No. 19-1392

In the Supreme Court of the United States

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

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL., RESPONDENTS

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

BRIEF OF TEXAS RIGHT TO LIFE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

ADAM K. MORTARA

[redacted]

JONATHAN F. MITCHELL

[redacted]

Counsel for Amicus Curiae

QUESTION PRESENTED

In *Roe v. Wade*, 410 U.S. 113 (1973), seven members of this Court invented a "right" to abortion and imposed it on the nation, despite the fact that there is no language in the Constitution that even remotely suggests such a right, and despite the fact that there was no pedigree for it apart from the justices' personal beliefs that pre-viability abortions should be legal on demand. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992), a plurality of justices doubled down on this court-invented right, while announcing a new and amorphous "undue burden" standard to judge the constitutionality of pre-viability restrictions on abortion. This fabrication atop a fabrication has proven to be non-falsifiable, as there is no way to determine when a "burden" crosses the line from "due" to "undue," apart from a judge's personal desire to see an abortion regulation enforced or thwarted. The question presented is:

> Should the Court overrule and repudiate its lawless and unconstitutional interventions into state abortion policy—or should the Court keep itself in the abortion-umpiring business despite the complete absence of any textual or historical support for a constitutional right to abortion, and despite the utter indeterminacy of the court-invented "undue burden" standard that is used to assess the constitutionality of abortion restrictions?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

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INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Texas Right to Life is the largest Texas Christian non-profit organization dedicated to legally, peacefully, and prayerfully protecting the God-given right to life of innocent human beings from fertilization to natural death. Texas Right to Life is opposed to abortion

1. All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

and spearheads the legislative efforts in the Texas State Capitol to protect innocent human life.

SUMMARY OF ARGUMENT

The members of this Court are bound by oath to support and defend the Constitution of the United States. Not the precedent of this Court. The Constitution itself. And the oath requires the members of this Court to enforce the Constitution according to what it actually says—not according to what the members of this Court would like for it to say, and not according to what previous members of this Court have said. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

There are of course many questions on which the Constitution is unclear, and in these situations it is entirely appropriate to invoke judicial precedent as a means of liquidating and settling constitutional issues that could plausibly be resolved in different ways. Almost all of this Court's constitutional precedents involve issues of that sort—which is why those cases reached this Court in the first place. But when this Court usurps its authority by inventing a constitutional "right" to abortion, when there is nothing in the Constitution that even remotely suggests that abortion is a constitutional right, the members of this Court are duty-bound to enforce the Constitution and repudiate the unconstitutional usurpations of their predecessors. Stare decisis must never be used to elevate the concoctions of previous courts over the Constitution itself.

ARGUMENT

I. ROE V. WADE IS A LAWLESS AND UNCONSTITUTIONAL ACT OF JUDICIAL USURPATION

The *Roe* opinion has been so excoriated by the nation's leading constitutional scholars[2] that it almost seems like piling on to discuss the abject lawlessness of the opinion and judgment in that case. One is tempted to simply drop a string cite of the innumerable scholarly criticisms of *Roe*—none of which has ever been seriously engaged (let alone refuted) by the members of this Court—and move on. But a decision from this Court that overrules *Roe* should provide *all* the reasons why the opinion deserves such an emphatic repudiation despite its status as 49-year-old precedent. Mississippi's brief does an admirable job explaining why *Roe* and *Casey* are "egregiously wrong,"[3] but there is more that can (and should) be said in

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2. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973) ("Roe v. Wade . . . is *not* constitutional law and gives almost no sense of an obligation to try to be."); Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 182 ("It is simple fiat and power that gives [*Roe v. Wade*] its legal effect."); Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421, 1434 (1995) (describing the opinion in *Roe* as "unreasoned," "sophomoric," and an "embarrassing performance[]"); Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 54 (1988) ("We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion.").

3. Pet. Br. at 1, 14–18.

an opinion from this Court that announces the overruling of *Roe*.

