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* INNER LIFE FUND AND INSTITUTE FOR FAITH AND FAMILY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully urge this Court to grant the Petition for a Writ of Certiorari and reverse the decision of the Fifth Circuit.

Inner Life Fund is a North Carolina non-profit, tax-exempt corporation formed on June 22, 2006 to preserve and defend the customs, beliefs, values, and practices of religious faith, as guaranteed by the First Amendment, through education, legal advocacy, and other means. ILF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA).

Institute for Faith and Family ("IFF") is a North Carolina nonprofit, tax-exempt corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici curiae*, its members, or its counsel, have made a monetary contribution to its preparation or submission.

constitutional liberties, including the right to life. See https://iffnc.com.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Planned Parenthood v. Casey*, a key passage asserted that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." 505 U.S. 833, 856 (1992). The dissenting justices were right when they concluded it is "dubious to suggest" that women have made progress only "in reliance upon *Roe*" rather than their own "determination to obtain higher education and compete with men in the job market," in conjunction with "society's increasing recognition of their ability to fill positions that were previously thought to be reserved for men." *Id.* at 956-957 (Rehnquist, C.J., dissenting). The time has come to expose the "social equality fallacy" that demeans the ability and contributions of women by presupposing they can only achieve equality through the "right" to abortion. Great progress has been made toward the goal of gender equality in the decades since *Roe* and *Casey*—independent of access to abortion or contraception.

As one commentator observed nearly three decades ago, "it is an offensive and sexist notion that women must deny what makes them unique as women (their ability to conceive and bear children), in order to be treated 'equally' with (or by) men." Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15, 46 (1993). Equality is truly possible only

"when women can affirm what makes them unique as women and still be treated fairly by the law and society." *Id*.; *see also* David Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 Marquette L. Rev. 975, 1001-13 (Summer 1992).

Justice Blackmun, the primary author of this Court's opinion in *Roe v. Wade*, has perpetuated the myth that abortion is necessary to gender equality. His commentary runs like a dark thread through case law, including *Roe*, *Webster*, and *Casey*, degrading the unique role of women in reproduction. Sadly, his derogatory view of women has been echoed by others over decades of abortion litigation. In *Roe*, he maligned motherhood by complaining that "[m]aternity, or additional offspring, may force upon the woman a distressful life and future." *Roe v. Wade,* 410 U.S. 113, 153 (1973). In *Webster*, this Court upheld a Missouri law that prohibited use of public services and funds for abortion and left intact a preamble affirming the protectable rights of unborn children to life, health, and well-being. *Webster v. Reproductive Health Services*, 492 U.S. 490, 506 (1989). But Blackmun's dissent characterizes the plurality as "oblivious or insensitive" to the abortion right he presumed "ha[d] become vital to the full participation of women in the economic and political walks of American life." *Id.* at 557 (Blackmun, J., dissenting). In *Casey*, Justice Blackmun reiterated the theme, arguing that restrictive abortion laws "implicate constitutional guarantees of gender equality" because they "deprive [a woman] of basic control over her life." *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). He accuses

the plurality of "clear[ing] the way again for the State to conscript a woman's body and to force upon her a 'distressful life and future.'" *Id*., citing *Roe*, 410 U.S. at 153. This paints a bleak, inaccurate picture of the role of women who conceive and bear children.

ARGUMENT

I. THE DISTRICT COURT'S CONDESCENDING RATIONALE DEMEANS WOMEN.

The District Court displayed "an alarming disrespect" for the views of pro-life Americans who characterize abortion as "the immoral, tragic, and violent taking of innocent human life." *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 278 (5th Cir. 2019) (Ho, J., concurring). The court expressed equal disdain for Mississippi's legislators, attacking their concern for women's health as "pure gaslighting" and accusing them of failing to "lift a finger to address the tragedies lurking on the other side of the delivery room: our alarming infant *and maternal*_mortality rates." *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 541 n. 22 (S.D. Miss. 2018) (emphasis added). Concern about "maternal mortality rates" is exactly what prompted enactment of the Mississippi law that is now under attack.

