No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, 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 *AMICI CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND OTHER RELIGIOUS ORGANIZATIONS IN SUPPORT OF PETITIONERS

CARL H. ESBECK
Ninth & Conley St.
Columbia, MO 65211

CHRISTIAN J. STRICKLAND
Schwartz, Orgler & Jordan, PLLC
2355 Pass Road
Biloxi, MS 39531

STEPHEN J. CARMODY
Brunini Law Firm
190 E. Capitol St.
Jackson, MS 39201

ANTHONY R. PICARELLO, JR.*
General Counsel
JEFFREY HUNTER MOON
Solicitor
MICHAEL F. MOSES
Associate General Counsel
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300
apicarello@usccb.org

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Other Authorities

INTEREST OF *AMICI*

Amici are religious organizations that share a longstanding interest in this Court's jurisprudence on abortion.[1] In our view, the rule the Court adopted in *Roe* v. *Wade*, 410 U.S. 113 (1973), and reaffirmed in *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), barring states from prohibiting abortion before viability, is deeply flawed. These decisions, insofar as they impede the ability of states to prohibit abortion before viability, should be overruled.

A list of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

The Constitution does not create a right to an abortion of an unborn child before viability or at any other stage of pregnancy. Abortion is inherently different from other types of personal decisions to which this Court has accorded constitutional protection. An asserted right to abortion has no basis in constitutional text or in American history and tradition. Quite the contrary, abortion prohibitions have been common throughout American history, including during the colonial and founding eras, in 1868 when the Fourteenth Amendment was ratified, and in 1973 when *Roe* was issued.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief in its entirety, and that no person or entity other than *amici* made a monetary contribution toward the preparation or submission of this brief. Counsel for all parties have filed blanket consents to the filing of amicus briefs.

The choice of viability as the point before which a state may not forbid abortion is entirely arbitrary, as individual Justices of this Court, and even the author of *Roe* and two authors of *Casey*'s three-justice plurality, have admitted. Neither *Roe*, nor *Casey*, nor any other decision of this Court has provided a principled justification for viability. As a result of this and other flaws, *Roe* and *Casey*, unlike other landmark decisions of this Court, have never met with general acceptance by the American public. *Roe* and *Casey* have been subject to continuing criticism by judges and legal scholars, including those who self-identify as pro-choice.

Multiple state interests justify prohibitions on abortion. The State has an interest in protecting human life. This is the most fundamental of human rights as it concerns the right of a human being to exist; without it, no other right is possible. The State also has an interest in protecting the integrity and ethics of the medical profession. The purpose of the profession is to heal and alleviate pain and suffering, not to destroy human life or to cause pain and suffering as abortion does.

The judicial creation of an abortion right is in tension with the notion of a written Constitution and the amendment process that the Constitution creates, features that are meaningless if federal courts can rewrite the Constitution. The claimed abortion right is inconsistent with the Constitution's structural restraints—restraints that leave important issues of public policy to the People through their elected representatives, state and federal. A judicially created abortion right cannot be squared with notions of

consent of the governed, separation of powers, federalism, or limited and delegated powers.

Casey purported to be a kind of grand compromise: states could not ban abortion but would have greater leeway to regulate it. Even if such a compromise were an appropriate undertaking of the judicial branch, the second half of this attempted compromise—which has placed federal courts in the position of policing and second-guessing popularly enacted abortion regulations—has proven to be as jurisprudentially disastrous as the first half. Courts today are as busy as ever striking down modest abortion regulations under an ever-shifting standard of review that, in practice, has often turned out to be more demanding than strict scrutiny.

Continued assertion of judicial authority over abortion has tainted the public's perception of the role of this Court and poisoned the process of judicial nominations and confirmations. Significant segments of the public, their elected officials, and the popular media have come to view the Court as "political," owing, in major part, to the Court's continuing treatment of abortion as an appropriate arena of lawmaking by federal judges. The only way to disabuse the public of the mistaken notion that this Court is doing more than interpreting the law is to stop perpetuating the fiction that the Constitution addresses the subject of abortion.

If it continues to treat abortion as a constitutional issue, this Court will face yet more questions downstream about what sorts of abortion regulations are permissible. Those questions, in turn, necessarily require the Court to decide what standard should be

used, and how that standard should be applied, in reviewing abortion regulations. While a three-justice plurality in *Casey* attempted to answer these questions with the "undue burden" and "large fraction" tests, those tests, after nearly 30 years of experience, have proven to be unworkable.

Facial, pre-enforcement challenges continue to be common, leading to the invalidation of abortion laws whose effects have never been tested because those laws have never been allowed to go into effect. These judgments are often based on speculative evidence, and state laws are often faulted for conditions that they did not create, such as the number of abortion providers in the state. Thus, despite *Casey*'s promise to give states greater latitude to regulate abortion, lower courts are as unconstrained and unpredictable as ever in policing and enjoining state abortion policies.

Finally, under *Roe* and *Casey*, no finality is ever attained as to the permissibility of abortion legislation. Even modest abortion laws of a type that this Court has previously approved continue to be challenged anew, and are often enjoined, based on different factual records. Despite this Court's protestation that the Judiciary is not the Nation's medical review board, the federal courts *de facto* have continued to function in that capacity in their review of abortion laws.