A. The *Roe* Opinion Flagrantly Disregards Article III's Case-Or-Controversy Requirement

The non-stop attacks on *Roe*'s decision to invent a constitutional right to abortion have obscured the fact that this Court never even had jurisdiction to reach the merits of the abortion controversy to begin with. Norma McCorvey, aka "Jane Roe," had given birth long before this Court announced its judgment in *Roe v. Wade*, and there was no certified class of pregnant women that Ms. Roe was purporting to represent.[4] Ms. Roe stood before this Court as a solitary litigant who was no longer pregnant, and she had no more interest in challenging the Texas abortion law than a woman who had never been pregnant in the first place. The case was undeniably moot and should have been dismissed on that ground.[5]

The Court, however, claimed that it could disregard this justiciability problem because (according to the *Roe* opinion) the appellate courts otherwise would never be able to rule on whether abortion is a constitutional right:

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4. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 401–02 (1975) (holding that a certified class may have a live controversy with the defendants even if the class representative's claims have become moot).

5. For an excellent discussion of the justiciability problems in *Roe*, *see* Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 160–67 (1973). *See also* David P. Currie, *The Constitution in the Supreme Court 1888–1986* at 465–66 (Chicago 1990) (criticizing the mootness analysis in the *Roe* opinion).

> [T]he normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid.

Roe, 410 U.S. at 125. This passage is transparently false. There are many ways to obtain an appellate-court ruling on whether pregnant women have a constitutional right to abort consistent with the case-or-controversy requirement of Article III. The most obvious path is to bring a class-action lawsuit on behalf of all pregnant women affected by an abortion restriction, and then ask a district court to certify that class before the representative plaintiff (or plaintiffs) give birth or obtain an abortion. Once a class is certified, there is no risk that the case will become moot after the pregnancies of the representative plaintiffs come to an end. *See Sosna v. Iowa*, 419 U.S. 393, 401–02 (1975); *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980) ("[M]ootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot."). This is what Jane Roe's lawyers should have done to avoid the mootness problem that they encountered on appeal—and their failure to take this step did not warrant the Court bailing them out with a false assertion that "pregnancy litigation" cannot otherwise survive past the trial-court stage. The Court should have dismissed the case and instructed the plaintiffs' lawyers to try again with a certified class.

There is a second and more serious problem with *Roe*'s claim that the plaintiffs' constitutional arguments would have "evaded" appellate review absent an exception to mootness. The constitutional claims asserted by Ms. Roe could have been litigated by an abortion provider—either as a defense to criminal prosecution[6] or in a pre-enforcement challenge to the state's abortion statutes. *See Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality opinion) ("[I]t generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision, and we decline to restrict our holding to that effect in *Doe* to its purely criminal context."); *DeFunis v. Odegaard*, 416 U.S. 312, 318–19 (1974) (a claim does not "evade review" when someone else remains capable of litigating the claim to its conclusion). Claims asserted by the abortion provider do not become moot before the case reaches an appellate court, so the *Roe* Court's *ad hoc* exception to mootness was unnecessary to ensure that the appellate courts can resolve the merits of the abortion controversy.

Nothing better exhibits the lawlessness of the *Roe* opinion than its cavalier treatment of this justiciability problem. The opinion spends five sentences discussing the mootness issue,[7] and its entire analysis rests on a false factual premise: That the *only* way an appellate court could

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6. *See* Epstein, *supra* at 164 ("[T]he Court was mistaken when it held that the mootness requirement must be relaxed the abortion cases because they present questions which will constantly arise yet be incapable of review. The criminal trial of the doctor would provide him with every opportunity to challenge the abortion statute on its face.").

7. *See Roe*, 410 U.S. at 125.

ever hope to rule on the constitutional rights of pregnant women is to overlook the mootness of Jane Roe's claim and decide the issue despite Ms. Roe's admitted lack of stake in the outcome. The Court cannot allow this shoddy jurisdictional analysis to be overlooked—even when *Roe*'s critics are (understandably) training their fire on the constitutional holding in that case. Jurisdiction must always come before the merits, and the absence of jurisdiction in *Roe* is one of the many "special circumstances"[8] that supports its overruling. *Roe* should be overruled because the case never should have decided to begin with.

