No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, 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 OF *AMICI CURIAE* WORLD FAITH FOUNDATION AND INSTITUTE FOR FAITH AND FAMILY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully urge this Court to reverse the decision of the Fifth Circuit.

World Faith Foundation is a California non-profit, tax-exempt corporation formed to preserve and defend the customs, beliefs, values, and practices of religious faith, as guaranteed by the First Amendment, through education, legal advocacy, and other means. WFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA).

Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the right to life. See https://iffnc.com.

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[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, its members, or its counsel, have made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question before the Court is whether all previability restrictions on abortion are unconstitutional. The answer is emphatically negative. Abortion terminates the life of an independent human being in the early stages of development. The Court should reject the viability line, step down from its inappropriate role as ex officio medical board, and discard the fallacy that women need access to abortion to participate in public life on an equal basis with men.

Abortion rests on a woman's right not to bear a *child*, a rationale that lacks coherence without presupposing the presence of a second, independent life in the womb—a *child*. Courts have obscured this reality with fuzzy phrases like "potential life" or "fetus that may become a child." But courts also acknowledge the state's interest in protecting "potential life," at least after the point of viability—an arbitrary, judicially crafted line that lacks constitutional justification and stymies legislative efforts at regulation.

Viability is a medical concept, now rendered obsolete by advances in medical knowledge and technology. Abortion is the only *medical* procedure elevated to *constitutional* status. This dual status has plagued courts and legislatures for almost five decades and thrust this Court into the role of "ex officio medical board" for which it is ill-equipped. When the Court steps into that position, it usurps legislative authority to regulate the practice of medicine and protect public health.

ARGUMENT

I. THE RIGHT TO DECIDE WHETHER OR NOT TO BEAR A *CHILD* PRESUPPOSES THERE *IS* IN FACT A *CHILD* DEVELOPING IN THE WOMB.

Casey characterized the "right recognized by *Roe*" as a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as *the decision whether to bear or beget a child*." *Planned Parenthood v. Casey*, 505 U.S. 833, 875 (1992) (emphasis added), citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971). In *Roe*, the district court stated that the Texas statute "deprive[d] single women and married couples of their right . . . to choose whether to have *children*." *Roe v. Wade*, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970) (emphasis added), relying on *Griswold v. Connecticut*, 381 U.S. 479 (1965). This characterization is incoherent absent recognition that a *child*—an independent second life—is growing inside the mother's womb. There are "millions of Americans who believe that *babies* deserve legal protection during pregnancy as well as after birth." *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 278 (5th Cir. 2019) (Ho, J., concurring) (emphasis added).

Word games blur the reality of a separate, independent life in the early stages of development. *Roe* recognized the state's "important and legitimate interest" in "protecting potential life" yet prohibited regulations in the first two trimesters of pregnancy. *Roe v. Wade*, 410 U.S. 113, 154, 163-164 (1973). Although the phrase "potential life" clouds the issue, "potential life is no less potential in the first weeks of

pregnancy . . . ." *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 459 (1983) ("*Akron I*") (O'Connor, J., dissenting).

The "potential life" thread runs through this Court's precedents. "A central premise of [*Casey*] was that the Court's precedents after *Roe* had 'undervalue[d] the State's interest in potential life.'" *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007), citing *Casey*, 505 U.S. at 873. "The State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that *may become a child*." *Casey*, 505 U.S. at 846 (emphasis added). But what else could it possibly become? Unless development is halted involuntarily by miscarriage or intentionally by abortion, the fetus inevitably emerges as a child. This Court acknowledged that "some women come to regret their choice to abort the *infant life* they once created and sustained." *Gonzales*, 550 U.S. at 159 (emphasis added). It blinks reality to say it "may become" a child.

Abortion proponents hide behind the veil of "potential life" and trumpet a "woman's autonomy to determine her life's course" and "enjoy equal citizenship stature." *Gonzales*, 550 U.S. at 174 (Ginsburg, J., dissenting). But these advocates cannot escape the presupposition of human life that haunts their assertions and word games. One author disparages the *Gonzales* Court's reliance on the allegedly "problematic and disputed assumption" that the fetus is a "morally consequential entity," an "inherently valuable life." Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 Wash. & Lee L. Rev. 915, 919,

921 (2010). This author grudgingly admits that, by "introduc[ing] the fetus as 'life' into constitutional law," the Court "has paved the way for the reversal of *Roe*." *Id*. at 944. The time has come to complete the Court's journey down that "paved" road.