All of these downstream problems are additional reasons why *Roe* and *Casey*, insofar as they bar states from prohibiting abortion before viability, should be overruled.

ARGUMENT

I. There Is No Constitutional Basis for the Viability Rule.

A. Neither Constitutional Text Nor History Supports a Right to Take the Life of an Unborn Child at Any Stage of Pregnancy.

The Constitution does not create a right to an abortion of an unborn child at any stage of pregnancy.

Roe attempted to ground a right to abortion in the Constitution by likening it to other personal decisions that had previously been held to enjoy constitutional protection, including decisions regarding procreation and contraception. *Roe* v. *Wade*, 410 U.S. 113, 152-53 (1973), citing *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Roe*, 410 U.S. at 169-70 (Stewart, J., concurring) (also citing *Skinner* and *Eisenstadt*). But *Skinner* and *Eisenstadt* concerned laws in which "the government *prevented* people from having children or interfered with the decision not to *become* pregnant, which is different from protecting an unborn child in an established pregnancy." Michael F. Moses, *Institutional Integrity and Respect for Precedent: Do They Favor Continued Adherence to an Abortion Right*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 557 (2013). Indeed, *Roe* admitted (410 U.S. at 159) that abortion is "inherently different" from marriage and procreation.

Roe also attempted, based on prior decisions of this Court that had declared protection under the Due Process Clause for rights deeply rooted in the Nation's

history and tradition, to locate an abortion right in history. The attempt was seriously flawed. "[S]ubsequent scholarship has demonstrated conclusively that acceptance of abortion is not in any sense deeply rooted in the Nation's history and traditions. The opposite is true: it is the *prohibition* of abortion that has deep roots in English and American history." *Institutional Integrity and Respect for Precedent*, *supra* at 553-54. An exhaustive study of the issue concludes that "[t]he tradition of treating abortion as a crime was unbroken through nearly 800 years of English and American history until the 'reform' movement of the later twentieth century." Joseph W. Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY xii (2006).[2]

There is no evidence that the framers of the Fourteenth Amendment thought they were creating a right to abortion at any stage of pregnancy. Quite the contrary. By the end of 1868, the year the amendment was ratified, 30 of the then-37 states had enacted prohibitions on abortion, including 25 of the 30 ratifying states.[3] Abortion prohibitions were universal

---

[2] Remarkably, the authors of *Casey*'s three-justice plurality claimed that "[w]e do not need to say whether each of us, had we been Members of the Court" when *Roe* was decided, "would have concluded, as the *Roe* Court did, that [states may not] ban … abortions prior to viability." 505 U.S. at 871. These and similar passages in the plurality opinion leave the impression that a majority of the Court was unconvinced that *Roe* was correctly decided as an original matter. *E.g.*, *id*. at 853 (referring to the "reservations any of us may have in reaffirming the central holding of *Roe*").

[3] Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 108 (1993). At early common law, quickening was required

in the year *Roe* was decided.[4] *See also* Brief of Amicus Thomas More Society in Support of Petitioners, Part III (describing the legal treatment of abortion in American history in greater detail).

Thus, neither constitutional text nor history provides support for an abortion right before viability or at any other stage of pregnancy. Indeed, it is hard to identify anyone today who defends *Roe* on textual or historical grounds. *See* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1007 (2003) ("I know of no serious scholar, judge, or lawyer who attempts to defend *Roe*'s analysis on textual or historical grounds."); Richard S. Myers, *Lower Court "Dissent" from Roe and Casey*, 18 AVE MARIA L. REV. 1, 6 (2020) (noting that "no one defends the Court's opinion in *Roe*").

Finally, treating unborn children differently depending on viability results in unequal treatment of both unborn children and their mothers in several respects. First and most obviously, the choice of viability creates two classes of unborn children whose

---

for an abortion prosecution, but that requirement was adopted for *evidentiary* reasons, not for any lack of concern about the child's life. *Id*. at 104. In the United States, the quickening distinction was largely eliminated in the nineteenth century. *Id*. at 116-17.

[4] "Until the 1960s, all but four of the fifty states had statutes that prohibited abortion except when necessary to save the life of the mother." Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85, 94 (2005). Despite a liberalizing trend that began in 1967, a majority of states (31) by the beginning of 1973, the year *Roe* was decided, prohibited abortion except to save the mother's life. *Id*.

legal status depends on the ability of then-current medical technology to keep them alive, a distinction that is constitutionally irrelevant.[5] In addition, creating a legal distinction based on viability may create a disparate impact on women on the basis of race and sex. There is evidence that unborn children who are female or African-American have "significantly greater prospects for survival."[6] As a result, under *Roe*'s viability rule, African-American mothers and the mothers of unborn girls may have a narrower window of time than others to procure an abortion. It would be out of keeping with the purpose of the Fourteenth Amendment, enacted to end racial inequality, if it were interpreted in a manner that creates racial disparities. Furthermore, unborn girls in some cultures face a significantly greater risk of being aborted than unborn boys, which undermines the claim that abortion furthers the interests of women.[7] Sex-selection abortions are now common in the United States.[8] Efforts to legalize abortion have

---

[5] *See* discussion *infra* at 9-13.

