No. 19-1392

IN THE
Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., IN HIS OFFICIAL CAPACITY AS STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL.,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ON BEHALF OF ITSELF AND ITS PATIENTS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMERICANS UNITED FOR LIFE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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July 29, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Since its founding in 1971, Americans United for Life (AUL) has represented parties or filed amicus briefs in virtually every abortion-related case decided by this Court. Briefs authored by AUL have been cited in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 426 n.9 (1983), *Webster v. Reproductive Health Services*, 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in the judgment), and *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2156 n.3 (2020) (Alito, J., dissenting). AUL's 50 years of work in Congress, state legislatures, and the courts has influenced a range of bioethical issues in American law, including assisted suicide and life-sustaining care for persons with disabilities. AUL's legal counsel to state legislatures on bioethical issues has guided legislators in virtually every state and encouraged significant changes in state legislation, including the 31 states which have enacted a fetal homicide law that provides legal protection for the developing human being *from conception*, as Wyoming did in 2021. S.F. 96, 66th Gen. Assemb., Gen. Sess. (Wyo. 2021) (enacted).

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[1] No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties were provided notice of the filing of this *amicus* brief pursuant to Sup. Ct. R. 37.2(a), and have granted written consent to its filing.

SUMMARY OF ARGUMENT

This appeal highlights the *unsettled* precedential status of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The standard of review for abortion regulations has bounced around, case by case, from *Roe* to *June Medical*. 140 S. Ct. at 2182 (Kavanaugh. J., dissenting) ("Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard."); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting); *Casey*, 505 U.S. at 999 (Scalia, J., concurring in the judgment in part and dissenting in part) ("Has *Roe* succeeded in producing a settled body of law?"); *Akron*, 462 U.S. at 461 & n.8 (O'Connor, J., dissenting); *Carey v. Population Servs. Int'l.*, 431 U.S. 678, 704 (1977) (Powell, J., concurring in part and concurring in the judgment).

Aside from the constantly shifting standard of review, *Roe* is radically unsettled for additional reasons. It has not received the acquiescence of Justices or lower court judges. *Roe* was wrongly decided and poorly reasoned. Numerous adjudicative errors during the original deliberations—especially the absence of any evidentiary record—have contributed to making *Roe* unworkable. It has been the subject of persistent judicial and scholarly criticism. There is a constant search for a constitutional rationale for *Roe*, and the Court has yet to give a reasoned justification for the viability rule. See Randy Beck, Gonzales*,* Casey *and the Viability Rule*, 103 Nw. U. L. Rev. 249 (2009).

Casey is unsettled by its failure to ground the abortion right in the Constitution, by an ambiguous standard of review that is unworkable, by conflicting precedents that have "defied consistent application" by the lower courts, and by persistent judicial and scholarly criticism. *Payne v. Tennessee*, 501 U.S. 808, 828–830 (1991). Politics aside, reconsidering *Roe* and *Casey* does not involve uprooting a stable, settled feature of the legal landscape. Because they are radically unsettled, *Roe* and *Casey* contradict the stare decisis values of consistency, dependability, and predictability and are entitled to minimal stare decisis respect.

ARGUMENT

I. PRECEDENT IS ONLY ENTITLED TO STARE DECISIS RESPECT IF IT IS SETTLED.

Stare decisis and settled law are inextricably intertwined. The complete Latin maxim, *stare decisis et quieta non movere,* means "stand by the decisions and not disturb what is settled." Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part).[2] *Stare decisis et quieta non movere* is first and foremost about settled law, as Justice Frankfurter emphasized in his opinion for the Court in *Helvering v. Hallock*, 309 U.S. 106 (1940).

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[2] See also John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1, 1–2 & nn.1–2 (1983) (citing authorities for the complete Latin maxim and translation). However, *stare decisis et quieta non movere* (rather than *non quieta movere)* preserves the proper sense of "do not disturb."

If the legal rule is unsettled, it is likely that one or more of the factors of stare decisis has unsettled the precedent, and it is not entitled to stare decisis respect. If the legal rule is settled, the question is whether there is a compelling reason to overturn it. The purpose of *stare decisis et quieta non movere* is to respect not *any* precedent but *settled* precedent.

This Court has recognized that *unsettled* precedent undermines the virtues of stare decisis. *Am. Legion v. Am. Humanist Ass'n.*, 139 S. Ct. 2067 (2019) (*Lemon* unsettled); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (*Abood* unsettled); *Payne*, 501 U.S. 808 (*Booth* and *Gathers* unsettled); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., with Thomas and Kavanaugh, JJ., concurring in the judgment) (*Auer v. Robbins* unsettled).

Unsettled precedent cannot promote the virtues of stare decisis: reliability, consistency, and predictability.[3] Unsettled precedent negates reasonable and substantial reliance. The American judicial tradition demonstrates the duty of correcting

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[3] *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 699 (2011) ("the goals of 'stability' and 'predictability' that the doctrine of statutory *stare decisis* aims to ensure" (quoting *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 201 (1991)); *Arizona v. Gant*, 556 U.S. 332, 348 (2009) ("the stability of the law"); *Payne*, 501 U.S. at 827 ("evenhanded, predictable, and consistent development of legal principles"); *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) ("tending to consistency and uniformity of decision").

the error and the imperative of settling the law.[4] The rule of law is not served by unsettled law that perpetuates unpredictability and unreliability, and shifts from case to case instead of "develop[ing] in a principled and intelligible fashion." *Vasquez v. Hillery,* 474 U.S. 254, 265 (1986).