B. The Supreme Court Has No Authority To Invent Constitutional "Rights" With No Textual Or Historical Pedigree

Matters get even worse for the *Roe* opinion as we move from jurisdiction to the merits. The problem with *Roe*, pointed out many times, in many ways, by many people, is that there is nothing—absolutely nothing—in the Constitution that can support the idea that abortion is a constitutional right. The freedoms enumerated in the Bill of Rights have nothing to do with sexual liberation or reproductive freedom. And despite the fact that many members of high society believe that abortion *should* be protected as a constitutional right, there has been no point in our nation's history where the right to have an abortion has obtained the supermajoritarian support needed to enshrine that right into a constitutional amendment. Nor is there any historical pedigree that could support an

8. *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment).

argument for an implied constitutional right to abortion, as abortion was criminalized throughout the United States for more than 100 years before *Roe v. Wade*. This leaves the *Roe* majority without anything to support its claim that abortion restrictions violate the Constitution. Justice Blackmun and his colleagues may have believed very strongly that pregnant women should be allowed to abort their unborn children for any reason prior to viability. But that is not a basis on which a court can declare a statute unconstitutional or enjoin its enforcement. A statute cannot be *un*-constitutional unless it contradicts something in the Constitution; it is not enough that a statute offends a judge's sense of morality or justice.

Mississippi's brief is too kind in describing *Roe* as "egregiously wrong,"[9] because a description of that sort implies that the *Roe* majority was actually interpreting (or trying to interpret) the Constitution while reaching a legally incorrect result. *Roe* is more appropriately described as a judicial concoction rather than an erroneous decision, because *Roe* does not even make a pretense of tying its decision to anything that the Constitution says. In the words of Professor Ely, *Roe* "is *not* constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973) (emphasis in original).[10] *Roe* has instead taken us to a land where

9. Pet. Br. at 1, 14–18.

10. *See also* Ely, *supra* at 935–36 ("What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions

Supreme Court justices get to recognize and enforce rights that they think *ought* to be protected by the Constitution.

We do not expect the respondents or their amici to argue that *Roe* was correctly decided or that abortion really is a constitutional right, since the living-constitution mindset that undergirds the *Roe* opinion finds feeble support on the Court these days. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 686–713 (2015) (Roberts, C.J., dissenting). We expect them instead to argue that *Roe*—however wrong the decision may have been—should nonetheless be retained on account of *stare decisis* considerations rather than the initial correctness of the Court's ruling. But Mississippi has explicitly asked the Court to overrule *Roe*, so the Court must determine just how bad the *Roe* decision was in deciding whether to accept or decline this invitation. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part) ("[I]s the prior decision not just wrong, but grievously or egregiously wrong?").

Asking whether *Roe* is "grievously or egregiously wrong"—as opposed to merely "wrong"—is the wrong question. The only way to defend the Court's actions in *Roe* is to endorse the idea that Supreme Court justices have the prerogative to invent and impose constitutional "rights" that have no textual support in the Constitution and no historical pedigree. That idea is the very definition of lawlessness. But only a person who accepts that view can proceed to the next question and ask whether *Roe* was

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they included, or the nation's governmental structure." (footnote omitted)).

"wrong" (or "egregiously wrong") to decide that abortion (of all rights) should be one of these Court-invented and Court-imposed rights.

The Court should reject *Roe* not because it is "egregiously wrong" but because it is lawless, and because it purports to empower the judiciary to announce and enforce "rights" of its own creation. A decision of that sort does not deserve to be called "wrong" or even "egregiously wrong." It is nothing less than an unconstitutional act of judicial usurpation—and *that* is how it should be described.