Even more appalling is the District Court's accusation that the challenged state law represents the "old Mississippi . . . bent on controlling women and minorities." *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 541 n. 22 (S.D. Miss. 2018). This attitude is in lock-step with the repeated but deeply flawed argument that convenient access to abortion

and/or contraception is necessary for women to achieve equality with men.

In keeping with Justice Blackmun's rhetoric, abortion supporters continue to frame issues touching abortion in terms of gender equality or "discrimination" against women. This theme emerged in the many legal battles over Obamacare's contraception mandate. Arguments in these cases presumed "[t]hat the absolute maximum availability of birth control, sterilization, and drugs that can in some circumstances act to destroy a human embryo are somewhere near the heart of women's equality and freedom." Helen Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379 (2013). Such "intrinsically powerful terminology" (*id*. at 390) has been used to exalt "reproductive rights" to a height that trumps all other liberties. At the same time, it degrades women to demand they deny their unique role in human reproduction in order to be counted equal to men.

A. Other factors are responsible for the progress of gender equality over the past several decades.

Women have made extraordinary progress in their ability to participate fully in American society. That progress in "gender equality" is attributable to a wide variety of factors unrelated to the easy availability of abortion or contraception. Indeed, "[v]irtually all" such progress in recent years is the result of "federal or state legislation and judicial interpretation wholly unrelated to and not derived from *Roe v. Wade*." Paige C. Cunningham & Clarke D. Forsythe, *Is Abortion the*

"First Right" for Women?: Some Consequences of Legal Abortion, in Abortion, Medicine and the Law 154 (J. Butler & D. Walbert eds., 4th ed. 1992). Progress began decades ago. Legislation protects women against unlawful discrimination in employment, education, housing, credit, and many other contexts:

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(k), 2000e-2(a) (public and private employment);
- 5 U.S.C. § 2302(b)(1)(A), (C) (personnel policies);
- Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1);
- Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d) (equal pay);
- 20 U.S.C. § 1681(a) (educational programs receiving federal funds);
- Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (forbidding discrimination on account of pregnancy in granting unemployment compensation benefits);
- Family and Medical Leave Act, 29 U.S.C. § 2601 et seq.;
- Public Works and Economic Development Act Amendments of 1971, 42 U.S.C. § 3123 (public works);
- 23 U.S.C. § 324 (highways);
- Fair Housing Act of 1968, 42 U.S.C. § 3604.

See Paul Benjamin Linton and Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of* Roe v. Wade*? A Critique of* Planned Parenthood v. Casey, 70 Case W. Res. 283, 312 n. 149-156 (Winter 2019). Many state constitutions contain language that expressly protects women against sex discrimination or guarantees men and women equal rights. *Id*. n. 158. These protections facilitate access to higher education and better jobs, as well as a woman's choice to become pregnant and bear a child without sacrificing her career.

Decisions in this Court have promoted gender equality by invalidating various preferences given to men. Examples include preferences in issuing letters of administration for an estate (*Reed v. Reed*, 404 U.S. 71, 75-76 (1971)); unilateral control over the disposition of community property (*Kirchberg v. Feenstra*, 450 U.S. 455, 459-460 (1981)); membership exclusions in nonprofit charitable organization (*Roberts v. United States Jaycees*, 468 U.S. 609, 626-627 (1984)); admissions limitations to publicly funded educational institutions (*United States v. Virginia*, 518 U.S. 515, 557-558 (1996)). These judicial doctrines and decisions are entirely independent of *Roe v. Wade*. *See also* Linton and Quinlan, *Does Stare Decisis Preclude Reconsideration*, 70 Case W. Res. at 311 n. 148.

More recently, the same courts that found the contraception mandate necessary implicitly acknowledged the significant progress in gender equality that occurred long before the advent of the mandate. When enacting legal protections, including the Pregnancy Discrimination Act, 42 U.S.C. § 2000e *et seq*., and Family and Medical Leave Act, 29 U.S.C.

§ 2601 *et seq*., Congress noted that "a woman's ability to get pregnant has led to pervasive discrimination in the workplace." *Priests for Life v. United States HHS*, 772 F.3d 229, 263 (D.C. Cir. 2014). These and other laws have independently enabled progress in gender equality without depending on easy access to abortion, and in a manner that affirms the unique physiology of women.

