No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS (AAPLOG), RIGHT TO LIFE OF MICHIGAN, INC., AND THE NATIONAL CATHOLIC BIOETHICS CENTER IN SUPPORT OF PETITIONERS

WILLIAM WAGNER
Counsel of Record
ERIN ELIZABETH MERSINO
GREAT LAKES JUSTICE CENTER
5600 W. Mount Hope Hwy
Lansing, MI 48917
(517) 643-1765
Prof.WWJD@gmail.org

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether all pre-viability prohibitions on elective abortions are unconstitutional.

2. Whether the validity of a pre-viability law that protects women's health, the dignity of unborn children, and the integrity of the medical profession and society should be analyzed under *Casey*'s "undue burden" standard or *Hellerstedt*'s balancing of benefits and burdens.

3. Whether abortion providers have third-party standing to invalidate a law that protects women's health from the dangers of the late-term abortions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, the American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG), Right to Life of Michigan, Inc., and the National Catholic Bioethics Center, submit this brief.[1]

The American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a nonprofit professional medical organization with over 4,000 obstetrician-gynecologist members and associates. Since 1973, AAPLOG has strived to ensure that pregnant women receive the highest quality medical care and are fully informed of the effects of abortion, including the potential long-term consequences abortion has on women's health. Before discontinuing the designation, the American College of Obstetricians and Gynecologists recognized AAPLOG as a special interest group for forty consecutive years. AAPLOG offers both healthcare providers and the public a better understanding of abortion-related health risks, such as depression, substance abuse, suicide, subsequent

---

[1] *Amici Curiae* sought and received consent from counsel of record for both the Petitioner and Respondent for the filing of this brief. Pursuant to Rule 37(a), *amici curiae* gave 10-days' notice of its intent to file this brief to all counsel. *Amici Curiae* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

preterm birth, and *placenta previa*. AAPLOG educates the public truthfully about human development and the monumental advancements made in this field over the last several years. AAPLOG exists to encourage and equip its members and medical practitioners to provide an evidence-based rationale for defending the lives of both the pregnant mother and her unborn child.

Right to Life of Michigan, Inc., is a non-profit and nonpartisan organization that believes every human being holds the inalienable right to life from conception until natural death and that laws should be interpreted by the court in a manner consistent with this truth. Right to Life of Michigan strives to achieve its goals by educating the public on life issues, motivating Michigan citizenry to action, encouraging community support for pregnant women, and participating in programs that foster respect and protection for human life. Right to Life of Michigan, with its hundreds of thousands of members throughout the State of Michigan, dedicates its work to protecting the sanctity of human life by supporting elected officials, public policy, and legislation that respects all human life, including the lives of the preborn.

The National Catholic Bioethics Center is a non-profit research and educational institute that applies the Catholic Church's moral teachings to ethical issues that arise in healthcare and the life sciences. The Bioethics Center represents thousands of members, many of whom are institutions. In collaboration with two graduate programs that provide degrees to dually-enrolled students concentrating in bioethics, the Center administers a certification program in bioethics. The

Center also provides expert consultation regarding the application of Catholic moral teachings to ethical issues that impact the dignity of human life. In recent years, healthcare providers from both the Center's members and non-members alike have increasingly sought the Center's counsel pertaining to governmental action affecting sincerely held religious belief and moral values.

Amici Curiae have contributed many *amicus curiae* briefs throughout the years in federal and state appellate courts, including before the United States Supreme Court. *Amici Curiae* seek to advance the interests of its members and the public by educating how both the mother and her pre-born child should receive appropriate legal protection through the enactment of moral and just laws. *Amici Curiae* analyze three central reasons why this Court should grant certiorari in this case and uphold Mississippi's law that limits voluntary abortion after the gestational age of fifteen weeks.

BACKGROUND

The Mississippi Legislature enacted the "Gestational Age Act" limiting the abortion of a pre-born infant after his or her gestational age of fifteen weeks, except in cases of medical emergency or severe fetal abnormality. MISS. CODE ANN. 41-41-191 (2018). Since Mississippi already limited abortions taking place after the gestational age of twenty weeks, the law exclusively regulated abortion of pre-born children between fifteen and twenty weeks of development. Pet. at 17.