C. *Roe*'s Decision To Refer To The Unborn Child As "Potential Life" Is Scientifically And Legally Inaccurate, And The Court Should Repudiate This Terminology Regardless Of Whether It Overrules *Roe*

One of the most ridiculous features of the *Roe* opinion is its insistence that an unborn child is nothing more than "potential life"—and its use of this "potential life" terminology throughout the opinion. *See Roe*, 410 U.S. at 150, 154, 156, 159, 162–64. Justice Scalia attacked this for "begging the question,"[11] but the problem is worse than that. There is no such thing as being "potentially" alive. Something is either alive—and therefore qualifies as "life"—or it is not. A human fetus inside the womb is composed of living cells, and it will *always* be alive unless the fetus has died in utero. Even pro-abortion judges recognize this fact. *See Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (majority opinion of Kennedy, J.) (describing the partial-

11. *See Casey*, 505 U.S. at 982 (Scalia, J., concurring in the judgment in part and dissenting in part).

birth abortion procedure as involving the "partial delivery of a *living fetus*" (emphasis added)); *id.* at 157 ("The government may use its voice and its regulatory authority to show its profound respect for the *life within the woman*." (emphasis added)); *Hope Clinic v. Ryan*, 195 F.3d 857, 887 (7th Cir. 1999) (Posner, J., dissenting) ("Obviously a one-day old embryo, like the cells that compose a living human body, is alive, not 'dead.' "); *id.* ("In a standard D & E, part or all of the fetus often will still have a heartbeat, and so be 'living' ").

The mere fact that something is alive does not mean that its life is automatically entitled to legal protection. Animals, for example, indisputably qualify as "life," yet it is mostly legal to hunt, trap, shoot, and eat them. Even human life can be taken lawfully in rare situations, such as self-defense, capital punishment, and warfare. So one does not concede the illegality (or even the immorality) of abortion by acknowledging the scientific fact that a human fetus inside the womb is alive—and is therefore an actual and not "potential" life.[12] But if Justice Blackmun

12. One of the most famous (or infamous?) arguments for abortion concedes the notion that the fetus *is* a living human being with the same right to life as a person who has already been born, yet contends that abortion is legally and morally justified by analogizing pregnancy to a scenario in which a woman has been hooked up against her will to a famous unconscious violinist, who needs to live parasitically off her organs and blood for the next nine months. *See* Judith Jarvis Thomson, *A Defense of Abortion*, 1 Phil. & Pub. Aff. 47 (1971). Whatever one thinks of Thomson's argument (and it has been criticized on many grounds), it shows that one can acknowledge the indisputable scientific fact that abortion terminates an actual life while still arguing that abortion should be legal.

and his colleagues wanted to rule that the life of an unborn child should be subordinated to other interests, in the way that animal life is subordinated to the interests of sportsmen and meat-eaters, then they needed to present an argument to that effect—and (more importantly) they needed to explain how the Constitution can be understood to impose that set of priorities on the states. They do not get to duck the question by pretending that nothing more than "potential life" is involved.

Roe's "potential life" formulation is even more inane when one considers the treatment of people who kill fetuses outside the abortion context. Under federal law[13] and the law of at least 38 states,[14] a person who intentionally kills an unborn child (except during an abortion) can be charged with homicide—even in pro-abortion states such as California. *See* Cal. Penal Code § 187(a) ("Murder is the unlawful killing of a human being, *or a fetus*, with malice aforethought." (emphasis added)). How can a homicide be committed against a mere "potential" life?[15] The country has passed the *Roe* majority by on this question. A fetus inside the womb is an *actual* life—both as a matter of law and as a matter of scientific fact. And if the Court is unwilling to overrule *Roe* in its entirety, it should at least repudiate the discredited phraseology of "poten-

13. *See* Unborn Victims of Violence Act of 2004, Pub. L. 108-212 (Apr. 1, 2004), codified at 18 U.S.C. § 1841 and 10 U.S.C § 919a.

14. *See* National Conference of State Legislatures, *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women* (May 1, 2018), https://bit.ly/3BKA1ng (last visited on July 29, 2021).

15. *See* Black's Law Dictionary (11th ed. 2019) (defining "homicide" as "the killing of one *person* by another" (emphasis added)).

tial life," which continues to appear in the opinions of this Court.[16]

II. THE COURT'S FAUX "REAFFIRMATION" OF ROE IN PLANNED PARENTHOOD V. CASEY HAS AGGRAVATED THE LAWLESSNESS OF THE ROE REGIME AND THE COURT-INVENTED RIGHT TO ABORTION

The Court had the opportunity to overrule *Roe* in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992), but it declined to do so. *Casey* overruled parts of *Roe*, such as the trimester timetable, as well as two post-*Roe* decisions that had disapproved abortion regulations. *See id.* at 882 (plurality opinion) (overruling *City of Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416, 447 (1983) and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986))). *Casey* also imposed a new "undue burden" standard to assess the constitutionality of pre-viability abortion regulations. *See id.* at 874–79 (plurality opinion). And it did all of this while purporting to adhere to the doctrine of "stare decisis." *See id.* at 854–69 (plurality opinion).