Technological developments over the last few decades expose the reality that life—not merely "potential" life—is present in the womb. The Mississippi legislature considered "developments in medical knowledge of prenatal development" showing that "the abilities to open and close fingers and sense outside stimulations develop at 12 weeks' gestation." *Dobbs*, 945 F.3d at 269. Current ultrasound technology permits a view of the developing child that was not possible when *Roe* was decided. *Hamilton* v. *Scott*, 97 So. 3d 728, 742 (Ala. 2012); *see McCorvey* v. *Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring) (noting early development of "sensitivity to external stimuli and to pain").

There is no escaping the logical conclusion that a *child* resides in the womb. The child is smaller, less developed, in a different location, and more dependent than a newborn infant but nevertheless a *child*. Case law, mired in the language of "potential" life, fails to address these critical factors. The fact of dependence in other contexts, e.g., parent-child, comatose patients, "is thought to create legal interests, not eliminate them." Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 Nw. U. L. Rev. 249, 275 (2009). *Casey* selected viability as the point where "the independent existence of the second life [could] in reason and all fairness be the object of state protection." *Casey*, 505 U.S. at 870.

But this hazy language does not tell us whether the Court "envisioned a purely biological concept" or a "degree of 'independence' thought to carry moral or legal significance." Beck, *Viability Rule*, 103 Nw. U. L. Rev. at 274 (2009). Both *Roe* and *Casey* acknowledge the state's interest in protecting the fetus from the outset of pregnancy. *Roe*, 410 at 162; *Casey*, 505 U.S. at 846. That interest implies the presence of "two distinct biological organisms." Beck, *Viability Rule*, 103 Nw. U. L. Rev. at 274. "No one can reasonably doubt that a developing fetus constitutes a living biological organism distinct from its mother long before the point of viability." *Id*.

II. THE STRICT VIABILITY LINE IS NO LONGER VIABLE.

This Court recognized the humanity of the previable child when it upheld the Partial Birth Abortion Act of 2003, 18 U.S.C.S. § 1531. The Act was constitutional even though it applied "both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales*, 550 U.S. at 147. The Court cited a congressional finding that the abortion methods proscribed by the Act had a "disturbing similarity to the killing of a newborn infant." *Id*. at 158. *Gonzales*' high respect for previable human life cannot be reconciled with the continued use of viability to judge the constitutionality of abortion laws.

Viability has long been defined as the point in time when it is reasonably likely the infant could survive outside the womb, "with or without artificial support."

Colautti v. Franklin, 439 U.S. 379, 388 (1979); *Casey*, 505 U.S. at 870 ("realistic possibility of maintaining and nourishing a life outside the womb"); *Roe*, 410 U.S. at 160, 163 ("potentially able to live outside the mother's womb, albeit with artificial aid" or "presumably has the capability of meaningful life outside the mother's womb"). *Casey* crafted its "undue burden" rule around viability, holding that a restriction would be unconstitutional if its "purpose or effect. . . is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 877. The Court confirmed the "state's power to restrict abortions after fetal viability" based on the existence of legitimate state interests "from the outset of the pregnancy." *Id*. at 846.

Many state laws have been struck down based on the arbitrary judicially created viability line,[2] even one that banned pre-viability abortions based on sex, disability, and other criteria. *Little Rock Family Planning Services v. Rutledge*, 397 F. Supp. 3d 1213 (D. Ark. 2019). It is ironic that a pregnant woman may *discriminate* against her own child based on sex while

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[2] *See, e.g., Jane L. v. Bangerter*, 102 F.3d 1112, 1115 (10th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997) (20 weeks); *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013), *cert. denied*, 571 U.S. 1127) (Arizona's 20-week ban); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (Idaho's 20-week ban); *MKB Mgmt. Corp. v. Stenehjem*,795 F.3d 768, 773 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016) (6-week ban based on heartbeat); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (Arkansas Human Heartbeat Act, banning abortions after 12 weeks' gestation), *cert. denied*, 136 S. Ct. 895 (2016).

claiming that abortion is necessary to prevent *discrimination* against women.

The viability line is arbitrary, lacks constitutional support, and conflicts with legal principles in other contexts. Developments in medical technology expose the reality of a child in the womb worthy of legal protection. "Emerging science never shows the unborn to be less than human; rather, each advancement further reveals the humanity of the developing child in all its wonder"—even at 15 weeks, the developing child has "fully formed eyebrows, noses, and lips," and "the baby's fully formed heart pumps about 26 quarts of blood per day."[3] Yet this Court has stubbornly maintained the viability line, reaffirming *Roe*'s "recognition of the right of the woman" to choose abortion "before viability . . . without undue interference from the State." *Casey*, 505 U.S. at 846. *Gonzales* began by presuming the same principle and timeline (*Gonzales*, 550 U.S. at 146)—but on the next page described the unborn child as "a living organism within the womb, *whether or not it is viable outside the womb*" (*id.* at 147, emphasis added).