Over the last forty years, significant medical advancements have changed, and continue to change, the landscape of obstetrics and gynecology in the United States. The district court, however, applied the scientific standard set forth in *Roe v. Wade*, 410 U.S. 113, 163-65 (1973), and sought the answer to only one question: whether a pre-born child of fifteen week gestational age is viable. Pet. App. 60a. The district court ignored the undue burden standard set forth by this Court in *Hellerstedt* and held that *Roe* creates a bright line right to pre-viability abortion. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); Pet. App. 58-66a. The Court of Appeals for the Fifth Circuit affirmed, finding that the lower court need not consider this Court's undue burden standard or balance the State's legitimate interests for enacting the law. Pet. App. 12a.

SUMMARY OF THE ARGUMENT

States have the right to prohibit pre-viability abortion to protect women's health, the dignity of pre-born children, and the integrity of the medical profession. Given the advancements in medicine and technology, this Court should re-examine and clarify the viability standard set by *Roe v. Wade*, 410 U.S. 113, 163-65 (1973).

The Fifth Circuit held: "States may *regulate* abortion procedures prior to viability so long as they do not impose an undue burden on the women's right, but they may not ban abortions. The law at issue is a ban." Pet. App. at 2a. Mississippi's law, however, is not a ban—it is a limit, allowing abortion in emergency cases and upon diagnosis of severe fetal abnormality. This

Court has recognized that a "state's interest in protecting unborn life can justify a pre-viability restriction on abortion." *Gonzales v. Carhart*, 550 U.S. 124 (2007). Here, the interests in the health of the pregnant mother, the humanity of the pre-born child, and the integrity of the medical profession allow the state to limit unnecessary and inhumane abortion practices.

This Court in *Roe* and its progenitor precedents incorrectly concluded that the meaning of the Fourteenth Amendment included a liberty interest in the right to abort an unborn child as part of one's personal autonomy. Not a single word uttered or written, in the promulgation of the Fourteenth Amendment, even remotely suggests that the Amendment includes a right to abortion. Undeniably, it is clear from the historical discussion that the authors of the Amendment never contemplated including such a diabolical entitlement. Indeed, judicially contriving such a liberty interest destabilizes representative constitutional governance because it exceeds the scope of the Judicial Power and fails to adequately address the profound government interest in protecting unborn human life. Furthermore, as four Justices of this Court just recognized, abortionists and abortion clinics, who profit from the sale of abortion, do not have standing to challenge a law affecting women and pre-born children. *June Med. Servs. L. L. C. v. Russo*, No. 18-1323, 2020 WL 3492640 (U.S. June 29, 2020).

Considering the advancements in medical science over the past forty years and the legal instability of the

viability standard set forth in *Roe*, this Court should grant certiorari and reverse the decision of the Fifth Circuit.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT INCLUDE A LIBERTY INTEREST TO ABORT ALL PRE-VIABILITY UNBORN CHILDREN.

The Fourteenth Amendment to the United States Constitution requires that no "State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

The Constitution is not a set of guidelines but a framework on which *we the people* constructed our government and our legal system. The words of the Constitution both create this Court's authority and give it definition. Our Country's founders crafted its words quite clearly to express a simple meaning. Faithful adherence to our Constitution serves as the touchstone for measuring the fulfillment of this Court's solemn duty. Every Justice taking the oath of office swears to uphold the Constitution as written, not as he or she prefers it be written.

Honestly discerning and applying the truthful meaning that the Drafters originally embodied in the Constitution's language should be this Court's high calling. To the contrary, using those words instead to match an outcome that a judge personally prefers is the first step on the path to tyranny. For example, in *Dred Scott v. Sandford*, this Court deemed some human life unworthy of constitutional protection based on the

color of a person's skin. 60 U.S. 393 (1857). That judicially contrived policy trampled upon the truth of the value of all human life, further dividing a divided nation, and precipitating a bloody civil war. After the Civil War, the people of the United States formally invalidated *Dred Scott*.

Proving that "those who cannot remember the past are condemned to repeat it,"[2] this Court in *Roe,* 410 U.S. 113, again deemed some human life unworthy of constitutional protection. The Court incorrectly declared provisions of the Fourteenth Amendment included a liberty interest in aborting an unborn child based upon the child's age.