This Court has affirmed this by stating that settled or "long-settled" precedent needs "special justification" to reconsider or overrule it. *Halliburton Co. v. Erica P. John Fund, Inc*., 573 U.S. 258, 350 (2014).[5] Unsettled precedents do not need such justification to be reconsidered.

When faced with *unsettled* law of conflicting precedents in *Helvering*, the Court recognized that stare decisis was "not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." 309 U.S. at 119.

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[4] See e.g., *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 470 (2015) (Alito, J., dissenting) ("*Stare decisis* is important to the rule of law, but so are correct judicial decisions."); *Payne*, 501 U.S. at 827 ("when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent") (internal quotation marks omitted); *Smith v. Allwright*, 321 U.S. 649, 665 (1944) ("when convinced of former error, this Court has never felt constrained to follow precedent").

[5] See also *Marvel Ent.*, 576 U.S. at 459 ("long-settled"); *Dickerson v. United States*, 530 U.S. 428, 461 (2000) (Scalia, J., with Thomas, J., dissenting) ("longstanding precedent"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 234 (1995) ("well-settled").

Because *unsettled* law cannot provide reliability, consistency, and predictability, unsettled precedent is due minimal stare decisis respect. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019) ("Because of its shaky foundations, the state-litigation requirement has been a rule in search of a justification for over 30 years. . . .another factor undermining the force of *stare decisis*.").[6]

II. The Court Has Traditionally Looked to Several Factors to Determine Whether Precedent is Settled.

Payne v. Tennessee is perhaps the leading modern decision where the Court looked to several factors to

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[6] See also *Am. Legion v. Am. Humanist Ass'n.*, 139 S. Ct. 2067, 2080–81 (2019) ("this Court has either expressly declined to apply the [*Lemon*] test or has simply ignored it'); *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) ("Standing by *James* and *Sykes* would undermine, rather than promote, the goals that *stare decisis* is meant to serve."); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 104 (1993) (Scalia, J., concurring) ("the well-settled proposition that *stare decisis* has less force where intervening decisions 'have removed or weakened the conceptual underpinnings from the prior decisions'" (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989))); *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47 (1977) ("*Schwinn* itself was an abrupt and largely unexplained departure from [*White Motor*]. . . . Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts."); *Graham v. Collins*, 506 U.S. 461, 497 (1993) (Thomas, J., concurring) ("When a single holding does so much violence to so many of this Court's settled precedents in an area of fundamental constitutional law, it cannot command the force of *stare decisis*."); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 924 (2007) (Breyer, J., dissenting) ("[T]he fact that a decision 'unsettles' the law may argue in favor of overruling.").

determine whether precedent is unsettled or settled. There the Court observed why the two precedents overturned were unsettled: they "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions and have defied consistent application by the lower courts." 501 U.S. at 828–30.

In addition, the Court has looked to "acquiescence" by the Justices and other judges. It has looked to whether the precedent was well-reasoned, *Ramos*, 140 S. Ct. at 1405, *Knick*, 139 S. Ct. at 2178, *Janus*, 138 S. Ct. at 2478, and whether there has been a series of consistent precedents or a series of conflicting precedents. The Court has also looked to judicial criticism and scholarly criticism. Intervening doctrinal developments may unsettle a precedent,[7] as well as the constant search for a new rationale for the precedent.[8]

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[7] *Janus*, 138 S. Ct. at 2460 (*Abood* "is inconsistent with other First Amendment cases and has been undermined by more recent decisions."); *Gant*, 556 U.S. at 358 (Alito, J., dissenting) (considering "whether there has been an important change in circumstances in the outside world"); *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) ("[S]tare decisis does not prevent us from overruling a previous decision where there has been a significant change in or subsequent development of our constitutional law.").

[8] See also *Janus*, 138 S. Ct. at 2481 n.25 ("the fact that [t]he rationale of [*Abood]* does not withstand careful analysis *is* a reason to overrule it" (alteration in original) (internal quotation marks omitted)); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 363 (2010) ("When neither party defends the reasoning of a precedent, the principle of adhering to that precedent

III. *ROE V. WADE* IS RADICALLY UNSETTLED.

Despite 48 years, *Roe* is radically unsettled due to a badly reasoned opinion based on a mistaken history and mistaken factual assumptions, a divided Court, conflicting precedents, lower court criticism, scholarly criticism, and the lack of state acquiescence.

Roe has been *applied* inconsistently in more than thirty cases and has only been *reaffirmed* in three. In *Akron* and *Thornburgh v. American College of Obstetricians & Gynecologists*, the Court "reaffirmed" based on a rigid application of stare decisis, but did not reaffirm *Roe on the merits*. *Akron*, 462 U.S. at 420–21 & n.1; *Thornburgh*, 476 U.S. 747, 772 (1986). Of course, *Casey* overturned both *Akron* and *Thornburgh*. 505 U.S. at 882. In *Casey*, the plurality heavily relied on stare decisis, especially the reliance interest factor, but never reaffirmed *Roe* on the merits; the plurality merely reiterated what *Roe* had said. See Section IV infra.