Considering the many alternatives that legislatures and courts have already used to ensure equal opportunities for both sexes, it is disingenuous to assert that convenient access to abortion is necessary to combat discrimination against women.

B. Opposition to abortion is not tantamount to discriminatory animus against women.

Shortly after *Casey*, this Court considered and rejected the conclusion "that opposition to abortion constitutes discrimination against the 'class' of 'women seeking abortion.'" *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993). This "intensely ideological issue of whether opposition to abortion is antifemale" arose from the language of a prior case (*Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)) holding that claims under 42 U.S.C. § 1985(3) require proof of a conspiracy to deprive a person (or class of persons) of equal protection rights. Smolin, *The Jurisprudence of Privacy*, 75 Marquette L. Rev. 975. And that conspiracy, in turn, must be motivated by "specific class-based, invidiously discriminatory animus." *Id*., quoting *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985). Ironically, the Operation Rescue petitioner named in *Bray* was a woman (Jayne Bray),

which means this Court was effectively asked to consider "whether a *woman* who conspires to block abortion facilities . . . is actually motivated, as a matter of law, by an invidious intent to subjugate or discriminate against *women*." Smolin, *The Jurisprudence of Privacy*, 75 Marquette L. Rev. at 1000. As this Court observed, there are "common and respectable reasons" to oppose abortion "other than hatred of, or condescension toward . . . women as a class." *Bray*, 506 U.S. at 270. Consequently, to disfavor abortion cannot be "*ipso facto* to discriminate invidiously against women as a class." *Id*. at 271. The question virtually answers itself.

C. It is common for women to lead the way in defending the right to life and limiting abortion.

Women lead and participate in many prominent organizations defending the right to life and efforts to scale back abortion. Susan B. Anthony List is a prominent example:

> SBA List's mission is to end abortion by electing national leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders.

(https://www.sba-list.org/). Others include Americans United for Life (https://aul.org); Life Legal Defense Foundation (https://lifelegaldefensefoundation.org/); Bioethics Defense Fund (bdfund.org); Becket Fund for Religious Liberty (https://www.becketlaw.org/); Alliance Defending Freedom (https://www.adflegal.org/);

Christian Legal Society (https://www.christianlegalsociety.org/).[2] In North Carolina, where amici organizations are incorporated, the woman-led North Carolina Values Coalition (sister organization to Institute for Family and Family) has worked to pass over 17 pro-life measures into law in North Carolina.

There are even self-described feminists in the pro-life movement. Feminists for Life describes its pro-woman vision in terms of the original goals of feminism:

> Feminists for Life is a renaissance of the original American feminism. Like Susan B. Anthony and other early American suffragists, today's pro-life feminists envision a better world in which no woman would be driven by desperation to abortion.

(https://www.feministsforlife.org/about-us/). This group is representative of American feminists in the Nineteenth Century, who "were intensely anti-abortion, viewing abortion as a consequence of the degradation of women by men" and "endorsed the passage and enforcement of nineteenth century anti-abortion legislation." Smolin, *The Jurisprudence of Privacy*, 75 Marquette L. Rev. at 1005 (citing James C. Mohr, Abortion in America 109-114 (1978)). Feminists of that time approved the actions of a leading female physician (Dr. Lozier), who long served as president of

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[2] This is merely a list of examples and certainly not an exhaustive list. There are many state and national organizations that advocate the pro-life cause with the participation of many dedicated women and men.

the New York Suffrage Association, when she brought charges against a couple seeking abortion. *Id.*

In addition to individual women and organizations working in the courts, many women lead and volunteer for the small nonprofit organizations across the nation that offer free information, ultrasounds, and other resources to pregnant women to help facilitate life-affirming choices. There are larger organizations established to assist these resource centers. *See, e.g.*, National Institute for Family and Life Advocates (https://nifla.org/); Carenet (https://www.care-net.org/); Heartbeat International (https://www.heartbeatinternational.org/).

Finally, two of the three attorneys listed on this amicus brief are women. All of these professional women working in professions specifically aimed at advancing pro-life public policies certainly do not believe they need abortion to achieve equality in society. In fact, their lives demonstrate that women can excel professionally even while birthing children and mothering them. There are both men and women active in the pro-life movement, but the active participation of so many professional women would be difficult to reconcile with the conclusion that abortion is necessary for women to participate equally in society.