In the matter now before this Court, the Fifth Circuit held that Mississippi's law interferes with the Fourteenth Amendment liberty interest found to exist in *Roe* and its progenitor precedents. The Fifth Circuit held that this interest precluded a State from placing limits on pre-viability abortion, even when those limits are based upon women's health, the development of the unborn child, and the integrity of the medical profession.

The advancements in medicine since in 1973 require this Court to revisit its core precedent in *Roe* and assess whether the Fourteenth Amendment thwarts all state regulation pertaining to pre-viability abortion.

---

[2] George Santayana, *THE LIFE OF REASON*, at 284, Scribner's, (1905).

A. Historical Evidence Demonstrates that the Constitution Does Not Require a Ban Against All State Regulation of Pre-viability Abortion.

This Court has explained how historical evidence reveals not just what the draftsmen intended a constitutional provision to mean, but also how they thought it should be applied. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 790 (1983). The debates of Congress and documents of the state legislatures that ratified the Fourteenth Amendment, provide "the most direct and unimpeachable indication of original purpose . . . ." Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 7 (1955).

Most of the discussion in the first session of the 39th Congress related to the subject matter of the Fourteenth Amendment. CONG. GLOBE, 39TH CONG., 1ST SESS. *passim* (1866). This discussion included governance of the South, readmission of Southern States, Union loyalty, issues concerning the newly freed Black race, and the distribution of powers between the states and the federal government. *Id.* The bulk of the session-long debate concerned the following measures: the Freedman's Bureau Bill (vetoed by the president), the Civil Rights Act of 1866, (enacted over a veto), and the Fourteenth Amendment itself. *Id.* The first two of these measures were statutes, passed in response to the Black Codes. *Id.* Their premise was the protection of the newly freed black race. *Id.;* Richard Kluger, SIMPLE JUSTICE: THE

HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 46 (1st ed.1976).

Not a single word uttered or written in the promulgation of the Fourteenth Amendment suggests that the Amendment included a liberty interest in the right to end the life of a pre-born child without regulation, if that decision occurs within the first or second trimester of the child's gestation. CONG. GLOBE, 39TH CONG., 1ST SESS. *passim* (1866). Indeed, it is beyond dispute that the historical discussion of the authors of the Amendment never contemplated including such a provision. *Id.*

Moreover, for the *Roe* Court to reach the result it did, it "had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Roe,* 410 U.S. at 174 (Rehnquist, C.J., dissenting). To illustrate, Connecticut proscribed abortion as early as 1821. *Id.* By the time adoption of the Fourteenth Amendment occurred in 1868, state and territorial legislatures had enacted at least thirty six laws proscribing abortion. *Id.* at 174-175.

Casey and *Hellerstedt*, therefore, incorrectly presumed the meaning of the Fourteenth Amendment included a right to abortion. This Court should correct that error by acknowledging the invalidity of *Roe's* jurisprudence. Correctly understood, the Fourteenth Amendment does not include a liberty interest to abort an unborn child, including unborn children at fifteen to twenty weeks gestational age. The Mississippi statute at issue, therefore, cannot violate the Fourteenth Amendment. *Planned Parenthood of Se. Pa. v. Casey*,

505 U.S. 833 (1992); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

Policy arguments relying upon *stare decisis* hold no merit in cases like *Dred Scott* or *Roe*, when what the Court decision relied upon was incorrect and extra-constitutional. Respondents assume that simply because the decisions in *Roe* and its progeny occurred, they must stand. But incorrect decisions require correction, not preservation. This Court should not adhere to *Roe's* error for the sake of "predictability" or "consistency". Being consistently and predictably wrong is no virtue. To be sure, clarifying whether to analyze laws under *Casey's* "undue burden" standard, or *Hellerstedt's* balancing of benefits and burdens, provides some predictability. Rather than providing predictability in the application of wrongly decided precedent, though, this Court ought to set a new life-affirming precedent in accordance with the Constitution; it should do so now, before its current precedent deprives another human life of his or her liberty.

B. The Extra-Constitutional Holding in *Roe* Undermines Representative Constitutional Governance and the Rule of Law.

Proponents of evolving judicial preferences wrongly claim that by amending the Constitution from the bench, unelected judges can bestow new meanings and even new rights and understandings for the people. In this jurisprudential wonderland, judges wrongly see the Constitution as an evolving organism, the meaning of which they believe their office empowers them to manipulate. Becoming Platonic philosopher kings,

they rule by judicial fiat, unbound by the constraints of the Constitution's actual language. At great risk to our Republic, the Court's abortion decisions embed this tyrannical principle in American constitutional jurisprudence.

