores this Court to do. Such a reversal would lead to inconsistent directives and would leave women and indeed, the general public, in the dark about the state of the law and undermine our "common law tradition … to ensure fair notice before any deprivation of life, liberty, or property could take place." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

The chaos that has ensued following *unsuccessful* challenges to *Roe* and *Casey* is a harbinger of the instability that would arise if the Court overturns these cases. States have drawn new lines constricting a woman's right to abortion, further disturbing settled expectations that the line is drawn at viability. Clinics have closed in the face of legal challenges, never to reopen, even after prevailing in court. *See, e.g.*, Lauren Caruba, *Despite Legal Victory, Whole Women's Health Shutters San Antonio Abortion Clinic*, San Antonio Express News (Jan. 17, 2019). Eliminating *Roe* and *Casey* would only lead to *further* instability as the courts would be called upon to opine on a case-by-case basis whether the particular line in the sand drawn by a specific state regulation of abortion complies with the Constitution. This ad-hoc line-drawing would lead to further instability, as women scrambling across state borders to access abortion would have little guidance when trying to determine when in their pregnancies they could obtain an abortion in any given State.

3. Protecting constitutional rights by prohibiting categorical bans—as *Roe* and *Casey* have done in prohibiting abortion bans before viability while permitting other, less intrusive restrictions—is a practice that has been frequently employed by this Court. As to the constitutional right to marriage, for example, the Court has held that States may not categorically ban interracial marriages, prisoner marriages, or same-sex marriages. *See Loving*, 388 U.S. at 11 (invalidating bans on interracial marriage because there is "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies [racial] classification"); *Turner*, 482 U.S. at 99 (invalidating bans on prisoner marriages because the "almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives"); *Obergefell*, 576 U.S. at 681 (invalidating same-sex marriage ban after determining that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character"). The Court also struck down a Texas statute that categorically prohibited consensual same-sex sexual intercourse, holding that no legitimate state interest could justify the statute's intrusion into individuals' "vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment." *Lawrence*, 539 U.S. at 564, 578.

The Court's obligation to draw lines, often close and difficult ones, is unavoidable and "cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little." *Duncan*, 391 U.S. at 160-61. Even if Mississippi is unsatisfied with the Court's viability rule, it provides needed guidance to the States, which must operate within the bounds of

the Constitution, and to women and their families, who must rely on settled law regarding abortion to guide important reproductive decisions they may make.

Finally, even if the point at which this Court drew a line between a women's liberty interest and the State's interest in fetal life were "arbitrary" as Mississippi contends—and it is not—"[l]iberty must not be extinguished for want of a line that is clear. . . . Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care." *Casey*, 505 U.S. at 869-70. Indeed, when the Court must draw a line—and particularly when that line embodies constitutional decrees settling an issue of public dispute—that line carries a "rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation." *Id.* at 867. That rare precedential force, or even ordinary precedential force, requires upholding *Roe* and *Casey* and rejecting Mississippi's call to overturn the viability line.

CONCLUSION

For the reasons stated above and in Respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

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