Gonzales upheld protection for the previable fetus against the gruesome "partial birth" D&E procedure, showing "respect for the dignity of [its] human life." *Gonzales*, 550 U.S. at 157. It is time to reexamine the harsh, unbending viability rule and affirm that "[t]he

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[3] https://lozierinstitute.org/cli-experts-urge-scotus-to-catch-up-to-science-in-mississippi-abortion-case/; https://lozierinstitute.org/new-paper-coauthored-by-cli-scholars-examines-treating-the-patient-within-the-patient/. These articles described in further detail the baby's fetal development at 15 weeks.

dignity of the not-quite-viable fetus does not change depending on the method by which it will be aborted." Beck, *Viability Rule*, 103 Nw. U. L. Rev. at 279.

A. Viability is an arbitrary line that lacks constitutional justification.

"Legislatures may draw lines which appear arbitrary" (*Casey*, 505 U.S. at 870") but "a [judicial] decision without principled justification would be no judicial act at all." *Id*. at 865. "The Court owes the public a principled justification for treating viability as the dispositive constitutional line." Beck, *Viability Rule*, 103 Nw. U. L. Rev. at 254. This Court "has never explained how it might derive this viability rule from the Constitution." *Id*. None of the Court's decisions provide "a constitutional analysis of state power and fetal entitlement that, when combined with the Court's definition of viability, would lead to the conclusion that the state can only protect a viable fetus." *Id*. at 253.

Justices of this Court have raised questions about the wisdom of drawing a strict line at viability. Strong precedent undergirds the state's interest in human life stretching back to the onset of pregnancy. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 746, 795 (1986) (White, J., dissenting) ("The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability . . . the State's interest, if compelling after viability, is equally compelling before viabilit**y**"); *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) ("we 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 [only] after viability"); *Gonzales*, 550 U.S. at 158 ("the State, from the inception of the pregnancy," has an interest "in protecting the life" of the unborn child); *Casey*, 505 U.S. at 881-887 (upholding previability waiting periods and informed consent laws). Justice White described the viability line as "entirely arbitrary." *Thornburgh*, 476 U.S. at 794 (White, J., dissenting). Justice O'Connor found the line "no less arbitrary than choosing any point before viability or any point afterward." *Akron I*, 462 U.S. at 461 (O'Connor, J., dissenting). Referencing O'Connor's dissent in *Akron I*, Justice Scalia argued there was no justification for the line "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.'" *Casey*, 505 at 989 n. 5 (Scalia, J., concurring in the judgment in part and dissenting in part). Even Justice Blackmun, in an internal memorandum circulated with an early draft of *Roe*, admitted the lack of justification: "You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary." Beck, *Viability Rule*, 103 Nw. U. L. Rev.at 250 n. 6, citing David Garrow, Liberty and Sexuality 580 (1998) (quoting cover memorandum from Harry Blackmun accompanying draft of *Roe v. Wade* (Nov. 22, 1972) (on file with the Library of Congress)).

B. The judicially crafted "right" to abort a previable child conflicts with other areas of law, where protection does not hinge on viability.

In any other context, "viability is purely an arbitrary milestone from which to reckon a child's legal existence." *Wiersma* v. *Maple Leaf Farms*, 543 N.W.2d 787, 792 (S.D. 1996). Damages may be recovered for the accidental death of a previable unborn child. *Hamilton*, 97 So. 3d at 733. It is "unfair and arbitrary" to draw a line that hinges on viability. *Mack v. Carmack*, 79 So. 3d 597, 611-612 (Ala. 2011). "[L]aws regarding prenatal injury, wrongful death, and fetal homicide have increasingly abandoned the viability standard expressed in *Roe*." *Hamilton*, 97 So. 3d at 737 (Parker, J., concurring specially). The shift away from viability has been "most significant" in the law of fetal homicide. "At least 38 states have enacted fetal-homicide statutes, and 28 of those statutes protect life from conception." *Id.* at 738.

Other areas of law offer substantial protection to the unborn, including "equity, property, crime, and tort" laws. David Kadar, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639, 639 (1980). Such protections "are of ancient vintage." *Id.* "Viability played no role in the common law of property, homicide, or abortion." *Hamilton*, 97 So. 3 at 743 (Parker, J., concurring specially), citing Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 Val. U. L. Rev. 563, 569 n.33 (1987). "[I]t must respectfully be pointed out that Justice Blackmun has understated the

extent to which the law protects the unborn child." William R. Hopkin, Jr., *Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy*, 47 Temp. L.Q. 715, 723 (1974).