Roe, with its progenitor precedents and progeny, supplants our politically accountable system of governance with an unelected judiciary's own protean preferences. In doing so, this Court's abortion jurisprudence exceeds the scope of the Judicial Power and therefore undermines the judiciary's institutional legitimacy.

As an initial matter, it remains undisputed that

> [t]he Federal Government 'is acknowledged by all, to be one of enumerated powers.' That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. . . . The enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.' The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.

Cf. *Nat'l Fed'n of Indep Bus v. Sebelius,* 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland,* 17 U.S. 316, 404-405 (1819));

U.S. Const. art. I, § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 9 U.S. (1 Wheat.), 194-95 (1824).

Nothing in Article III empowers the Court to change or "evolve" the Constitution. Moreover, nothing in *Marbury v. Madison*'s ubiquitous assertion that it is the province of the Court to say what the law is, empowers the Court to say instead what it prefers the law to be. 5 U.S. (1 Cranch) 137 (1803). Yet, *Roe* ventured far beyond the scope of its Article III powers, improperly evolving the true understanding of the Fourteenth Amendment from something designed to protect the inherent value of human life, to instead include a liberty interest in the right to pre-viability abortion. Extra-constitutional precedent amounts to judicially created law against which our founders warned.

Hamilton explains why wilful judicial policymaking improperly conflicts with the Constitution's design for republican governance:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions ....The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

THE FEDERALIST NO. 78 (Alexander Hamilton).

The Constitution, therefore, assumes a jurisprudence obligating the judiciary to honestly apply constitutional provisions according to their true

meaning. When, as in *Roe*, policy preferences of politically unaccountable judges instead supplant policies of the people's representatives, government ceases to represent the people. As early as 1823, Thomas Jefferson observed the threat to republican governance from the judiciary exercising will instead of judgment:

> Their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions nevertheless become law by precedent, sapping by little and little the foundations of the Constitution, and working it's change by construction, before any one has perceived that this invisible and helpless worm has been busily employed in consuming its substance.

Thomas Jefferson, October 31, 1823, Letter from Thomas Jefferson to Adamantios Coray, https://founders.archives.gov/documents/Jefferson/98-01-02-3837 (last visited July 14, 2020).

The Constitution expressly delegates specific lawmaking powers to the Congress and specific enforcement powers to the President. U.S. Const., arts. §§ I, II. These enumerated powers provide legitimacy when Congress or the President act pursuant to such powers while carrying out their respective constitutional roles. Unlike these enumerated legislative and executive powers, the Constitution's delegation of the Judicial Power includes no specific enumerated powers to the judiciary to carry out its constitutional role of resolving cases and controversaries. The judiciary's duty to apply the Rule

of Law, as understood and expressed by the people's representatives, preserves this legitimacy.

Under the guise of exercising judicial review, *Roe*'s ban on State regulation of pre-viability abortion actually amends the Constitution. In opposing ratification of the Constitution, the anti-federalists foresaw the threat to representative governance from an unchecked independent judiciary:

> …[the authors of the constitution] have made the judges independent, in the fullest sense of the word. There is no power above them, to control any of their decisions. . . . In short, they are independent of the people, of the legislature, and of every power under heaven. *Men placed in this situation will generally soon feel themselves independent of heaven itself.*

Brutus, The Power of the Judiciary*, The New-York Journal*, New York City, March 20, 1788, http://resources.utulsa.edu/law/classes/rice/Constitutional/AntiFederalist/78.htm (last visited July 14, 2020) (emphasis added).

Thomas Jefferson, although on the other side of the debate, nonetheless likewise understood how an independent judiciary could lead to an abuse of power:

> The constitution… is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but

> in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass.

Thomas Jefferson, September 6, 1819 Letter from Thomas Jefferson to Spencer Roane, https://founders.archives.gov/documents/Jefferson/98-01-02-0734 (last visited July 20, 2020).

The concern of an independent judiciary undercutting its own institutional legitimacy, continues to hold merit. The judiciary's solemn duty requires adherence to the Rule of Law, as expressed in the Constitution. This duty requires it to resist the temptation to use its independence, as it did in *Roe*, to impose its will over that of the people.