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through stare decisis is diminished."), *id*. at 379 (Roberts, CJ., joined by Alito, J., concurring) ("when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake"); *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies."); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2445 (2019) (Gorsuch, J., concurring in the judgment) ("[E]veryone agrees that . . . this Court should not always remain bound to decisions whose "rationale no longer withstands 'careful analysis.'") (quoting *Gant*, 556 U.S. at 348)).

Numerous Justices and federal judges have observed that *Roe* and *Casey* are unsettled.[9] Legal scholars too have repeatedly warned of the unsettled state of abortion law.[10] The Eighth Circuit, the Fifth

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[9] *Gonzales v. Carhart*, 550 U.S. 124, 186 (2007) (Ginsburg, J., dissenting) (referring to "[t]he Court's hostility to the right *Roe* and *Casey* secured"); *id*. at 187 ("*Casey*'s principles . . . are merely 'assume[d]' . . . rather than 'retained' or 'reaffirmed'") (alteration in original) (quoting *Casey*, 505 U.S. at 846); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F.3d 997, 999 (7th Cir. 2019) (Kanne, J., joined by Barrett, J., dissenting from denial of rehearing en banc) ("Given the existing unsettled status of pre-enforcement challenges in the abortion context, I believe this issue should be decided by our full court."); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198 (1992) ("Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades is *Roe v. Wade*.").

[10] Marc Spindelman, *Embracing* Casey*:* June Medical Services L.L.C. v. Russo *and the Constitutionality of Reason-Based Abortion Bans*, 109 Georgetown L.J. Online 115 (2020) ("*June Medical* . . . has already begun gaining a certain reputation as a Trojan Horse: in form, a pro-choice ruling that overturns a Louisiana anti-abortion measure, but in substance, an anti-choice, pro-life decision that sets the stage for future reversals of the Supreme Court's reproductive rights jurisprudence."); William Baude, *Precedent and Discretion*, 2019 Supreme Court Review 313, 332 (2020) ("Consider the most salient precedent in the country, *Roe v. Wade*. . . [T]he Court did not succeed at its goal of 'call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.' The future of the decision remains unsettled.") (alteration in original); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. Rev. 1107, 1116 (2008) ("[A] decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed."); Randy Beck,

Circuit, and other courts have written recently on the unsettled status of the *basic* standard of review in abortion law after *June Medical*.[11]

Unsettled by a divided Court. Acquiescence in *Roe* and *Casey* has been prevented by consistent criticism from Justices of this Court. After declaring a "right" to abortion, the Court quickly grew divided over the application of that right to specific state regulations. *Casey*, 505 U.S. at 950 (Rehnquist, J., concurring in the judgment in part and dissenting in part). By the "splintered" decision in *Casey*, the number of dissenters had grown to four, which has since marked

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The Essential Holding of Casey*: Rethinking Viability*, 75 U. Mo. Kan. City L. Rev. 713 (2007) (In *Stenberg*, "the three justices who formed the *Casey* plurality had not successfully resolved the abortion issue even among themselves."); Michael J. Gerhardt, *Super Precedent*, 90 Minn. L. Rev. 1204, 1220 (2006) ("[T]he persistent condemnation of *Roe,* particularly by national political leaders—including Presidents Reagan, George H.W. Bush, and George W. Bush, as well as a current majority of the United States Senate—undermines its claim to entrenchment."); Joseph W. Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY, 846 (2006) ("*Webster* left uncertain just what standard should be applied to test the constitutionality of abortion statutes"); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 105 (1991) (citing *Roe* as "[a] particularly controversial example of a case illustrating the costs of the Court's failure to reach 'judicial closure' . . . Whatever the merits of *Roe,* it has never stabilized; from the beginning it has been criticized by a wide spectrum of politicians and scholars, and has been the subject of constant challenges.").

[11] *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 741, 751 n.7 (7th Cir. 2021) (noting the Court's abortion jurisprudence is "not stable" and is "challenging and fluid"); *id.* at 752 (Kanne, J., dissenting) (observing that *June Medical* was "a fractured case that produced six different opinions").

most abortion decisions. Decisions that lack acquiescence by the members of the Court and are marked by dissents are unsettled. *Payne*, 501 U.S. at 829 ("decided . . . over spirited dissents challenging the basic underpinnings of those decisions"); *Knick*, 139 S. Ct. at 2178 ("repeated criticism over the years from Justices of this Court and many respected commentators").[12] To the extent that unanimous decisions lend stability to the law and reinforce the legitimacy of the Court, the splintered decisions that *Roe* and *Casey* have consistently fostered dramatically undercut stability and legitimacy.

Unsettled because wrongly decided. *Roe* was wrongly decided because it lacked a precedential foundation, lacked any evidentiary record, and created a "right" for which there was no historical foundation in Anglo-American law. In addition, *Roe* violated a number of settled prudential rules. These defects explain why *Roe* is still radically unsettled.