[6] Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713, 731 & nn. 101-02 (2007), citing Steven B. Morse, et al., *Racial and Gender Differences in the Viability of Extremely Low Birth Weight Infants: A Population-Based Study*, 117 PEDIATRICS 106 (2006); *see also* S.L. Lukacs & K.C. Schoendorf, *Racial/Ethnic Disparities in Neonatal Mortality-United States, 1989-2001*, 292 JAMA 2461 (2004); Greg R. Alexander, et al., *US Birth Weight/Gestational Age-Specific Neonatal Mortality: 1995-1997 Rates for Whites, Hispanics, and Blacks*, 111 PEDIATRICS 61 (2003).

[7] *See*, *e.g.*, Debora Mackenzie, *Sex-Selective Abortions May Have Stopped the Birth of 23 Million Girls*, NEW SCIENTIST (Apr. 16, 2019).

[8] Kelsey Harkness, *Sex Selection Abortions are Rife in the U.S.*,

also been animated by explicitly eugenic goals, including an effort to abort persons with disabilities. *Box* v. *Planned Parenthood*, 139 S. Ct. 1780, 1782-91 (2019) (Thomas, J., concurring). Absent some clear textual or historical basis, the Constitution should not be construed to require a rule that creates so many inequities.

B. The Viability Rule Is Arbitrary, Lacking Any Principled Justification

"We must justify the lines we draw." So said the *Casey* plurality. 505 U.S. at 870. A "decision without principled justification," the plurality elaborated, "would be no judicial act at all." *Id*. at 865. Any claimed justification for an abortion right "must be *beyond dispute*." *Id*. (emphasis added).

Yet neither *Roe*, *Casey*, nor any other decision of this Court provides a "principled justification" for the viability rule, let alone one that is "beyond dispute."

Start with *Roe*. The Court admitted that the state has a legitimate interest in protecting unborn human life,[9] but concluded that that interest did not become

---

NEWSWEEK (Apr. 14, 2016). By noting the disparate effects of the viability rule, we are not suggesting that the Court choose some other (but equally arbitrary) point in pregnancy that does not have those effects.

[9] *Roe* used the term "potential life," but that phrase "is a euphemism. No one really denies that the unborn human is alive as a biological matter before an abortion." Beck, *The Essential Holding of Casey*, 75 UMKC L. REV. at 726 n.76. This Court has acknowledged that the unborn child "by common understanding and scientific terminology … is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales* v.

compelling until viability because at that point the unborn child "has the capability of meaningful life outside the mother's womb." 410 U.S. at 163. Providing a *definition* of viability, and then using it as the basis for a conclusion that viability is the constitutionally meaningful point before which the state cannot *prohibit* abortion, is no explanation at all.[10] As one commentator famously observed in the year *Roe* was decided, that "explanation"—the only one proffered by the Court—"mistake[s] a definition for a syllogism."[11]

The *Casey* plurality offered *one sentence* to support retention of *Roe*'s viability rule, and that sentence, like the original *Roe*, merely *defines* viability:

> The second reason [for retaining the viability rule apart from stare decisis, which the plurality presented as the first reason] is that the concept of viability, as we noted in *Roe*, 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

---

Carhart, 550 U.S. 124, 147 (2007). An unborn child is also indisputably human. Robert P. George and Christopher Tollefsen, EMBRYO: A DEFENSE OF HUMAN LIFE 3 (2008).

[10] *See* Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 NW. U.L. REV. 249, 273 n.139 (2009) (noting that recitation in *Roe* of the definition of viability in place of an explanation has long been criticized even by those scholars who describe themselves as pro-choice); *id*. at 253 (noting "the broad academic consensus that *Roe* failed to offer any argument in favor of the viability rule").

[11] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 924 (1973).

> 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. But the plurality offers no explanation for why "reason" and "fairness" bar abortion prohibitions before viability.

The absence of an explanation did not go unnoticed at the time *Casey* was decided. Justice Scalia observed:

> The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "can in reason and all fairness" be thought to override the interests of the mother. Precisely why is it that, at the magical second when machines currently in use … are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.

Id. at 989 n.5 (Scalia, J., concurring in the judgment in part, dissenting in part) (internal citations omitted).

The three-justice plurality's decision to retain the viability rule while jettisoning other central aspects of *Roe* (specifically the trimester framework and strict scrutiny) is especially puzzling in light of two additional factors. *First*, the plurality expressly and

correctly acknowledged that the state has an "important," "legitimate," "substantial," and "profound" interest, *throughout pregnancy*, in protecting unborn human life. *Id*. at 875-76, 878. But if that is the case, then why is the state forbidden to prohibit abortion before viability? *Second*, two members of the *Casey* plurality had earlier *admitted*, in opinions they authored or joined, that the viability rule was arbitrary,[12] a view shared at one time or another by no less than five other sitting justices.[13]

Indeed, the author of *Roe* was among them. Initially proposing the end of the first trimester as the point at which abortions could be prohibited, Justice Blackmun admitted that the selection of that point was as arbitrary as the choice of quickening *or viability*, an admission that is now public record.[14]

---

[12] *Akron* v. *Akron Ctr. for Reprod. Health*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting) ("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."), *overruled on other grounds*, *Casey*, 505 U.S. at 870, 882-83; *Webster* v. *Reprod. Health Servs.*, 492 U.S. 490, 519 (1989) (plurality opinion) (Rehnquist, C.J., joined by White and Kennedy, JJ.) ("[W]e do not see why the State's interest in protecting potential human life 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.").