It is time for this Court's abortion jurisprudence to conform to the standards long applied in other areas of law.

C. Developments in medical technology render the viability line obsolete.

Advances in medical and scientific technology have made "clear that a new and unique human being is formed at the moment of conception, when two cells, incapable of independent life, merge to form a single, individual human entity." *Hamilton*, 97 So. 3 at 746 (Parker, J., concurring specially). At every stage of development, "an unborn child is a unique human being." *Id*. at 747. It is troubling that this Court "unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication," leaving courts in a position of "willful blindness to evolving knowledge" while science "push[es] the frontiers of fetal viability closer to the date of conception." *McCorvey*, 385 F.3d at 853. As the Fifth Circuit cautioned, "courts will remain willfully blind to scientific developments" if they do not need to consider new evidence. *Dobbs*, 945 F.3d at 275.

Key medical developments include the infant's ability to feel pain. Decades ago, Justices Blackmun and Stevens admitted "it [was] obvious that the State's interest in the protection of an embryo . . . increases progressively and dramatically as the organism's

capacity to feel pain, . . . increases day by day." *Webster*, 492 U.S. at 552 (Blackmun, J., concurring in part and dissenting in part) (quoting *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring)). As concurring Fifth Circuit Judge Ho pointed out, it would be ironic for the state to allow the unnecessary suffering of unborn babies while "*requir[ing]* . . . execution methods that avoid causing unnecessary pain to convicted murderers." *Dobbs*, 945 F.3d at 280 (Ho, J., concurring) (emphasis added).

Another critical development is the ability to detect a child's heartbeat in the womb. Several years ago, the Eighth Circuit considered whether the state could prohibit abortions of "unborn children who possess detectable heartbeats." *MKB*, 795 F.3d at 770. Experts testified that "fetal cardiac activity is detectable by about 6 weeks" although viability does not occur "until about 24 weeks." *Id.* at 771. Sadly, the court concluded that *Roe* dictated the outcome but suggested that "good reasons exist for [this] Court to reevaluate its jurisprudence." *Id.* at 774.

Viability itself is an evolving standard, but because of this Court's decisions, the state's interest in unborn life hinges on "developments in obstetrics" rather than "developments in the unborn." *MKB*, 795 F.3d at 774. The viability rule "causes fetal and maternal rights to vary based on legally and morally irrelevant factors," including the current state of prenatal medical knowledge. Beck, *Viability Rule*, 103 Nw. U. L. Rev.at 252. The vicissitudes of medical developments result in an unjustified "disparate treatment," e.g., of "a healthy

26-week-old fetus" in 1973 as compared to "an identical fetus similarly situated in 2009." *Id.* at 258.

Developments in abortion jurisprudence are tied to viability—a *medical* concept. It is time for the Court to sever this symbiotic relationship and relinquish its inappropriate role as ex officio medical board.

III. THIS COURT SHOULD NOT ACT AS THE NATION'S "*EX OFFICIO* MEDICAL BOARD."

Abortion is the only medical procedure that has been declared a constitutional right. This dual status, coupled with adherence to the strict viability line established by judicial precedent, has flipped the legislative and judicial roles. This Court encroaches on legislative territory and acts like a national medical review board ruling on viability, medical procedures, and what constitutes acceptable access to an elective procedure. This is particularly troublesome in an area of evolving science and nearly 50 years of contentious national debate. It is time for the Court to resume its appropriate judiciary position and treat abortion as an elective medical procedure rather than a constitutional mandate.

History shows how this Court vacillates between usurping the role of "medical board" and deferring to legislatures, all because one *medical* procedure (abortion) was elevated to *constitutional* status. This lethal combination propelled the Court into the role of "ex officio medical board," a position for which courts and judges are not prepared. The Court stepped into this landmine as far back as *Roe* itself, establishing the

state's compelling interest point "at approximately the end of the first trimester" based on "present *medical* knowledge" because of the "now-established *medical* fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Roe*, 410 U.S. at 163 (emphasis added). *Roe*'s trimester framework implicitly appointed the Court as "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 99 (1976) (White, J., concurring in part and dissenting in part). A decade after *Roe*, Justice O'Connor cautioned that "[t]he *Roe* framework . . . is clearly on a collision course with itself" because it is "inherently tied to the state of medical technology that exists whenever particular litigation ensues." *Akron I*, 462 U.S. at 458 (O'Connor, J., dissenting) (explaining that the "compelling interest" and viability points will both move as medical science progresses). The *Akron I* majority assumed a distinctly *medical* role, declaring that "present medical knowledge" warranted striking down a requirement that second-trimester abortions be performed in a hospital. *Id.* at 437. The majority had no qualms about deciding that abortion was safe enough for D&E procedures performed in "an appropriate nonhospital setting" (*id.* at 438) and that a 24-hour "inflexible waiting period" had "no medical basis" (*id.* at 450).