Roe had no precedential foundation. The Court cited a string of "privacy" cases for the *ipse dixit* that

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[12] Cf. *Emp. Div. v. Smith*, 494 U.S. 872 (1990), is obviously unsettled. See *Fulton v. City of Philadelphia, Pa.*, 593 U.S. ___ (2021) (Alito, J., concurring) (slip op., at 11) ("five sitting Justices" have urged that *Smith* be reconsidered)). *Hill v. Colorado*, 530 U.S. 703 (2000), is obviously unsettled. See *Price v. City of Chicago*, 915 F.3d 1107, 1119 (7th Cir. 2019) ("While the Supreme Court has deeply unsettled *Hill*, it has not overruled the decision."). *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is obviously unsettled. See *Am. Legion*, 139 S. Ct. 2067. See also Bryan A. Garner et al., THE LAW OF JUDICIAL PRECEDENT 190–91 n.44 (2016) (collecting divided decisions by the Court).

the "right of privacy" is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," 410 U.S. at 152–53, but then acknowledged that a woman "carries an embryo and, later, a fetus" and that "[t]he situation therefore is *inherently different* from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold* [and] *Stanley* . . . were respectively concerned." *Id*. at 159 (emphasis added).[13]

Roe had no historical foundation. The history proffered in *Roe*, which makes up nearly half of the *Roe* opinion, has been severely criticized as erroneous.[14] It was abandoned by the Court by the time of *Webster*, 492 U.S. at 537, and the *Casey* Court did not defend it. The Court has never demonstrated that *Roe*'s abortion right is "deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

Roe is unsettled due to basic adjudicative errors. There was no evidentiary record in either *Roe* or *Doe*

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[13] The precedential foundation has been criticized by numerous scholars. See e.g., Philip Bobbitt, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 159 (1982); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973); William Van Alstyne, *Closing the Circle of Constitutional Review from* Griswold v. Connecticut *to* Roe v. Wade*: An Outline of a Decision Merely Overruling* Roe, 1989 Duke L.J. 1677 (1989).

[14] Dellapenna, *supra* note 10, 13–15 & nn.71–72 (collecting authorities), 125–370; Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 Buff. L. Rev. 1141, 1193 (2015) ("Dellapenna argues persuasively that this combination [safety and effectiveness] did not come together until the nineteenth century.").

v. Bolton—they were decided on motions to dismiss or for summary judgment—as counsel for Georgia and Texas made clear at oral argument.[15] This violated the settled principle that the Court will not decide a constitutional claim without "an adequate and full-bodied record." *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (quoting *Pub. Affairs Assocs. v. Rickover*, 369 U.S. 111, 113 (1962) (*per curiam*)); *New York v. Ferber*, 458 U.S. 747, 780–81 (1982) (Stevens, J., concurring in judgment) ("Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.").[16]

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[15] Tr. of Oral Argument at 16, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) (counsel for Texas saying, "The record that came up to this Court contains the amended petition of Jane Roe, an unsigned alias affidavit, and that is all."); Tr. of Oral Argument at 18, *Doe v. Bolton*, 410 U.S. 179 (1973) (No. 70-40) (counsel for Georgia saying, "And that again is one of the great problems with this case. We know of no facts, there are no facts, in this case, no established facts.").

[16] See also *Renne v. Geary*, 501 U.S. 312, 321–22 (1991) (citing cases); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970); *Associated Press v. Nat'l Lab. Rels. Bd.*, 301 U.S. 103, 132 (1937) ("Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances."); *City of Hammond v. Schappi Bus Line*, 275 U.S. 164, 171–72 (1927). See also Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. Mia. L. Rev. 21, 36–38 (1978) ("The Court's conclusion in *Roe* that '[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth' rested entirely on materials not of record in the trial court, and that conclusion constituted the underpinning for the holding that the asserted interest of the state 'in protecting the woman from an inherently hazardous procedure' during the first trimester did not exist.").

Deciding *Roe* and *Doe* with no evidentiary record led to serious problems in fashioning judicial rules and applying them in subsequent cases. Two problems flowing from those adjudicative errors, which bear directly on Mississippi's 15-week limit here, are the viability rule and the factual assumption that "abortions are safer than childbirth." *Akron*, 462 U.S. at 430 n.11; *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (*per curiam*) ("[T]he insufficiency of the State's interest in maternal health is predicated upon the first trimester abortion's being as safe for the woman as normal childbirth at term. . . ."). As utter dictum, *Roe*'s viability rule violated the long-established rule that "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *City of L. A. v. Patel*, 135 S. Ct. 2443, 2457 (2015) (Scalia, J., dissenting) (alterations in original) (citation omitted).

One of many problems that resulted from the lack of any evidentiary record in *Roe* and *Doe* is that when the Court announced the viability rule in *Roe*, it considered the relation of viability to fetal life but never considered the implications for maternal health, which is now implicated in this case. Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology 729 (2004). After the dictum in *Roe*, the Court has never actually examined the viability rule *as applied* to the state interests of maternal health or fetal survivability. For example, the statute defining viability in *Colautti v. Franklin* was challenged on its face and invalidated as

unconstitutionally vague. 439 U.S. 379, 391–93 (1979). *Gonzales v. Carhart* was also a facial challenge. 550 U.S. 124, 145 (2007). It upheld a ban on an abortion procedure that applied before and after viability, over the objection of the dissent that the decision "blur[red] the line, firmly drawn in *Casey*, between previability and postviability abortions." *Id.* at 171 (Ginsburg, J., dissenting).[17]

Unsettled by a poorly reasoned opinion. "[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Payne*, 501 U.S. at 827 (internal quotation marks omitted). *Roe*'s rationale and reasoning have been subjected to withering and enduring criticism from Justices, judges, and scholars. "[T]he opinion in *Roe* is so poorly written that defenders of its outcome usually begin their analysis by apologizing for the opinion." Joseph W. Dellapenna, DISPELLING THE MYTHS OF ABORTION