II. MISSISSIPPI CAN ENACT SECOND TRIMESTER ABORTION REGULATION TO PROMOTE ITS LEGITIMATE STATE INTERESTS IN PROTECTING THE LIFE OF THE UNBORN AND PROTECTING WOMEN'S HEALTH.

This Court has correctly recognized that states hold a "legitimate and substantial interest in preserving and promoting fetal life" and women's health. *See, e.g., Gonzales v. Carhart* (*Carhart II*), 550 U.S. 124, 145 (2007); *Casey*, 505 U.S. at 871 (recognizing that a state's interests in protecting the potentiality of human life and the health of pregnant women were both important and legitimate). This Court in *Roe* intimated that these legitimate interests "were separate and distinct" and grew "in substantiality as the woman approaches term." 410 U.S. at 162-63. The

Court in *Roe* determined that "[i]n the second semester, the state interest in maternal health was found to be sufficiently substantial to justify regulation reasonably related to that concern. And at viability, usually in the third trimester, the state interest in protecting the potential life of the fetus was found to justify a criminal prohibition against abortion." *Harris v. McRae*, 448 U.S. 297, 313 (1980) (citing *Roe*, 410 U.S. at 162-63).

This Court departed from the trimester framework of *Roe*. *Webster v. Reproductive Health Servs.,* 492 U.S. 490 (1989); *Hodgson v. Minnesota,* 497 U.S. 417 (1990). And the constitutional standard under which abortion regulation must be scrutinized has transmogrified over time. *Compare Roe*, 410 U.S. 113 to *Casey*, 505 U.S. 833 to *Hellerstedt*, 136 S. Ct. 2292. Yet, the principle set forth in *Roe*, that a State's legitimate interests should weigh more heavily in the Court's analysis as the child develops and as the pregnant mother faces increased health risks from late-term abortion, remains. *Roe*, 410 U.S. at 145 ("The factor of gestational age is of overriding importance.").

A. Mississippi Holds a Profound Governmental Interest in the Inherent Value of Life at the Gestational Age of Fifteen to Twenty Weeks.

[3]

Advancements in science now reveal the humanity of a pre-born child between the gestational ages of fifteen to twenty weeks. Gone are the days where society can question or reimagine how a child in utero looks or if the child is merely a compilation of lifeless cells. Actual video of children in the womb reveal the advanced development of a fetus, especially later in his or her development from sixteen to twenty weeks. *See* https://www.ehd.org/your-life-before-birth-video/ (last visited July 15, 2020) (displaying pieces of actual video footage of a child's development in utero).

---

[3] Actual photograph of a human fetus at eighteen weeks of gestational development. Lennart Nilsson, Foetus 18 weeks, http://100photos.time.com/photos/lennart-nilsson-fetus (last visited July 14, 2020).

Mississippi's law is partially based on legislative findings pertaining to the advanced development and humanity of pre-born children at the gestational age of fifteen to twenty weeks. Pet. at 7-9. At twenty two days, the child's heart begins to beat. https://www.ehd.org/your-life-before-birth-video/ (last visited July 15, 2020). At six weeks, the child begins moving. *Id.* At seven weeks, scientists can detect a child's brainwaves, and the child can move his or her head and hands. *Id.* The child displays leg movements and the startle response. *Id.* At eight weeks, the child's brain exhibits complex development. *Id.* The child begins breathing movements and shows preference for either his or her left or right hand. *Id.* At nine weeks, the child sucks his or her thumb, swallows, and responds to light touch. *Id.* At ten weeks, the child's unique fingerprints are formed on his or her fingers. *Id.* At twelve weeks, the child opens and closes his or her mouth and moves his or her tongue. *Id.* The child's fingers and hands are also fully formed by twelve weeks gestation. *Id.*; *see also* https://www.ehd.org/movies/231/Responds-to-Touch (last visited July 15, 2020) (displaying video of fetus at fifteen weeks responding to touch). By sixteen weeks, the child's gender is easily detectable, and the child looks undeniably human:

https://www.ehd.org/gallery/436/Hiding-the-Face#content (last visited July 15, 2020) (showing photographic still of sixteen week ultrasound video of a male fetus hiding his head away from the touch of the ultrasound transducer). By nineteen weeks, the child hears noises and makes facial expressions when listening to music. *See, e.g.*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC articles/PMC4616906/ (last visited July 15, 2020) (finding that neural pathways participating in the auditory–motor system may be developed as early as the gestational age of sixteen weeks).