II. IT IS CONDESCENDING AND DEMEANING TO WOMEN TO PRESUME THAT ABORTION PROVIDERS MAY SPEAK FOR THEM WITHOUT THEIR CONSENT OR PARTICIPATION.

The application of third party standing to abortion cases merits a more thorough investigation. In the recent *June Medical* opinion, this Court concluded that Louisiana's "unmistakable concession of standing as part of its effort to obtain a quick decision from the District Court on the merits" barred further consideration of the state's third party standing arguments. *June Medical Servs. v. Russo*, 2020 U.S. LEXIS 3516, *25 (2020). But further consideration is urgently needed, particularly in cases—like *June Medical* and in this Petition—where there is a clear conflict of interest between the plaintiffs and the women protected by the law they challenge.

Plaintiff doctors "do not claim any right to provide abortions." *Id*. at 99 (Thomas, J., dissenting). Nor can they point to *any* "evidence in the record of women who seek abortions in Louisiana actually opposing this law on the ground that it violates their constitutional rights." *Id*. at 99 n. 5. What the record does contain is "substantial evidence" that Louisiana's law protects women. *Id*. at 108 (Alito, J., dissenting). "[T]he idea that a regulated party can invoke the right of a third party for the purpose of attacking legislation enacted to *protect* the third party is stunning." *Id*. at 109 (Alito, J., dissenting) (emphasis added). The majority dodges this blatant conflict of interest in an astounding display of intentional blindness and contempt for the *women* who

lack a voice in the litigation. There is no reason an abortion regulation should "face greater constitutional scrutiny than any other measure that burdens a regulated entity in the name of health or safety" unless that law "has an adverse effect *on women*." *Id*. at 111 (Alito, J., dissenting) (emphasis in original). A law that protects women cannot meet the criteria for any heightened standard of review.

Abortion providers presume that contraception and even elective abortion are desirable practices and that easy access is necessary for women's health, quality of life, and equality with men. But not all women agree, and not all women of childbearing age desire access to abortion. Even where contraception is concerned, women have many reasons for not using it "that the law cannot mitigate or satisfy" by increasing access. Alvaré, *No Compelling Interest*, 58 Vill. L. Rev. at 380. The legal challenge to Mississippi's statute fails to consider the actual needs and desires of the women involved. That is especially true where not even one woman has joined the litigation as a plaintiff.

In their acts of "invalidating legislatively-enacted laws based on new and evolving constitutional standards. . . liberal Justices have paternalistically suggested that women . . . are incapable of evaluating and defending their own interests within the political process." David Smolin, *The Jurisprudence of Privacy*, 75 Marquette L. Rev. at 1025. It is equally "paternalistic" for abortion providers to unilaterally march into court, purporting to represent the interests of women they barely know (if at all), to persuade judges to invalidate laws intended to promote the

health and safety of women. This Court recently struck down such a law in *June Medical v. Russo*, 2020 U.S. LEXIS 3516 (2020). The primary sponsor of the legislation was Louisiana state senator Katrina Jackson, an African-American Democrat *woman* who was serving as a state representative when she introduced the bill in 2014.[3] A *woman* introduced a law to protect *women* in the state where she served as legislator, yet not one *woman* participated in the lawsuit that challenged the law. If this is not paternalism, it is not clear what is.

It demeans women to allow abortion providers to engage in legal advocacy on their behalf—and allegedly for their benefit—without their consent. Women can speak for themselves. It is particularly troublesome where these self-appointed legal advocates challenge laws intended to protect the health and safety of women seeking abortions. In this case, as in *June Medical*, there is not so much as *one woman* complaining that Mississippi's law prevented her from obtaining an abortion early in her pregnancy. *Not one woman*. If the law truly posed an undue burden, surely the plaintiffs could have found *one woman* to join their crusade against the statute.

CONCLUSION

This Court should grant the Petition and reverse the decision of the Fifth Circuit.

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[3] http://www.legis.la.gov/legis/BillInfo.aspx?s=14RS&b=ACT620 (last visited 07/07/20).

Respectfully submitted,

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