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[17] *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), involved a facial challenge, *id.* at 476, where the Court upheld a Missouri statute that required a second physician to be present if the fetus was aborted post-viability. *Id.* at 486. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) involved a facial challenge filed before the effective date of the statute, *id.*, requiring a particular standard of care during an abortion procedure and the presence of a second physician after viability. *Id.* at 768. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989), involved a facial challenge, *id.* at 521, to a requirement that physicians perform tests to determine whether the fetus is viable if the physician had reason to believe that the mother is twenty or more weeks pregnant. *Id.* at 501. *Stenberg v. Carhart*, 530 U.S. 914 (2000), involved a facial challenge, *id.* at 922, and the statute was invalidated on its face for lacking an adequate "health" exception. *Id.* at 937.

HISTORY 687 & n.433 (2006) (citing sources). See also Jack M. Balkin, ed., *What* Roe v. Wade *Should Have Said* (2005); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 943 (1973) ("*Roe* lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine."). Mark V. Tushnet concluded, "It seems to be generally agreed that, as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful." *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 820 & n.121 (1983).

Unsettled by conflicting precedents. Justice O'Connor highlighted the problem in her *Akron* dissent. 462 U.S. at 461–64 & n.8. The decisions from *Roe* to *Casey* exhibited a confused standard of review. *Casey*, 505 U.S. at 944 (Rehnquist, J., concurring in judgment in part and dissenting in part) ("the confused state of this Court's abortion jurisprudence"). The Court's abortion doctrine is also plagued by an unsettled standard for pre-enforcement challenges.[18] Likewise, the rule for third-party standing in abortion litigation is unsettled. *June Med. Servs.*, 140 S. Ct. at 2146 (Thomas J., dissenting). And the rule for facial challenges and whether a "large fraction" is required is unsettled.

Unsettled by lower court criticism. The Court has traditionally observed that its decisions have been

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[18] See e.g., *Box*, 949 F.3d at 999 (Kanne, J., joined by Barrett, J., dissenting from denial of rehearing en banc) (referring to "the existing unsettled status of pre-enforcement challenges in the abortion context").

unsettled by lower court criticism. *Pearson v. Callahan*, 555 U.S. 223, 234 (2009) ("Lower court judges . . . have not been reticent in their criticism. . . ."); *Swift Co. v. Wickham*, 382 U.S. 111, 124–25 (1965) (citing the criticism of the *Kesler* rule in the lower court by Judge Henry J. Friendly). Lower court criticism of the Court's abortion doctrine has been persistent. As Judge Sutton recently wrote about the Court's abortion case law:

> What have been the effects of this centralization of power? Has it left the competing sides to the debate content or more fearful of what's next? Has judicial authority over the issue been healthy for the federal courts? More than all that, has it worked? Has our jurisprudence facilitated more compromise and thus more settled law? Today's case, it seems to me, is Exhibit A in a proof that federal judicial authority over the [abortion] issue has not been good for the federal courts or for increased stability over this difficult area of law.

Preterm-Cleveland v. McCloud, 994 F.3d 512, 536 (6th Cir. 2021) (Sutton, J., concurring).[19]

Unsettled by scholarly criticism. The Court has traditionally cited the criticism of legal scholars as

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[19] See Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 Geo. J. L. & Pub. Pol'y 445, 491–93 (2018) (listing additional examples of judicial criticism); Richard S. Myers, *Lower Court "Dissent" from* Roe *and* Casey, 18 Ave Maria L. Rev. 1 (2020).

showing that a precedent is unsettled or warrants reconsideration. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 232 (1995). *Roe* is one of the most widely and frequently criticized decisions in the Court's history. See Dellapenna, *supra*, at 771 n.6 (2006) (a comprehensive collection of critical sources). *Roe* was immediately questioned in an influential critique by John Hart Ely.[20] Many of the most influential constitutional law experts of the 1970s criticized *Roe*.[21] Scholarly criticism has continued after every abortion decision.

Unsettled by state resistance (non-acquiescence). The *Roe* Court anticipated that state legislatures would respond to the decision with abortion regulations that would fill the legal vacuum. 410 U.S at 165 n.67; *id.* at 174 (Rehnquist, J., dissenting). And many States responded immediately. "State legislatures across the United States never quit attempting to discover restrictions on abortion that would pass muster before the Supreme Court." Dellapenna, *supra*, at 838. See also *id*. at 887–88 nn. 3–7.

In the past decade, however, a growing number of states have enacted increasingly strong limits. Twenty-four states have enacted limits on abortion at

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[20] Ely, *supra* note 13.

[21] See Stephen B. Presser & Clarke D. Forsythe, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 Tex. Rev. of L. & Pol. 301 (2006) (compiling sources).

or near 20 weeks.[22] Nearly a dozen states have passed laws prohibiting abortion upon evidence of a fetal heartbeat.[23] *Outside* the context of abortion, 37 states have enacted a fetal homicide law, with 31 of these states extending protection from conception.[24] Since *Roe*, numerous states have increased legal protection for the prenatal human being in tort and criminal law. Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 U. St. Thomas J. L. & Pub. Pol'y. 141, 146–48 (2011). A recent analysis by Linton shows that "in at least nine distinct ways, the overwhelming majority of states have expressed their profound disagreement with (and rejection of) the abortion regime imposed upon them by the Court in *Roe*."[25] Clearly, more than half of the States have not accepted *Roe* and *Doe*.