The humanity of the pre-born child in the second trimester is more apparent today than when *Roe* was decided. This Court should grant certiorari to clarify the balance between the right to privacy and personal

autonomy with a State's ability and right to regulate abortion at this later stage of gestational development.[4]

B. Mississippi's Law Rightly Protects Women from the Adverse Effects of Late-Term Abortion.

Extending elective and unnecessary abortion late into the second trimester increases negative health consequences. Unlike abortions performed in the first trimester, where the fetal bones are soft enough to collapse into a large bore suction catheter, unborn children at the gestational ages of fifteen to twenty weeks cannot fit into a catheter because they are too large and "their bones have calcified, making them too firm to remove [from the womb] by suction alone." https://aaplog.org/wp-content/uploads/2019/08/CO-3-Post-Viability-Abortion-Bans.pdf (last visited July 16, 2020). Therefore, dilation and evacuation (D & E) procedures are required. *Id*. In *Gonzales*, this Court

---

[4] *Roe*'s viability standard is otherwise seemingly rejected in American law pertaining to matters affecting the unborn child's rights. For example, a pregnant mother's freedom over her body does not legitimize the use of illicit drugs resulting in the death of the unborn child. *See, e.g.,* MICH. COMP. LAWS § 333.7404. Likewise, a child in the womb holds property rights, and such rights can even result in appointment of a guardian ad litem to protect the unborn child's interest. *See, e.g.,* MICH. COMP. LAWS § 600.2045. Both criminal and civil law recognize the humanity of the child in utero. Causes of action exist for wrongful death and other tortious injuries committed against the unborn child, as well as criminal homicide. *See, e.g., Womack v. Buchhorn,* 384 Mich. 718 (1971); *O'Neill v. Morse,* 385 Mich. 130 (1971); Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law*, 6 U. ST. THOMAS J. LAW & PUB. POL'Y 141, 146–48 (2012).

detailed how abortion in the second trimester is performed:

> Although individual techniques for performing D & E differ, the general steps are the same. A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. The steps taken to cause dilation differ by physician and gestational age of the fetus. A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond. In general the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix for two days, while others use dilators for a day or less. After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the

> cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. . . . Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. . . . Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit.

Gonzales, 550 U.S. at 135–36 (internal citations omitted).

Although similarly abhorrent, the procedures required in a second trimester abortion are undeniably more destructive than in the first trimester. https://aaplog.org/wp-content/uploads/2019/08/CO-3-Post-Viability-Abortion-Bans.pdf (last visited July 16, 2020). Likewise, abortions obtained in the second trimester of pregnancy carry greater health risks. *Id.*; *see also* https://pubmed.ncbi.nlm.nih.gov/15051566/ (last visited July 16, 2020).

Later term abortions cause an increased risk of preterm birth in subsequent pregnancies and an increased risk of adverse psychological outcomes such as depression, substance abuse and suicide. https://aaplog.org/wp-content/uploads/2019/08/CO-3-

Post-Viability-Abortion-Bans.pdf (last visited July 16, 2020). Empirical data shows that abortions performed in the second trimester pose a far more serious health risk to women than abortions performed at an earlier gestational age. *See*, *e.g.*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3066627/ (last visited July 16, 2020) ("The abortion complication rate is 3%–6% at 12-13 weeks gestation and increases to 50% or higher as abortions are performed in the 2nd trimester."); https://pubmed.ncbi.nlm.nih.gov/15051566/ (last visited July 16, 2020) ("Compared with women whose abortions were performed at or before 8 weeks of gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes.").

Since late-term abortion poses a more significant health risk to women and Mississippi appears to offer a legitimate basis for limiting later term abortions, this Court should grant certiorari to clarify the interplay between the rights of the State and the rights of the individual manufactured in *Roe*.