Casey changed the *Roe* regime in two significant respects, and each of these changes made the bad situation that *Roe* created even worse. First, the *Casey* plurality explicitly asserted that the Court can use the Due Process Clause to invent and impose constitutional rights that have no basis in constitutional text or history—and it

16. *See, e.g.*, *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2135, 2136, 2138 (2020) (Roberts, C.J., concurring in the judgment); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007)

announced a new "reasoned judgment" test for determining what these court-created rights should be. *See id.* at 847–49 (plurality opinion); *id.* at 849 (plurality opinion) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule."). A "reasoned judgment" test empowers the Court to manufacture and enforce whatever constitutional rights it wants to foist upon the nation; it is a non-falsifiable standard that can be used to justify any ruling imaginable.[17]

Second, *Casey* announced that pre-viability abortion regulations would be henceforth be judged according an "undue burden" test. *See id.* at 874–79 (plurality opinion). And how is a judge to determine when a "burden" on this court-invented right to abortion crosses the line from "due" to "undue"? The plurality explained:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a *substantial* obstacle in the path of a woman seeking an abortion of a nonviable fetus.

Id. at 877 (plurality opinion) (emphasis added). So "non-substantial" obstacles remain constitutionally acceptable, but "substantial" obstacles are impermissible. But the

17. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 663–64 (2015) (invoking *Casey*'s "reasoned judgment" standard to justify a court-invented right to same-sex marriage).

plurality opinion gives us no clue on where the tipping point between a "non-substantial" obstacle and a "substantial" obstacle might be.

The result has been a 30-year regime in which judges have latitude to approve or disapprove abortion regulations as they see fit. Pro-abortion judges declare any burden or obstacle on abortion access to be "undue," even when the challenged restriction is identical to laws that were previously upheld as constitutional by this Court. *See, e.g.*, *Armstrong v. Mazurek*, 94 F.3d 566, 566 (9th Cir. 1996) (holding that plaintiff's challenging Montana's physician-only requirement had shown a "fair chance of success on the merits" of their constitutional challenge, despite repeated rulings from this Court holding that physician-only laws are *per se* constitutional), cert. granted, judgment rev'd, 520 U.S. 968 (1997); *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002) (reversing a district court injunction that had blocked the enforcement of an Indiana informed-consent law "materially identical to a law held valid by the Supreme Court in *Casey*"). And academic research has shown that Republican and Democratic-appointed judges differ dramatically in their application of the undue-burden standard (what a surprise!)[18]—even though *no*

18. *See* Cass R. Sunstein, David Schkade, Lisa M. Ellman, and Andrew Sawicki, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* at 93 (Brookings 2006) ("In cases between 1991 and 2005, there is powerful evidence of ideological voting: Republican appointees cast a pro-choice vote 46 percent of the time, while Democratic appointees cast a pro-choice vote 72 percent of the time. The 26 percent difference is exceedingly large—among the largest in our entire data set.").

measurable difference in the abortion-related votes of Republican and Democratic-appointed judges appears in the data from 1971 through 1990.[19]

The indeterminacy of *Casey*'s "undue burden" standard—when combined with the utter absence of textual or historical support for the idea of a constitutional right to abortion—makes it impossible for the judiciary to maintain the pretense that its abortion pronouncements are rooted in law. The members of this Court can say that abortion is constitutional right as many times as they want, as if they can somehow speak a constitutional right into being and perpetuate its existence through incantation. But they will *never* persuade the people of this country who have read the Constitution and know full well that the Court is making it up. The looseness in the *Casey* "undue burden" regime has only aggravated the perception that judicial rulings in abortion cases are based on the personal beliefs of the judge rather than anything in the Constitution.