[13] Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 HASTINGS CONST. L.Q. 187, 192 & n.30 (2016) (listing all seven justices with relevant citations).

[14] Cover Memorandum of Justice Blackmun Accompanying Draft of *Roe v. Wade*, quoted in David Garrow, LIBERTY AND SEXUALITY 580 (2005) ("You will observe that I have concluded that the end

In short, this Court has never justified the lines it has drawn or provided a "principled justification," let alone one "beyond dispute," in regard to *Roe*'s viability rule.

C. The Viability Rule Has Never Met with General Acceptance by the American Public, Judges, or Legal Scholars.

Landmark decisions of this Court, regardless of the reaction they elicit at the time, have generally come to be accepted over time as part of the fabric of our law and society. This is not true of *Roe*.

For purposes of comparison, consider *Brown* v. *Board of Education*, 347 U.S. 483 (1954). *Brown*'s holding that racially segregated schools offend the Constitution is an unquestioned and universally accepted proposition in American life and society even if it was not initially. By contrast, after decades of experience, the viability rule has *never* met with anything even close to universal public acceptance in the United States. Quite the contrary, public opinion over time has trended in the *opposite* direction. In 1996, *65% of the American public* "said that abortion should be generally illegal in the second trimester," compared to only 26% who thought it should be legal at that stage.[15] By 2011, an even larger majority, *71%*

---

of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.").

[15] Randy Beck, *State Interests and the Duration of Abortion Rights*, 44 MCGEORGE L. REV. 31, 41 (2013) (citing the surveys). Opinion polls that merely ask "do you support *Roe*" may be suspect because of public misperceptions about what *Roe* held.

percent of Americans, believed that abortion should generally be illegal in the second trimester compared to 24% who thought it should generally be legal at that stage.[16]

While opinion polls do not decide constitutional cases, this underscores, nearly 50 years after *Roe*, how radically out of sync the viability rule is with the views of the American public, and how much of mainstream America has rejected it. Even more indicative of this are the numerous abortion statutes, enacted prior to and after *Roe*, that forbid abortion without reference to viability.[17]

One sign of a decision's virtues or vices is its reception by lower court judges. By that measure, *Roe* and *Casey* score consistently low marks. Inferior courts follow those decisions as they are required to do, but often under vocal protest and with candid

---

The polls we cite here focus on questions relating to specific stages of pregnancy.

[16] *Id*. Some polls also show majority support for prohibitions on abortion at even earlier stages of pregnancy. *See*, *e.g.*, Matthew Sheffield, *Poll: Majority Thinks Fetal Heartbeat Abortion Bans Aren't Too Restrictive*, THE HILL (May 15, 2019) ("More than half of registered voters believe that laws banning abortion after the sixth week of pregnancy are not too restrictive, according to a new Hill-HarrisX survey.").

[17] *See* Paul Benjamin Linton, *Overruling Roe v. Wade: Lessons from the Death Penalty*, 48 PEPP. L. REV. 261, 333-40 (2021) (compiling statutes). The viability rule is also out of sync with international norms. O. Carter Snead, *A Time for Courage on the Supreme Court*, NEWSWEEK (May 20, 2021) (noting that "we are one of only seven nations that permits elective abortions after 20 weeks' gestation").

criticism. "Nothing in the text or original understanding of the Constitution establishes a right to an abortion," wrote one member of the appellate panel that heard this very case. *Jackson Women's Health Org.* v. *Dobbs*, 945 F.3d 265, 277 (5th Cir. 2019) (Ho, J., concurring in the judgment). A federal appellate judge in another circuit notes the unfortunate effect that *Roe* and *Casey* have had on federal courts and the resulting instability in the law. *Preterm-Cleveland* v. *McCloud*, 994 F.3d 512, 536 (6th Cir. 2021) (Sutton, J., concurring) ("Today's case, it seems to me, is Exhibit A in a proof that federal judicial authority over the issue [of abortion] has not been good for the federal courts or for increased stability over this difficult area of law.").

The viability rule has come in for particular criticism by the federal and state appellate bench.[18] Members of this Court have been among the rule's sharpest critics. *See* note 12, *supra*; *see also* Beck, *Twenty-Week Abortion Statutes*, at 192 & n.30 (compiling criticism of the viability rule by individual Justices).

Roe and *Casey* have also been subjected to withering and continuing criticism in the legal academy, including by those who self-identify as pro-

[18] *E.g.*, *MKB Mgmt. Corp.* v. *Stenehjem*, 795 F.3d 768, 776 (8th Cir. 2015) (concluding that the "viability standard discounts the legislative branch's recognized interest in protecting unborn children"); *Little Rock Family Planning Services* v. *Rutledge*, 984 F.3d 682, 693 (8th Cir. 2021) (Shepherd, J., concurring) (concluding that "the viability standard fails to adequately consider the substantial interest of the state in protecting the lives of unborn children").

choice.[19] Indeed, even those who support an abortion right often attempt to construct *alternative* justifications for it. There would be no reason for books like "What *Roe* Should Have Said" were *Roe* defensible on its original terms.[20] Of course, even in *Casey* itself, *seven* justices refused to defend *Roe* on its original terms—the four who rejected *Roe* altogether and the three in the plurality who rejected *Roe*'s trimester framework and strict scrutiny but not its viability rule.