But in *Webste*r, this Court began to question its "medical board" position and chip away at "trimesters and viability," because these "key elements" of *Roe* are "not found in the text of the Constitution or in any

place else one would expect to find a constitutional principle." *Webster*, 492 U.S. at 518-519, cited by *Gonzales*, 550 U.S. at 163-164. *Webster* rightly criticized *Roe*'s framework because it "left this Court to serve as the country's *ex officio* medical board." *Webster*, 492 U.S. at 518-519. *Gonzales* followed in *Webster*'s footsteps questioning the Court's "medical board" position, but more recent cases have reversed that trend and reestablished the Court's ill-advised medical role.

A. *Whole Woman's Health v. Hellerstedt* thrust this Court back into the role of "ex officio medical board."

In *Whole Woman's Health v. Hellerstedt* ("*WWH*"), "the majority reappoint[ed] this Court as 'the country's *ex officio* medical board with powers to disapprove medical and operative practices and standards throughout the United States.'" 136 S. Ct. 2292, 2326 (2016) (Thomas, J., dissenting), citing *Gonzales*, 550 U.S. at 164 (internal quotation marks omitted). The Court departed from its ruling in *Gonzales*, which eschewed the role of "medical board" and restored the traditional deference to legislatures—"medical uncertainty underlying a statute is for resolution by legislatures, not the courts." *Gonzales*, 550 U.S. at 163. *Casey's* undue burden standard did not require courts to "attempt to reweigh the strength of the medical justification for a law by balancing it against the law's burdens." *Id*. at 166. *WWH* abandoned this deferential approach by imposing a balancing test that leaves legislatures guessing as to what this Court, acting as "ex officio medical board," might uphold. *WWH*, 136

S.Ct. at 2300 (requiring "medical benefits sufficient to justify the burdens upon access" and concluding that neither the admitting privileges nor the surgical center requirement conferred such benefits). In *June Medical* the parties offered "competing *predictions*" about compliance with Louisiana's admitting privileges law. *June Med. Servs. v. Gee*, 139 S. Ct. 663, 664 (2019) (Kavanaugh, J., dissenting from grant of application for stay). Such factual disputes place this Court right back in the inappropriate role of medical advisory board. Courts may only review the constitutionality of a law, "not its wisdom." *Berman v. Parker*, 348 U.S. 26, 32 (1954). The *June Medical* plurality violated that principle by declaring that the Louisiana law at issue "holds no benefits for the public and bears too many social costs." *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2171 (2020) (Gorsuch, J., dissenting).

B. Abortion is the only medical procedure with a constitutional overlay.

Abortion jurisprudence has plagued courts and legislatures for nearly five decades. When the government emphasizes the constitutional aspect and minimizes health concerns, public health is at risk. Acting as an "ex officio medical board," the Court invalidates commonsense health regulations—if legislatures even dare to enact them. Abortion regulations are denied the deferential rational review normally applied in the *medical* context. Instead, abortion is treated as a *constitutional right* and restrictions are subjected to the rigorous standard typically reserved for the most fundamental rights. Confusion reigns despite common features that might

help resolve the tension. Even fundamental rights like free speech and voting are subject to reasonable regulation. The state may regulate the practice of medicine to ensure public safety. In both cases, there is no government obligation to finance or facilitate. The state need not pay the printing or airtime costs for a speaker. The state need not fund a medical procedure or guarantee availability—even for a life-saving procedure. The same is true of abortion: The state is not a guarantor of access or convenience.

It has been over 25 years since this Court's landmark ruling in *Casey*, "yet its contours remain elusive." Laura Wolk and O. Carter Snead, *Article: Irreconcilable Differences?* Whole Woman's Health, Gonzales*, and Justice Kennedy's Vision of American Abortion Jurisprudence*, 41 Harv. J.L. & Pub. Pol'y 719 (Summer 2018). *Casey* recognized the tension between the constitutional and medical aspects of abortion, noting that earlier cases required strict scrutiny of "any regulation touching upon the abortion decision . . . to be sustained only if drawn in narrow terms to further a compelling state interest." *Casey*, 505 U.S. at 871, citing *Akron I*, 462 U.S. at 427. These earlier cases could not all "be reconciled with the holding in Roe itself that the State has legitimate interests [not only] in the health of the woman" but also "*in protecting the potential life within her*." *Casey*, 505 U.S. at 871 (emphasis added).