III. THE ARGUMENTS FOR RETAINING ROE AND CASEY ARE MERITLESS

The arguments for retaining *Roe* and *Casey* are easy to anticipate, given that both decisions have been hotly contested for decades in the courtroom and the academy.

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19. *See* Sunstein, et al., *supra* at 92 ("It is striking to see that between 1971 and 1990 there are no party effects: Democratic appointees cast a pro-choice vote 62 percent of the time, and Republican appointees do so 58 percent of the time. There are also no panel effects for either party. During this period, the ideological affiliation of the appointing president does not matter in the abortion context." (footnote omitted)).

Some of these arguments deserve to be taken seriously. Other arguments are fatuous and should be exposed as such. We will address these arguments in descending order of flimsiness.

A. The Argument That "Reliance Interests" Require Adherence To *Roe* And *Casey*

When deciding to overrule precedent, the Court often considers whether its prior decision has engendered "reliance interests"—and whether it would be unjust or undesirable to pull the rug from under those who have taken actions in reasonable reliance on this Court's previous exposition of the law. *See, e.g.*, *Ramos*, 140 S. Ct. at 1406; *id.* at 1414–15 (Kavanaugh, J., concurring in part); *Knick v. Township of Scott*, 139 S. Ct. 2162, 2179 (2019); *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1499 (2019). The issue of reliance interests featured prominently in the *Casey* plurality opinion,[20] and one can expect the respondents and their amici to appeal to "reliance interests" in their efforts to save *Roe* and *Casey* from repudiation.

But there are *no* reliance interests that warrant the retention of *Roe* and *Casey*, and there is no argument that has been advanced that shows otherwise. Consider the *Casey* plurality opinion, which insisted that *Roe* could not be overruled without upsetting the reliance interests of those who have "ordered their thinking and living" around the court-invented right to abortion:

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20. *See Casey*, 505 U.S. at 855–56.

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

Casey, 505 U.S. at 855–56 (citation omitted). This is one of the most specious and ill-considered passages in the history of constitutional law (though it has many competitors). The first and most obvious problem is that abortion will remain legal and available in the United States even if *Roe* and *Casey* are overruled. Overruling *Roe* does not ban abortion nationwide; it merely returns the issue to the states, and many (if not most) states will maintain the legality of abortion. To be sure, there will also be states that outlaw or severely restrict the procedure, but women who reside in those states can travel to pro-abortion states to get their abortions — and there is no shortage of "abortion funds" throughout the country that are eager to pay the travel costs and other abortion-related costs for indigent

women who are seeking to abort their pregnancies.[21] It would also not be surprising to see a wealthy pro-abortion state (such as California or New York) offer taxpayer subsidies to women who travel from other states to abort, especially in response to a decision from this Court that overrules *Roe*. Abortion will *still* be available for women who want to use it as a fallback method of birth control, even though it may become more inconvenient for some to obtain.

The second problem is that the *Casey* plurality never explains *what* choices or decisions were made in "reliance" on the idea of a court-invented and court-protected right to abortion. The opinion babbles about how "people have organized intimate relationships and made choices that define their views of themselves and their places in society." But what does that mean? And how will these supposed "choices" be undermined by a decision from this Court that overrules *Roe*? One can imagine a scenario in which a woman has chosen to engage in unprotected (or insufficiently protected) sexual intercourse on the assumption that an abortion will be available to her later. But when this Court announces the overruling of *Roe*, that individual can simply change her behavior in response to the Court's decision if she no longer wants to take the risk of an unwanted pregnancy. That has nothing to do with "reliance" interests; it is an example of someone changing their behavior going forward in response to a new rule of law, and it happens all the time in response to rulings from this Court regardless of whether those

21. *See* https://abortionfunds.org (last visited on July 29, 2021).

decisions overrule a prior precedent. And even if reliance in the face of the pendency of this case were creditable, a pregnant woman can still get an abortion during the 25 days before the Court's mandate issues. (The Court can also delay its mandate even further to ensure that every woman who became pregnant in reliance in *Roe* has the opportunity to abort before the new regime takes effect. *See* Sup. Ct. R. 45.)