D. Multiple State Interests Justify Prohibitions on Abortion Before Viability.

There is an unfortunate tendency in abortion cases to become lost in minutiae. The factual record in individual cases can be lengthy and complex, the case law complicated and difficult to apply. But these case-specific features cannot disguise the tragedy that is the common denominator in these cases: the intentional destruction, on an unprecedented scale, of the most innocent and defenseless of the human family. In the truest sense, they are our *family*, our *brothers and sisters*. Like *all* members of the human family, they should be treasured and loved. Nothing in the Constitution requires states to stand idly by while their lives are deliberately taken.

---

[19] *E.g.*, Forsythe & Presser, *The Tragic Failure of Roe v. Wade*, at 88 n.13 (citing scholarly articles).

[20] *See*, *e.g.*, Jack M. Balkin (ed.), WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (2005).

States have many interests in prohibiting the intentional taking of unborn human life. We will discuss two of them.

1. Protecting Human Life

Both the founders and the drafters of the Fourteenth Amendment recognized the right to life as the first right protected by government.[21] The priority given to this right is no accident. It is the logical starting point in any discussion of the fundamental rights of persons. All other rights, interests, and values secured by the government are meaningless if one does not first possess the right simply to live. Thus, ours has always been a society that "strongly affirms the sanctity of life." *Furman* v. *Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

Decisions of this Court recognize the state's "interest in the protection and preservation of human life, and there can be no gainsaying this interest." *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 280 (1990). "The States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime." *Id*. The same can be said for state prohibitions on assisted suicide,

[21] The Declaration of Independence places the right to life first in the list of inalienable rights. The Fifth and Fourteenth Amendments list the right to life first among those rights of which the government cannot deprive a person without due process of law. Thomas Jefferson's March 31, 1809 letter to the Republican Citizens of Washington County, Maryland, stated: "The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government." 8 THE WRITINGS OF THOMAS JEFFERSON 165 (H.A. Washington, ed.) (1871).

which are "longstanding expressions of the States' commitment to the protection and preservation of all human life." *Washington* v. *Glucksberg*, 521 U.S. 702, 710 (1997).

Abortion involves the purposeful taking of an innocent human life and, like the homicide of a born person, it is a proper subject of prohibition by the state. "Among all the crimes which can be committed against life, procured abortion has characteristics making it particularly serious and deplorable." Pope John Paul II, Encyclical Letter *Evangelium vitae*, ¶ 58 (1995). The Second Vatican Council speaks of abortion, together with infanticide, as an "unspeakable crime." Pastoral Constitution on the Church in the Modern World (*Guadium et spes*), ¶ 51 (1965). This follows from the act itself, which is deadly in intention and consequence, and from the inherent sanctity and dignity of the innocent child whose destruction is intended:

> The moral gravity of procured abortion is apparent in all its truth if we recognize that we are dealing with murder and, in particular, when we consider the specific elements involved. The one eliminated is a human being at the very beginning of life. No one more absolutely *innocent* could be imagined….
>
> Human life is sacred and inviolable at every moment of existence, including the initial phase which precedes birth.

Evangelium vitae, ¶¶ 58, 61. "Reason alone," as the current pontiff has observed, "is sufficient to recognize

the inviolable value of each single human life," including that of the unborn. Pope Francis, Apostolic Exhortation *Evangelii gaudium*, ¶ 213 (2013).

2. Protecting the Integrity and Ethics of the Medical Profession

"There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales*, 550 U.S. at 157, quoting *Glucksberg*, 521 U.S. at 731. "[T]he state has 'legitimate concern for maintaining high standards of professional conduct' in the practice of medicine." *Gonzales* at 157, quoting *Barsky* v. *Board of Regents*, 347 U.S. 442, 451 (1954).

The animating purpose of the medical profession—one might say the very heart of medicine—is to do no harm, to heal and alleviate pain and suffering. Any act that takes life is the antithesis of healing. Health care workers are called to a professional integrity that "tolerates no action that destroys life." Pontifical Council for Pastoral Assistance to Health Care Workers, NEW CHARTER FOR HEALTH CARE WORKERS, ¶ 52 (2016). For those reasons, it is entirely reasonable for the state to forbid health professionals to take a human life. That prohibition is applicable at any stage of life, including at its beginning and natural end. It does not offend the Constitution for the state to forbid the healing professions to cause or assist in causing an intentional killing. *See*, *e.g.*, *Glucksberg*, 521 U.S. at 705-06, 735-36 (upholding a state law forbidding

assisted suicide against a constitutional challenge); *Vacco* v. *Quill*, 521 U.S. 793, 797, 809 (1997) (same).[22]

The state also has an interest in ensuring that health professionals *alleviate* (not cause) pain and suffering. The Petitioners proffered expert testimony that an unborn child is likely to experience pain as early as ten weeks after the last menstrual cycle. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d at 279 (Ho, J., concurring in the judgment). The state has an obvious interest in preventing a physician from causing horrific pain, including that caused by an abortion in which an unborn child is literally torn limb from limb. *Id*. at 281.