Unsettled by an unworkable role and rule. Unworkability is a traditional defect that unsettles a

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[22] These include Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin. The limitations in Arizona, Idaho, Missouri, North Carolina, Tennessee, and Utah are not in effect.

[23] These include Arkansas, Georgia, Idaho, Iowa, Kentucky, Louisiana, Ohio, Oklahoma, South Carolina, South Dakota, and Texas. None are currently in effect.

[24] See Paul Benjamin Linton & Maura K. Quinlan, *Does* Stare Decisis *Preclude Reconsideration of* Roe v. Wade*? A Critique of* Planned Parenthood v. Casey, 70 Case W. Res. L. Rev. 283, 321 nn. 204–05 (2019); S.F. 96, (Wyo. 2021).

[25] Paul Benjamin Linton, *Overruling* Roe v. Wade*: Lessons from the Death Penalty*, 48 Pepp. L. Rev. 261, 274 (2021); see *id*. at 333 (listing state legislative responses).

precedent or legal rule. *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009); *Randall v. Sorrell*, 548 U.S. 230, 272 (2006); *Payne*, 501 U.S. at 827. See generally, Clarke D. Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and* Roe v. Wade*: An Introduction*, 18 Ave Maria L. Rev. 48 (2020). This is especially so if the rule is judge-made. See e.g., *Kisor*, 139 S. Ct. at 2444 (Gorsuch, J., concurring in judgment) (force of stare decisis is less for "judicially invented default rule[s].") (alteration in original) (internal quotation marks omitted). The unworkability of the Court's detailed abortion doctrine has been one consistent point of criticism.[26]

The Court adopted an unworkable role as the nation's "*ex officio* medical board with powers to approve or disapprove medical and operative practices. . . ." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 99 (1976) (White, J., concurring in part and dissenting in part); see also *Hellerstedt*, 136 S. Ct. at 2326 (Thomas, J., dissenting) (same); *Webster*, 492 U.S. at 519 (plurality opinion) (same); *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting) (same).

The Court has been unable to competently fill that self-appointed role in the medical context of abortion. *Roper v. Simmons*, 543 U.S. 551, 618 (2005) (Scalia, J., dissenting) ("Legislatures are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a

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[26] See e.g., *Webster*, 492 U.S.at 518–21 (plurality opinion); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting).

flexibility of approach that is not available to the courts.") (internal quotation marks omitted). Consequently, the Court has delegated that role to abortion providers, creating an irresolvable contradiction that has resulted in the Court denigrating the states' interests and the states' role in protecting those interests.

Unsettled by its sweeping scope. Roe v. Wade and *Doe v. Bolton* are unique decisions. The Court did not merely strike down the Texas laws "as a unit." *Roe*, 410 U.S. at 166. The Court drafted a detailed regime, *Webster*, 492 U.S. at 520 (plurality opinion), and *Doe* created a health exception after viability that has been applied to invalidate limits on post-viability abortion. *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 209 (6th Cir. 1997), cert. denied, 523 U.S. 1036 (1998). *Roe* and *Doe* are generally understood to have created a right to abortion for any reason, at any time of pregnancy, which positioned the Court at odds with enduring public opinion. Randy Beck, *Fueling Controversy*, 95 Marq. L. Rev. 735, 737 (2011) ("*Roe*'s extension of abortion rights through the second trimester of pregnancy created a structural misalignment between constitutional law and popular sentiment.") (reviewing polling data).

IV. *PLANNED PARENTHOOD V. CASEY* FAILED TO SETTLE *ROE V. WADE* AND THUS NEITHER IS ENTITLED TO STARE DECISIS RESPECT.

Casey was a splintered decision, decided 3-2-4, necessarily weakening its precedential effect. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1199 (1992); David M. Smolin,

The Jurisprudence of Privacy in a Splintered Supreme Court, 75 Marq. L. Rev. 975 (1992); Bryan A. Garner et al., THE LAW OF JUDICIAL PRECEDENT 194–97 (2016) ("[I]n general these split decisions make weak precedents."). The rule from *Marks v. United States*, 430 U.S. 188 (1977) cobbles together a controlling opinion for purposes of identifying a *holding* for *vertical* precedent but cannot provide a constitutional *rationale* for *horizontal* precedent. The plurality in *Casey* recognized that *Roe* was unsettled but failed to consider that fact in its stare decisis analysis. *Casey*, 505 U.S. at 843 (referring to "a jurisprudence of doubt").