1. Abortion's dual status creates tension in the government's regulatory role. That tension emerges in scores of cases brought before this Court over the years. Abortion is a quintessential medical procedure

elevated to constitutional status. The government must exercise restraint where constitutional rights are implicated but may exercise a more active role in regulating the practice of medicine to protect public health and safety. *Simopoulos v. Virginia*, 462 U.S. 506, 516 (1983). The state has discretion in the face of medical uncertainty. *Kansas v. Hendricks,* 521 U.S. 346, 360 n. 3 (1997); *Gonzales*, 550 U.S. at 164. Like other medical procedures, abortion may be regulated to address risks and potential complications. *Roe*, 410 U.S. at 150 (facilities and circumstances); *Simopoulos*, 462 U.S. at 510-511 (same); *Akron I*, 462 U.S. at 428-429 (safeguarding health and maintaining medical standards). A zero tolerance policy would invalidate many reasonable regulations merely because of disagreement among medical experts. That would be "too exacting a standard to impose on the legislative power. . .to regulate the medical profession." *Gonzales*, 550 U.S. at 166. Informed consent requirements for abortion are "no different from a requirement that a doctor give certain specific information about any medical procedure." *Casey*, 505 U.S. at 884; *Gonzales*, 550 U.S. at 163-164 (same); *Danforth*, 428 U.S. at 67 ("we see no constitutional defect in requiring it only for some types of surgery . . . or where the surgical risk is elevated above a specified mortality level").

Even fundamental constitutional rights are subject to reasonable regulation**.** Free speech is a cherished fundamental right, but even in a traditional public forum where the right to speak is at its zenith, the state may impose "reasonable restrictions on the time, place, or manner of protected speech." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). *Casey* noted

the underlying principle that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Case*y, 505 U.S. at 873.

2. Abortion jurisprudence has taken on a life of its own, exalting this "right" even when it sacrifices health and safety concerns. This Court has "transformed judicially created rights like abortion into preferred constitutional rights" (*WWH*, 136 S. Ct. at 2329 (Thomas, J., dissenting)), elevating abortion to a position not enjoyed by *any* other medical procedure *or* constitutional right. Unlike any other medical procedure—even a life-saving measure—abortion has been declared a constitutional right. And unlike any other constitutional right, abortion implicates the same health and safety interests as any comparable medical procedure. Courts must strike a delicate balance, but if they accentuate the constitutional aspect and undermine the medical side, states may hesitate to enact and/or enforce health regulations and public safety is jeopardized.

Gonzales and *WWH* underscore the shifting sands of abortion law. *Gonzales* respected the "wide discretion" due to legislators in the face of "medical uncertainty." *Gonzales*, 550 U.S. at 163. *WWH* abruptly curtailed it: "The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law." *WWH*, 136 S. Ct. at 2310. *WWH* exemplified this Court's troubling tendency "to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." *Id.* at 2321 (Thomas, J., dissenting), quoting *Stenberg v. Carhart*, 530 U.S. 914,

954 (2000) (Scalia, J., dissenting). As a result, *Gonzales* and *WWH* "appear to be on a collision course, leaving the proper interpretation of *Casey* an open question." Wolk, *Irreconcilable Differences,* 41 Harv. J.L. & Pub. Pol'y at 751. The recent *June Medical* opinion left many questions unanswered and failed to offer guidance on how to apply the unworkable burden-benefits analysis demanded by *WWH*, a test more appropriate for a medical board than a court of law. "The plurality's test offers no guidance. Nor can it. The benefits and burdens are incommensurable, and *they do not teach such things in law school*." *June Medical v. Russo*, 140 S. Ct. 2103, 2180 (2020) (Gorsuch, J., dissenting) (emphasis added).

3. Abortion is the only medical procedure where regulations must meet a standard higher than rational basis. *Roe* unleashed a prolonged wave of litigation challenging health and safety regulations that would be routinely upheld in any other context. Post-*Roe* litigation highlights the unique character of abortion with its overlapping medical and constitutional concerns. This Court acknowledged that physicians must have room to exercise medical judgment because "abortion is a medical procedure" but lumped it in with "fundamental rights" that demand a compelling state interest. *Akron I*, 462 U.S. at 427. According to *Akron I*, the state's interest in health becomes compelling only after the first trimester. *Id*. at 429. *Thornburgh's* reasoning is similar, drawing harsh criticism from Justice O'Connor: "Under this prophylactic test . . . the mere possibility that some women will be less likely to choose to have an abortion . . . suffices to invalidate" a state regulation.