E. A Judicially Created Right to Abortion Before Viability Contradicts the Text and Structure of the Constitution.

That an abortion right is nowhere to be found in, or inferred from, the text of the Constitution or the Nation's history and traditions should be sufficient reason for the federal judiciary to leave the issue to the political branches. But the argument for not "constitutionalizing" abortion is even more compelling when one considers the tension—one is forced to say the conflict—that a judicially crafted abortion right creates with the text and structure of the Constitution.

First, an abortion right conflicts with the notion of a written Constitution, as well as the processes for

---

[22] *Roe* seriously erred (410 U.S. at 130-32) in its treatment of the Hippocratic oath. Martin Arbagi, *Roe and the Hippocratic Oath*, in ABORTION AND THE CONSTITUTION 159-81 (Dennis J. Horan, et al., eds.) (1987).

amendment that the Constitution creates. Both are meaningless if federal courts are at liberty to rewrite the Constitution.

Second, the abortion right is in conflict with the structural restraints (such as separation of powers and federalism) that leave important issues up to the People through their elected representatives, state and federal.

The notion that it is the role of the federal judiciary, and not the elected branches of government, to decide such an important question of public policy as abortion conflicts with principles of popular sovereignty (consent of the governed) and separation of powers that lie at the very core of our constitutional government. The people's chosen representatives, who by virtue of their election and relatively short terms remain accountable to the people, are vested with exclusive lawmaking power subject only to such constraints as the people themselves have agreed to place beyond the reach of political majorities. State governments remain the repository of all political power not specifically delegated to the federal government. U.S. Const., amend. X; *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 535-36 (2012). There is a constitutionally prescribed mechanism for amending the Constitution, and the judiciary plays no role in that process. U.S. Const., art. V. Finally, all officers of the federal government, including judges, are bound by oath to support "*this* Constitution," *i.e.*, the Constitution which the people themselves adopted and have amended from time to time. U.S. Const., art. VI (emphasis added).

All these fundamental features of our Constitution—popular sovereignty, separation of powers, representative government, the vesting of lawmaking authority in the legislative branch, federalism, the amendment process, and the prescribed oath of office—are in irreconcilable conflict with the claim of a constitutionally based right to an abortion.

The three-justice *Casey* plurality cited the institutional integrity of the Judiciary as a reason to retain an abortion right. The opposite is true. A correct understanding of the federal courts' role in American government requires rejection of the viability rule.

II. Failure to Overturn the Viability Rule Will Have Continued Bad Consequences.

Casey purported to be a kind of grand compromise: states (a) could not ban abortion but (b) would have greater leeway to regulate it. Even assuming that such a compromise is an appropriate undertaking of the judicial branch—in our view, it is not—the second half of this attempted compromise, which has placed federal courts in the position of policing and second-guessing popularly enacted abortion regulations, has proven to be as jurisprudentially disastrous as the first half. Courts today are as busy as ever striking down modest abortion regulations under an ever-shifting standard of review that, in practice, has turned out to be more demanding than strict scrutiny.[23]

---

[23] *See Planned Parenthood* v. *Com'r*, 888 F.3d 300, 310 (7th Cir. 2018) (Manion, J., concurring in the judgment in part, dissenting

In addition, the continued assertion of judicial authority over abortion has tainted the public's perception of the role of this Court and poisoned the process of judicial nominations and confirmations. Significant segments of the public, their elected officials, and popular media have come to view the Court as "political," owing, in major part, to the Court's continuing treatment of abortion as an appropriate arena of lawmaking for the federal courts. The best and (in our view) only way to disabuse the public of the mistaken notion that this Court is doing more than calling balls and strikes is to stop perpetuating the fiction that the Constitution addresses the subject of abortion. The solution—the one and only lasting solution—is to return the issue to the political branches.

A decision by this Court to continue treating abortion as a constitutional issue means that this Court will face questions downstream about what sorts of abortion regulations are permissible. Those questions, in turn, necessarily require the Court to decide what standard it will use, and how it will apply that standard, in reviewing abortion regulations. A three-justice plurality in *Casey* attempted to answer these questions with the "undue burden" and "large fraction" tests. But, after nearly 30 years of

---

in part) (observing that the abortion right under *Casey* is "more ironclad even than the rights enumerated in the Bill of Rights"), *rev'd in part*, 139 S. Ct. 1780 (2019). For a description of the twists and turns in this Court's abortion jurisprudence, *see* Moses, *Institutional Integrity and Respect for Precedent*, at 542-53.

experience, these tests have proven to be highly problematic for reasons we take up next.

A. The Undue Burden Standard Is Unworkable.

Casey defined an "undue burden" as a "substantial obstacle." 505 U.S. at 877. But "substantial obstacle" is as subjective and unworkable as "undue burden"—a problem noted by Justice Scalia when the test was first announced. *Id.*, at 986-87 (Scalia, J., concurring in the judgment in part, dissenting in part) (describing the test as "inherently manipulable," "hopelessly unworkable," and gauged to conceal "raw judicial policy choices concerning what is 'appropriate' abortion legislation"); *see also id*. at 930 (Blackmun, J., concurring in part, dissenting in part) (concluding that *Roe*'s strict scrutiny was "far less manipulable" than the undue burden standard adopted by the *Casey* plurality).