Casey was simply incoherent. The plurality emphasized stare decisis but expressly overruled *Akron* and *Thornburgh*. *Casey*, 505 U.S. at 870, 882. It refused to overrule *Roe* due to political pressure, *id.* at 867, but failed to acknowledge the political pressure on both sides. It suggested that abortion was "*sui generis*," *id.* at 857, even though there is a long Anglo-American tradition protecting prenatal life, and extensive state protection in prenatal injury, wrongful death, and fetal homicide law. Dellapenna, *supra*; Linton, *The Legal Status of the Unborn Child Under State Law*, *supra*. It talked about a "covenant," *Casey*, 505 U.S. at 901, but not the Anglo-American legal protection for the prenatal human that historically parallels that covenant. It called "the contending sides . . . to end their national division by accepting a common mandate rooted in the Constitution," *id.* at 867 (alteration in original), but failed to explain how an abortion "right" was "rooted in the Constitution." *Id*. It only justified the "right" by

repeating the *ipse dixit* of *Eisenstadt* ("If the right of privacy means anything, it is the right. . . ."). *Id*. at 896. And the "mystery" passage necessarily ignores the reality that state legal protection specifically protects the prenatal human *as a human being*. Linton, *The Legal Status of the Unborn Child Under State Law*, *supra*.

Casey did not "reaffirm" *Roe* on the merits but on stare decisis. 505 U.S. at 854–69.[27] *Casey* did not provide a constitutional foundation for *Roe* in text, history, or structure. *Casey* did not demonstrate that an abortion right is "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). See *Casey*, 505 U.S. at 982 (Scalia J., concurring in judgment in part and dissenting in part) ("The authors of the joint opinion, of course, do not squarely contend that *Roe v. Wade* was a correct application of 'reasoned judgment'; merely that it must be followed, because of *stare decisis*."). *Casey* failed its own test: "a decision without principled justification would be no judicial act at all." 505 U.S. at 865. Cf. *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring) ("*Stare decisis* is a doctrine of preservation, not transformation. . . There is . . . no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different

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[27] See also Dellapenna, *supra* note 10, at 853 (The plurality "contented themselves with standing on the rule of *stare decisis* without an original examination of the relevant history and tradition.").

grounds that have since been abandoned or discredited.").

The closest the plurality in *Casey* came to addressing the merits of the constitutional "right" was an *ipse dixit*. 505 U.S. at 846 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."). Next, there are several ambiguous recitations of *Roe*'s analysis; *id.* at 848 ("[T]he Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." (citations omitted)); *id*. at 851 ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."); *id*. at 853 ("[I]ts holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person."); *id.* at 869 ("[T]he basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate."). Finally, there is the vague "mystery" passage. *Id.* at 851.

Casey has been unsettled by scholarly criticism.[28] And *Casey*'s stare decisis discussion has been an

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[28] See e.g., Stephen G. Gilles, *Why the Right to Elective Abortion Fails* Casey*'s Own Interest-Balancing Methodology—and Why It Matters*, 91 Notre Dame L. Rev. 691 (2015); Paul Benjamin Linton, Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15 (1993); Paul C. Quast, *Respecting Legislators and Rejecting Baselines: Rebalancing* Casey, 90 Notre Dame L. Rev. 913, 915 n.12 (2014) (collecting case and scholarly sources).

orphan. Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. Rev. 1165 (2008). Despite proclaiming a "full-blown" theory of stare decisis, the exposition of stare decisis in the plurality opinion in *Casey* has been relied upon by the Court's majority in *no* stare decisis decision in the 29 years since *Casey*. *Lawrence v. Texas*, 539 U.S. 558 (2003), of course, relied on the "mystery" passage of *Casey*, not the stare decisis exposition. *Casey*'s stare decisis analysis has also been the subject of significant scholarly criticism.[29]

Casey is unsettled by an ambiguous standard of review. Neal Devins, *How* Planned Parenthood v.

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[29] Robert F. Nagel, THE IMPLOSION OF AMERICAN FEDERALISM 99–111 (2001); Mary Ann Glendon, A NATION UNDER LAWYERS 114–15 (1994); Dellapenna *supra* note 10, at 856 & n.171 ("its utter intellectual incoherence"); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 Constitutional Commentary 311 (2005); Linton & Quinlan, *Does* Stare Decisis *Preclude Reconsideration of* Roe v. Wade*? A Critique of* Planned Parenthood v. Casey, *supra* note 24; L.A. Powe, Jr., *Intragenerational Constitutional Overruling*, 89 Notre Dame L. Rev. 2093, 2112 (2014) ("*Casey*'s intentional failure to mention what appears to be the principal factor in overruling seriously undermines the credibility of its treatment of stare decisis."); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995 (2003); Linton, Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court*, *supra* note 28; Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 Notre Dame L. Rev. 11 (1999).

Casey *(Pretty Much) Settled the Abortion Wars*, 118 Yale L. J. 1318, 1322 (2009) ("*Casey* is a sufficiently malleable standard that it can be applied to either uphold or invalidate nearly any law that a state is likely to pass.").[30] What is an "undue burden" in the abortion context is continually litigated. See e.g., *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 988 F.3d 329, 335 (6th Cir. 2021) (holding 2-1 that a 24 to 48 hour waiting period for women an undue burden and noting that "disagreement had arisen as to the proper application of *Casey*'s undue burden standard (as the *Casey* plurality itself predicted that it would. . . .)"); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., concurring in the denial of rehearing en banc) ("How much burden is 'undue' is a matter of judgment, which depends on what the burden would be (something the injunction prevents us from knowing) and whether that burden is excessive (a matter . . . which one judge is apt to do differently from another. . . . .)"). The undue burden standard is unworkable. Quast, supra, at 915 n.12 (collecting criticism of undue burden standard).