Thornburgh, 476 U.S. at 829 (O'Connor, J., dissenting) (internal citations and quotation marks omitted). In cases of this era this Court discarded its traditional deference to legislatures regulating medical practices, to the dismay of dissenting Justices: "I had thought it clear that regulation of the practice of medicine . . . was a matter peculiarly within the competence of legislatures, . . . subject to review only for rationality." *Thornburgh*, 476 U.S. at 802 (White, J., dissenting). If strict scrutiny were consistently applied to medical procedures, "there is no telling how many state and federal statutes . . . governing the practice of medicine might be condemned." *Id*.

In *Casey*, this Court criticized earlier cases for requiring "any regulation touching upon the abortion decision" to satisfy strict scrutiny. *Casey*, 505 U.S. at 871. *Casey* modified the standard applied in earlier cases, reasoning that more attention should have been paid to the portions of *Roe* that underscored state interests such as the health of the woman. *Id*. More recently, the tide turned again. The *WWH* majority opinion appeared "far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion." *WWH*, 136 S. Ct. at 2326 (Thomas, J., dissenting), citing *Casey*, 505 U.S. at 871, 874-875.

4. Reasonable regulation of medicine encompasses the medical profession's obligations to care for the new life growing in the womb. Informed consent requirements highlight this important point. *Casey* treated abortion as a medical

procedure, not merely a constitutional liberty, and validated informed consent requirements "as with any medical procedure." *Casey*, 505 U.S. at 881, citing *Danforth*, 428 U.S. at 67 and overruling portions of two earlier cases. *Casey*, 505 U.S. at 882; *see Akron I*, 462 U.S. at 449-450 (inflexible waiting period allegedly had "no medical basis"). Chief Justice Burger's dissent in *Thornburgh* foreshadowed *Casey*: "Today the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo. . . ." *Thornburgh*, 476 U.S. at 783 (Burger, C.J., dissenting). Yet undoubtedly "doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health . . . risk[ing] a malpractice lawsuit if they fail to do so[.]" *Id*. *Casey* tracked the commercial speech standard that allows states to require "truthful, non-misleading information" about a medical procedure and its risks. *Casey*, 505 U.S. at 882.

Significantly, this Court analogized abortion to other procedures involving another person. In the case of a kidney transplant operation, the state may require that the recipient be provided with "information about risks to the donor as well as risks to himself or herself." *Casey*, 505 U.S. at 882-883. Similarly, the state may require information about "consequences to the fetus, even when those consequences have no direct relation" to the mother's own health. *Id*. at 882. Such requirements "cannot be considered a substantial obstacle to obtaining an abortion" and thus "there is no undue burden." *Id*. at 883. *Casey*'s analogy implicitly

recognizes the presence of a second life—the child in the womb.

C. Strict adherence to the viability line reverses the legislative and judicial roles.

Abortion jurisprudence tends to bypass the rational review applicable to other health regulations and the usual deference to state legislatures. Viability is a rapidly evolving area of neonatal science. *See* Section II above. Legislatures can respond to advances in scientific knowledge and technology, setting policies and enacting laws accordingly. "While the judiciary is ill-equipped to make specific and speedy policy decisions in response to constantly advancing medical and scientific data, state legislatures are well-suited to do exactly that." Pet. 26. When the Court maintains a stronghold on its role as "ex officio medical board," legislatures and lower courts are forced to adhere to whatever rigid viability line has been drawn by the Court in its latest pronouncement.

It is "for the legislatures, not the courts, to balance the advantages and disadvantages" of laws regulating medical procedures. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487 (1955). Legislators do not legislate in a vacuum. In *Lee Optical*, this Court declined to invalidate a law forbidding an optician from duplicating lenses without a prescription from an ophthalmologist or optometrist. "The mode and procedure of medical diagnostic procedures is not the business of judges." *Parham v. J. R.*, 442 U.S. 584, 607-608 (1979) (upholding Georgia's system for voluntary

mental health commitment of juveniles at parental request).

Gonzales correctly stated that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Gonzales*, 550 U.S. at 164. The "traditional rule" of deference is "consistent with *Casey*," giving legislatures wide discretion "in areas where there is medical and scientific uncertainty." *WWH*, 136 S. Ct. at 2325 (Thomas, J., dissenting), citing *Gonzales*, 550 U.S. at 163. But *WWH* shifted the emphasis to the constitutional aspects of abortion, highlighting the Court's "independent constitutional duty to review factual findings where constitutional rights are at stake" and not "place dispositive weight" on those "findings." *WWH*, 136 S. Ct. at 2310 (Thomas, J., dissenting), citing *Gonzales*, 550 U.S. at 165. The majority "radically rewr[ote] the undue-burden test," telling courts "they need not defer to the legislatures" in cases of medical uncertainty but must instead "scrutinize[e] the record themselves." *WWH*, 136 S. Ct. at 2324 (Thomas, J., dissenting). This Court should return to its earlier position that gave broad discretion to legislatures in areas of medical uncertainty and evolving scientific knowledge.