To this day, nearly 30 years after *Casey*, no one can say with confidence what an "undue burden" is. One federal appellate judge has concluded that the undue burden standard is so lacking in objective content that "*[o]nly the Justices*, the proprietors of the undue-burden standard, can apply it to a new category of statute...." *Planned Parenthood* v. *Box*, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., concurring in denial of reh'g *en banc*) (emphasis added). That a seasoned federal appeals judge would reach this conclusion is a clear sign that the test, after nearly 30 years of experience, is not susceptible to neutral and objective application.

Of course, if it were practicable to relegate all questions about the undue burden test to this Court, that would be no solution either. The Justices of this Court do not agree on how to apply the test. A classic illustration of this is that even the three Justices who penned the plurality opinion in *Casey* did not agree among themselves whether subsequently challenged laws imposed an undue burden. Justices O'Connor and Souter voted to strike down a Nebraska statute prohibiting partial-birth abortion, while Justice Kennedy voted to uphold it. *Cf. Stenberg* v. *Carhart*, 530 U.S. 914, 938 (2000) (claiming that a "straightforward application" of *Casey* required invalidation), *with id.* at 956-79 (Kennedy, J., dissenting) (reaching the opposite conclusion). Several years later, applying the undue burden test, Justice Kennedy voted to uphold a federal statute prohibiting partial-birth abortion, while Justice Souter voted to strike it down under the same test. *Cf. Gonzales*, 550 U.S. at 145-46, 168, *with id.* at 169-71 (Ginsburg, J., dissenting, joined by Souter, J., among others).[24]

In recent times, the confusion has only deepened. To take one example, there is now an unresolved question whether the undue burden test requires judges to balance the benefits and burdens of a challenged abortion law. In *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), this Court held that it does. In *June Medical Services* v. *Russo*, 140 S. Ct. 2103 (2020), a four-justice plurality concluded that it does, but the five remaining justices, in separate

[24] Justice O'Connor, having retired from the Court, did not participate in *Gonzales*.

opinions, disagreed. There is now a festering circuit split on whether to apply a balancing test.[25]

The unworkability of the undue burden test is just one of many signs that it should be rejected in favor of returning the abortion issue to the political branches.

B. The Large Fraction Test is Unworkable.

Casey requires facial invalidation of abortion legislation whose purpose or effect unduly burdens the decision of a "large fraction" of women to have an abortion. However, this Court has never indicated how one is to determine the fraction's numerator and denominator. *Hellerstedt* adopted an interpretation of the large fraction test in which the numerator and denominator appear to be *identical*. 136 S. Ct. at 2343 n.11 (Alito, J., dissenting) ("Under the Court's holding, we are supposed to use the same figure (women actually burdened) as both the numerator and the denominator. By my math, that fraction is always '1,'

[25] The Seventh Circuit uses a balancing test. *Planned Parenthood* v. *Box*, 991 F.3d 740 (7th Cir. 2021), *petition for certiorari pending*, No. 20-1375 (U.S.). The Eighth Circuit has rejected use of a balancing test. *Hopkins* v. *Jegley*, 968 F.3d 912, 915-16 (8th Cir. 2020); *Little Rock Family Planning Servs.* v. *Rutledge*, 984 F.3d at 687 n.2. A three-judge panel of the Fifth Circuit used a balancing test, but its opinion was subsequently vacated and the case is now pending before the *en banc* court. *Whole Woman's Health* v. *Paxton*, 978 F.3d 896, 904 (5th Cir. 2020), *vacated and reh'g en banc granted*, 978 F.3d 974 (5th Cir. 2020). Judges of the Sixth Circuit are almost evenly divided on the issue, with a slim majority declining to endorse a balancing test, but with the dissenters claiming that that portion of the majority opinion is dicta. *Preterm-Cleveland* v. *McCloud*, 994 F.3d 512 (6th Cir. 2021) (*en banc*).

which is pretty large as fractions go."). If that is correct, then the outcome of the undue burden test is rigged to ensure the invalidation of *any* facially challenged abortion regulation. But that is an absurd result and cannot possibly be what *Casey* intended.

Uncertainty over how to apply the large fraction test has filtered down to lower courts, creating confusion over (a) how to determine the denominator,[26] and (b) what constitutes a "large fraction." *Preterm-Cleveland*, 994 F.3d at 534 (plurality) (noting uncertainty as to both questions). This is another reason why abortion regulation is the proper domain of the legislative branch.

C. Allowing Pre-Enforcement Challenges in the Abortion Context Will Continue to Blur the Distinction Between Facial and As-Applied Challenges.

A third area of confusion wrought by *Casey* concerns how judges are to evaluate challenges to laws regulating abortion that have not yet gone into effect. Circuit judges have been skeptical that pre-enforcement challenges should be allowed at all in the abortion context because such challenges do not allow the plaintiff's predictions about the challenged law's

---

[26] Compare *Planned Parenthood* v. *Jegley*, 864 F.3d 953, 958 (8th Cir. 2017) (stating that the denominator is *all women seeking a medication abortion*, a large number that would tend to make the fraction small), with *Planned Parenthood* v. *Com'r*, 896 F.3d 809, 819, 826 (7th Cir. 2018) (stating that the denominator is *all women for whom the challenged regulation is an impediment*, a small number that would tend to make the fraction large), *vacated on other grounds*, 141 S. Ct. 184 (2020).

effect to be tested. Some appellate courts have concluded outright that it is an abuse of discretion for a trial judge to issue a pre-enforcement injunction since the effect of such an abortion law is open to debate.[27] This Court too has indicated that as-applied challenges are to be favored over facial challenges in abortion cases. *Gonzales*, 550 U.S. at 167 (stating that a facial challenge in that case "should not have been entertained in the first instance").