Casey has been unsettled by the conflicting precedents that followed. Several months after *Casey* was decided, *Fargo Women's Health Organization v. Shafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J.,

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[30] See also Ruth Burdick, Note, *The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split Over the* Salerno *Test*, 23 Hastings Const. L.Q. 825 (1996) (citing cases); Sandra L. Tholen & Lisa Baird, *Con Law is as Con Law Does: A Survey of* Planned Parenthood v. Casey *in the State and Federal Courts*, 28 Loy. L.A. L. Rev. 971 (1995) (citing cases).

concurring), resulted in the "large fraction" test being applied to *all* state abortion regulations. In *Janklow v. Planned Parenthood,* 517 U.S. 1174 (1996), a divided Court disputed the applicable standard of review. *Stenberg v. Carhart*, 530 U.S. 914 (2000), upended the *Casey* standard of review. The standard of review has bounced around from *Casey* to *Fargo* to *Stenberg* to *Gonzales* to *Whole Woman's Health*, to *June Medical Services*. *Casey* is unsettled because of at least two lines of conflicting precedent with contradictory standards of review: *Casey-Stenberg-Whole Woman's Health* versus *Casey-Gonzales-June Medical*.

Casey is unsettled by judicial criticism in the lower courts. See e.g., *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 588 (5th Cir. 2014) (noting confusion over pre-enforcement facial challenge standard in abortion cases); supra note 26 (collecting examples).

Casey's exposition of reliance interests was exceptionally weak. *Casey* repeated the error of *Roe*. Just as *Roe* had no evidentiary record for its constitutional rationale, *Casey* had no evidentiary record for its adoption of "reliance interests." Instead, the *Casey* Court cited two pages from a 1990 book as its entire case for reliance: Rosalind Petchesky's ABORTION AND WOMEN'S CHOICE. But Petchesky never made the claim for which the *Casey* Court cited her; she did not claim that abortion can be shown to be necessary for workforce participation. She staked that claim on contraception, not abortion. Since *Casey*, the abortion rate has declined considerably—by more

than 52% since 1980.[31] In addition, *Roe* is a doctrinal orphan: it stands for abortion but has not been relied upon "as a basis of women's rights in any area other than abortion." Dellapenna, *supra*, at 866; Paul Benjamin Linton, Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15, 43–45, 78–102 (1993) (citing cases and statutes). Reliance interests must be *reasonable* and they must be *substantial*; both are undercut by the unsettled status of *Roe* and *Casey*.[32]

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[31] According to Professor Michael New, based on data from the Alan Guttmacher Institute, "the abortion rate peaked at 29.3 per thousand women of childbearing age in 1980 and fell to 13.5 per thousand women of childbearing age in 2017. (29.3 - 13.5)/29.3 = .539 (or a decline of over 53 percent)." Email from Michael J. New, Ph.D., Professor, Cath. U. of Am., to Clarke Forsythe, Senior Counsel, Am. United for Life (July 9, 2021, 06:07 CST) (on file with author).

[32] See e.g., *Ramos*, 140 S. Ct. at 1420 (Sotomayor, J., concurring) ("[T]he reliance interests at stake in this case are not especially substantial. . . ."); *Id.* at 1440 (Alito, J., dissenting) ("entirely reasonable reliance"); *Davis v. United States*, 564 U.S. 229, 241 (2011) ("in reasonable reliance on binding precedent"); *Comm'r of Internal Revenue v. Fink*, 483 U.S. 89, 105 (1987) (Stevens, J., dissenting) ("reasonable reliance on a previous interpretation"); *Fulton*, 593 U.S. __, (slip op., at 73) (Alito, J., concurring in judgment) ("even if more substantial reliance could be shown"); *Gant*, 556 U.S. at 359 (Breyer, J., dissenting) ("substantial reliance here"); *LaRue v. DeWolff, Boberg & Assocs. Inc.*, 552 U.S. 248, 259 (2008) (Roberts, C.J., concurring in part and concurring in judgment) ("no doubt engendered substantial reliance interests"); *Adarand Constructors*, 515 U.S. at 233 (1995) ("because *Monroe* was a departure from prior practice that had not engendered substantial reliance") (internal quotation marks omitted); *District of Columbia v. Heller*, 554 U.S. 570, 679 (2008) (Stevens, J., dissenting) ("upon which substantial reliance has been placed by legislators and citizens for nearly 70 years").

Matched against the demands of stare decisis, *Casey* has utterly failed to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez*, 474 U.S. at 265. The continued confusion and turmoil since *Casey* should dispel any notion that the Court can settle the abortion issue and dispel any *reasonable* expectation that *Roe* will remain the law. Overruling *Roe* would "avoid the false modesty of adhering to a precedent that seized power we do not possess in favor of the truer modesty of ceding an ill-gotten gain." *Nestlé USA, Inc. v. Doe*, No. 19-416, slip. op. at 7 (U.S. June 23, 2021) (Gorsuch, J., joined by Kavanaugh, J., concurring).

CONCLUSION

Because *Roe v. Wade* and *Planned Parenthood v. Casey* are radically unsettled, the Court has no choice but to reconsider them. Upon reconsideration, applying the factors of *stare decisis et quieta non movere* as this Court has done in *Helvering*, *Allwright*, *Adarand*, *Payne*, *Janus, Citizens United*, and *Knick*, *Roe* and *Casey* should be overruled.

Respectfully submitted,

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July 29, 2021