The third problem is with the *Casey* plurality's false assertion that women would no longer "control their reproductive lives" if *Roe* were to be overruled. *See Casey*, 505 U.S. at 856 (plurality opinion). Women can "control their reproductive lives" without access to abortion; they can do so by refraining from sexual intercourse. The only time abortion is needed to ensure women's ability to "control their reproductive lives" is when a pregnancy results from non-consensual behavior as in cases of rape, or when a pregnancy is endangering her life. What the *Casey* plurality meant to say is that women (and men) should have the right to freely engage to sexual intercourse while having abortion available as a fallback method of birth control. But that has nothing to do with "reliance interests"; it is an ideological assertion that the cause of sexual liberation should take priority over the lives of unborn human beings. Many supporters of abortion share that view, but it has no place in an analysis of stare decisis.

B. The Argument That Overruling *Roe* Will Harm The Court's "Institutional Credibility"

Pro-abortion commentators have become fond of saying that the Court's "institutional credibility" will be harmed if the Court overrules its lawless and unconstitu-

tional ruling in *Roe*.[22] But they never explain what, exactly, they mean by this. If their point is that overruling the court-invented right to abortion will engender criticism and opposition, they are surely correct. The editorial pages of the nation's newspapers will be very unhappy if the Court overrules *Roe*. Pro-abortion politicians will denounce the Court. And pro-abortion law professors will circulate and sign letters bemoaning the Court's decision.

But why should anyone think that will hurt the Court's institutional credibility? The Court's institutional credibility comes from its demonstrated adherence to the Constitution and the laws—not from whether its decisions find approval from newspaper editorialists or the managerial class. There will always be cynics who view the Court as nothing more than a political institution, and those are the people who are pressuring the Court to retain *Roe* when they know full well that there is nothing in the Constitution that can possibly support the decision. Trying to preserve the Court's "institutional credibility" with that audience is a fool's errand. These are the legal realists who have given up on the idea of law and regard the judiciary as nothing but a tool through which they impose their preferred policies on the nation. And when these individuals speak of "institutional credibility," they are not in any way suggesting that adherence to precedent is needed to preserve the Court's reputational capital, but only adherence

22. *See, e.g.*, Editorial, *A Big Abortion Case Could Upend "Roe"—And Burn The Court's Credibility*, Wash. Post. (May 22, 2021), https://wapo.st/2WxCAJn ("Will the justices unravel decades of precedent to achieve an ideological victory on the most hot-button of issues, or will they preserve the credibility of their institution?").

to the precedents that they support as a matter of policy. None of these self-appointed priests of the Court's "institutional credibility" expressed any angst when the Court overruled *Baker v. Nelson*, 409 U.S. 810 (1972), or *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Finally, any analysis of the Court's "institutional credibility" must acknowledge the fact that millions of Americans regard abortion as akin to murder and regard *Roe* as moral abomination—and many others (like Professor Ely) support legal abortion as matter of policy yet still regard *Roe* as lawless. As a leading constitutional scholar has aptly remarked, "The Court will face harsh institutional consequences no matter how it deals with *Roe*."[23] So the Court might as well do right by the Constitution—as required by the judicial oath—and repudiate the textually indefensible idea that abortion is somehow a constitutional right.

C. The Argument That Overruling *Roe* Will Undermine Other Precedents Of This Court

Supporters of *Roe* have correctly observed that this Court has recognized and enforced other supposed constitutional "rights" that have no basis in constitutional text or historical practice. The *Casey* plurality opinion, for example, noted that right to interracial marriage from *Loving v. Virginia,* 388 U.S. 1, 12 (1967), has no textual or historical pedigree, much like the right to abortion that this Court invented in *Roe v. Wade*. *See Casey*, 505 U.S. at 848 (plurality opinion) ("Marriage is mentioned nowhere in

23. Jack Goldsmith, *The Shape of the Post-Kennedy Court*, The Weekly Standard (July 2, 2018), https://washex.am/3i77vEy.

the Bill of Rights and interracial marriage was illegal in most States in the 19th century"). And there are other court-imposed "substantive due process" rights whose textual and historical provenance are equally dubious. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell* v. *Hodges*, 576 U.S. 644 (2015). So the Court must determine whether it can overrule *Roe* without cutting the legs from under *Loving* and other substantive-due-process pronouncements. Mississippi's brief is sensitive to this concern, as it goes out of its way to distinguish *Griswold*, *Lawrence*, and *Obergefell*.