IV. IT IS TIME TO DISCARD THE "SOCIAL EQUALITY FALLACY." WOMEN DO NOT NEED UNFETTERED ACCESS TO ABORTION TO ACHIEVE EQUAL CITIZENSHIP.

This Court can no longer deny the reality that there is a *child*, a "second life," in the womb of a pregnant

woman. It is time to acknowledge that reality and discard the fallacy that women cannot achieve equality without easy access to abortion.

A woman can choose to bear a *child* without sacrificing equality. Abortion proponents often presume "[t]hat the absolute maximum availability of birth control, sterilization, and drugs that can in some circumstances act to destroy a human embryo are somewhere near the heart of women's equality and freedom." Helen Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379 (2013). Such "intrinsically powerful terminology" (*id.* at 390) degrades women by demanding they deny their unique role in human reproduction. As one commentator observed, "it is an offensive and sexist notion that women must deny what makes them unique as women (their ability to conceive and bear children), in order to be treated 'equally' with (or by) men." Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15, 46 (1993). True equality is possible only "when women can affirm what makes them unique as women and still be treated fairly by the law and society." *Id.*; *see also* David Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 Marquette L. Rev. 975, 1001-13 (Summer 1992). This Court should discard the "social equality fallacy" that demeans both women and children.

Great progress has been made toward gender equality in the decades since *Roe* and *Casey*—independent of access to abortion. The District Court in

this case ignored that progress and displayed "an alarming disrespect" for those who characterize abortion as "the immoral, tragic, and violent taking of innocent human life." *Dobbs*, 945 F.3d at 278 (Ho, J., concurring). The court disparaged Mississippi's legislators, attacking their concern for women's health as "pure gaslighting" and accusing them of failing to "lift a finger to address the tragedies lurking on the other side of the delivery room: our alarming infant and maternal mortality rates." *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 541 n. 22 (S.D. Miss. 2018). Concern about "maternal mortality rates" is exactly what prompted legislators to enact the Mississippi Gestational Age Act.

Even more appalling is the District Court's accusation that the law represents the "old Mississippi . . . bent on controlling women and minorities." *Currier*, 349 F. Supp. at 541 n. 22. That attitude aligns with the deeply flawed argument that women need convenient access to abortion to achieve equality with men. A key passage in *Casey* asserted that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856. But it is "dubious to suggest" that women have made progress only "in reliance upon *Roe*" rather than their own "determination to obtain higher education and compete with men in the job market," in conjunction with "society's increasing recognition of their ability to fill positions that were previously thought to be reserved for men." *Casey*, 505 U.S. at 956-957 (Rehnquist, C.J., dissenting).

Justice Blackmun, primary author of *Roe*, perpetuated the myth that abortion is necessary to gender equality. His commentary runs like a dark thread through *Roe*, *Webster*, and *Casey*. Sadly, his derogatory view of women echoes down the halls of abortion litigation. Blackmun maligned motherhood by complaining that "[m]aternity, or additional offspring, may force upon the woman a distressful life and future." *Roe,* 410 U.S. at 153. In *Webster*, this Court upheld a Missouri law that prohibited use of public resources for abortion and left intact a preamble affirming the protectable rights of unborn children to life, health, and well-being. *Webster*, 492 U.S. at 506. Blackmun's dissent characterized the plurality as "oblivious or insensitive" to the abortion right he presumed "ha[d] become vital to the full participation of women in the economic and political walks of American life." *Id.* at 557 (Blackmun, J., dissenting). Justice Blackmun reiterated the theme in *Casey*, arguing that restrictive abortion laws "deprive [a woman] of basic control over her life." *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). He accused the plurality of "clear[ing] the way again for the State to conscript a woman's body and to force upon her a 'distressful life and future.'" *Id.*, citing *Roe*, 410 U.S. at 153. This paints a bleak, inaccurate picture of women who conceive and bear children.

Justice Blackmun's rhetoric nevertheless presupposes the existence of a child, a "second life," in the womb. The "distressful life and future" he foresees is a life spent nurturing and caring for the *child* who is inevitably born if not aborted. Such care and nurture

are essential aspects of human existence in a civilized nation. It is time for this Court to recognize, respect, and protect the life of every vulnerable, defenseless *child* developing in the womb of his or her mother.

CONCLUSION

The Fifth Circuit decision should be reversed.

Respectfully submitted,

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