III. ABORTION PROVIDERS, SEEKING TO INVALIDATE MISSISSIPPI'S LAW THAT PROTECTS WOMEN FROM THE NEGATIVE HEALTH CONSEQUENCES ASSOCIATED WITH LATE TERM ABORTION, DO NOT REPRESENT THE SAME INTERESTS AS A PREGNANT MOTHER.[5]

Normally, a plaintiff "cannot rest his claim to relief on the legal rights or interests of [other] parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975), *citing Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam) (holding "no basis" existed for permitting a physician "standing to secure an adjudication of his patient's constitutional right[s] *** which they do not assert in their own behalf."). In *Tileston*, the physician contested a state statute controlling, *inter alia*, the use of instruments to preclude his patient from conceiving a child. *Id.* at 46.

Whether characterized as Article III standing requiring a plaintiff suffer a concrete and particularized injury, *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Warth*, 422 U.S. at 500, or as prudential standing generally prohibiting "a litigant raising another person's legal rights," Respondent's potential conflict of interest here precludes it from asserting the constitutional rights of others, *see Elk*

---

[5] Interestingly, the state law at issue here only regulates abortion between 16-20 weeks, and the Respondent asserted in the lower court that they do not perform abortions after 16 weeks of development. Pet. App. at 5a.

Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12, 15 (2004).

Indeed in *Roe*, this Court found that Plaintiff Roe satisfied standing as a woman whose condition of pregnancy was "capable of repetition yet evading review," 410 U.S. at 125, but held that Dr. Hallford, the abortionist asserting his right to perform abortions, lacked standing and was dismissed from the case, 410 U.S. at 127. Abortion providers hold no constitutional right of their own to execute abortions. And they certainly are not exempt from health and safety laws when providing their services. *See Casey*, 505 U.S. at 884.

In this case, the law at issue protects a woman's health from the dangers of a late term abortion. *See, e.g.*, Pet. App. at 65-74a. Notwithstanding a life-saving purpose, an abortion provider seeks to invalidate this law purporting to represent the same interests of the very women protected by the law.

Cases like this one reveal real motives and expose potential conflicts of interest. Abortion providers financially benefit every time they abort a woman's unborn living child. If they genuinely represent the interests of those for whom they supposedly speak, why do they want to invalidate laws enacted to protect these women? How are male abortion providers situated in the same position as pregnant mothers facing an abortion decision? Simply put, they are not.

Regrettably, five members of this Court recently upheld the right of a third-party man to eliminate State-enacted health and safety regulations of a

surgical procedure performed exclusively on pregnant mothers. It concluded so without any legal reasoning: "We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Med. Servs. L. L. C. v. Russo*, No. 18-1323, 2020 WL 3492640, at *9 (U.S. June 29, 2020). Permitting such a practice to occur for a period of decades does not make the practice just or any more in line with conventional requirements to satisfy standing. *Id*. at 29-34 (Thomas, J., dissenting). Indeed individuals far more greatly affected by the woman's abortion decision lack standing to bring legal challenges to it. *Casey,* 505 U.S. 833 (recognizing women have the right to seek and obtain abortion without notifying their husbands); *Doe v. Smith*, 486 U.S. 1308 (1988) (stating a father's interest in the abortion of his child did not provide him with a legal basis to participate in the mother's abortion decision of said child). Would not the father of a pre-born child be substantially more affected by access to abortion both personally and financially than, for example, the male doctor who performed abortions on a part-time basis in *June Medical*?

Allowing abortion providers to bring these lawsuits enables them to amend duly enacted legislation to promote their own interests, such as pecuniary gain, professional security, protection from medical malpractice, and retention of an undemanding and easily satisfied standard of care. None of these incentives, however, help or promote the interest of a pregnant mother. Permitting people with this degree of potential conflict to assert the constitutional rights of a pregnant mother, pushed to the sidelines in these

lawsuits, is unconscionable—especially given that the right asserted supposedly finds its basis in *her* personal autonomy. *See, e.g.*, *Warth*, 422 U.S. at 500.

CONCLUSION

For the reasons provided in this brief, *Amici Curiae* urge this Court to grant certiorari, revisit the *Roe* viability standard, and reverse the decision of the Fifth Circuit.

Respectfully submitted,

WILLIAM WAGNER
Counsel of Record
ERIN ELIZABETH MERSINO
GREAT LAKES JUSTICE CENTER
5600 W. Mount Hope Hwy
Lansing, MI 48917
(517) 643-1765
Prof.WWJD@gmail.org

Counsel for Amici Curiae