The *Casey* plurality's attempt to analogize *Roe* to *Loving* is a red herring. To be sure, the *rationale* of *Loving* purported to invoke the doctrine of substantive due process and a supposed constitutional "freedom to marry,"[24] which is nowhere to be found in the language of the Constitution. But the outcome in *Loving* is defensible without any need to resort to court-invented substantive-due-process rights. The text of the Civil Rights Act of 1866 provides all the authority needed to set aside a state's anti-miscegenation law:

> [C]itizens, of every race and color, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts . . . as is enjoyed by white citizens . . . any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

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24. *Loving*, 388 U.S. at 12.

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27. There is abundant authority establishing that marriage is a contract,[25] and the Civil Rights Act gives every citizen the "*same right* . . . to make and enforce contracts . . . *as is enjoyed by white citizens*." *Id.* That means that if a white citizen has the right to marry a white spouse, then one cannot escape the conclusion that an anti-miscegenation law withholds that "same right" from a minority citizen.[26] So *Loving* remains good law regardless of whether the Constitution's text or historical practice can support a right to interracial marriage.

The news is not as good for those who hope to preserve the court-invented rights to homosexual behavior and same-sex marriage. *See Lawrence*, 539 U.S. 558; *Obergefell*, 576 U.S. 644. These "rights," like the right to abortion from *Roe*, are judicial concoctions, and there is no other source of law that can be invoked to salvage their existence. Mississippi suggests that *Obergefell* could be defended by invoking the "fundamental right to marry" which is "'fundamental as a matter of history and tradition.'" Pet. Br. at 13 (quoting *Obergefell*, 576 U.S. at 671). But a "fundamental right" must be defined with specificity before assessing whether that right is "deeply rooted

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25. *See, e.g.*, William Blackstone, Commentaries *421 ("Our law considers marriage in no other light than as a civil contract . . . . [T]he law treats it as it does all other contracts."); Meister v. Moore, 96 U.S. 76, 78 (1877) ("Marriage is everywhere regarded as a civil contract."); Elizabeth S. Scott & Robert E. Scott, *Marriage As Relational Contract*, 84 Va. L. Rev. 1225, 1230 (1998) (analyzing contemporary marriage as a "long-term relational contract").

26. *See* Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 Stan. L. Rev. 1237, 1303–07 (2017).

in this Nation's history and tradition." *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (requiring federal courts to employ a "careful description" of conduct or behavior that a litigant alleges to be protected by the Constitution, and forbidding resort to generalizations and abstractions). Otherwise long-prohibited conduct can be made into a "fundamental right" that is "deeply rooted in this Nation's history and tradition," so long as a litigant is creative enough to define the "right" at a high enough level of abstraction.[27] The right to marry an *opposite*-sex spouse is "deeply rooted in this Nation's history and tradition"; the right to marry a same-sex spouse obviously is not.

This is not to say that the Court should announce the overruling of *Lawrence* and *Obergefell* if it decides to overrule *Roe* and *Casey* in this case. But neither should the Court hesitate to write an opinion that leaves those decisions hanging by a thread. *Lawrence* and *Obergefell*, while far less hazardous to human life, are as lawless as *Roe*.

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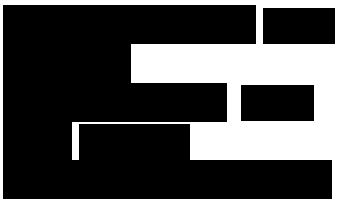
27. Professor Balkin uses this gimmick to claim that the original meaning of the Fourteenth Amendment encompasses a right to abortion. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291 (2007).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ADAM K. MORTARA



JONATHAN F. MITCHELL

July 29, 2021