And yet, the practice of bringing pre-enforcement facial challenges to abortion legislation continues, leading inevitably to (a) judgments based on speculative evidence, (b) a blurring of the distinction between facial and as applied challenges, and (c) court decisions based often on factors for which the government itself is not even responsible (such as the number and location of abortion clinics in a given state).

This impossible state of affairs would correct itself if the Court were to follow Justice Scalia's suggestion to, in his words, "get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." *Casey*, 505 U.S.

---

[27] *A Woman's Choice-E. Side Women's Clinic* v. *Newman*, 305 F.3d 684, 693 (7th Cir. 2002) (stating, in an abortion case, that "it is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate"); *Comprehensive Health* v. *Hawley*, 903 F.3d 750, 756-57 (8th Cir. 2018) (rejecting a pre-enforcement facial challenge to an abortion law "[b]ecause the record is practically devoid of any information" about the burdens imposed by the law, and that the appellate court therefore "lack[ed] sufficient information to make a constitutional determination").

at 1002 (Scalia, J., concurring in the judgment in part, dissenting in part).

D. The Lawfulness of Abortion Legislation Is Never Settled but Is Subject to Continued Re-Litigation.

A fourth unhappy consequence of federal judicial review of abortion legislation is the lack of settled law and the perennial re-litigation of abortion cases. Though the *Casey* plurality purported to give states greater latitude to regulate abortion throughout pregnancy, this portion of the plurality opinion has been given little effect.[28] There is today a well-funded legal machine devoted to challenging abortion laws that, on their face, would seem to be entirely reasonable and unobjectionable. And lower courts, lacking clear guidance and themselves all too often mistakenly viewed as political actors, often enjoin these regulations.

A case in point: earlier this year, the Seventh Circuit left in place a lower court injunction of an Indiana parental notice law. The law requires parental notification once a judge has approved of a minor's decision to have an abortion, but before the abortion occurs, *unless* the judge decides *in that individual case* that notification is not in the minor's best interest. *Planned Parenthood* v. *Box*, 991 F.3d

[28]It is ironic that the plurality opinion in *Casey*, purporting to "call[] the contending sides" of the abortion debate to a peaceful resolution of the abortion issue (505 U.S. at 867), has instead become an engine of ongoing, rancorous litigation that makes finality, even as to certain categories of abortion regulation, practically impossible.

740 (7th Cir. 2021), *petition for certiorari pending*, No. 20-1375 (U.S.). It is hard to imagine a more balanced and individualized legislative treatment of this issue. The court of appeals, however, concluded that even this modest regulation, which allows for individualized decision making by a judge familiar with the facts of the case and the particular circumstances of the minor, is an undue burden.

How is it possible that lower courts are preventing such modest regulations from going into effect? The answer is simple. *Casey* purports to consider whether a law imposes an undue burden based on the factual record of *individual* cases. *E.g.*, 505 U.S. at 887 (emphasizing that the plurality's decision about Pennsylvania's waiting period law was based "on the record before us"). Thus, each case is different and thereby subject to a different result. In effect, despite this Court's protestations to the contrary, federal courts today function as the *ex officio* medical boards of review for the entire Nation when it comes to abortion.[29]

The disastrous result is that nothing relating to federal court review of abortion regulations is *ever* truly settled. Even modest abortion legislation of a type previously upheld by this Court is now subject to re-litigation in lower courts, state by state, based on

---

[29] *Cf. Webster*, 492 U.S. at 518-19 (plurality opinion) (criticizing *Roe*'s trimester framework because, among other things, it "left this Court to serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States") (internal quotation marks omitted), quoted in *Gonzales*, 550 U.S. at 163-64.

different factual records.

Ultimately these cases, with all the problems they entail for lower courts, land on this Court's doorstep. And under the current jurisprudence, it will never stop. This should not be. The way to prevent it is to return the issue to the states, where it properly belongs.

CONCLUSION

The Mississippi legislation should be upheld.

Respectfully submitted,

ANTHONY R. PICARELLO, JR.*
General Counsel
JEFFREY HUNTER MOON
Solicitor
MICHAEL F. MOSES
Associate General Counsel
UNITED STATES CONFERENCE
OF CATHOLIC BISHOPS
3211 Fourth Street, N.E.
Washington, D.C. 20017
apicarello@usccb.org
(202) 541-3300

CARL H. ESBECK
Ninth & Conley Streets
Columbia, MO 65211

(Continued on next page.)

CHRISTIAN J. STRICKLAND
Schwartz, Orgler & Jordan
2355 Pass Road
Biloxi, MS 39531

STEPHEN J. CARMODY
Brunini Law Firm
190 E. Capitol St.
Jackson, MS 39201

July 28, 2021

*Counsel of Record

Appendix (List of Amici)

United States Conference of Catholic Bishops

Assembly of Canonical Orthodox Bishops of the United States of America

Diocese of Biloxi

Diocese of Jackson

The Ethics and Religious Liberty Commission of the Southern Baptist Convention

The Lutheran Church-Missouri Synod

National Association of Evangelicals