No. 19-1392

IN THE

Supreme Court of the United States

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

v.

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

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

Amicus Brief of Senators Josh Hawley, Mike Lee, and Ted Cruz in Support of Petitioners

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INTEREST OF *AMICI CURIAE*[*]

As Members of the U.S. Senate, Josh Hawley, Mike Lee, and Ted Cruz have a strong interest in promoting the clarity and consistency of American constitutional law. If this Court does not provide workable legal frameworks for defining and safeguarding constitutional rights, legislators like *amici* will face serious obstacles to their Article I obligations to promote longstanding state interests, such as the protection of prenatal life. *Amici* urge the Court to reverse the decision of the Court of Appeals because the undue burden legal standard used to adjudicate abortion cases since *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992) has systematically failed to meet that standard of workability and is not entitled to *stare decisis*.

SUMMARY OF ARGUMENT

I. *Stare decisis* considerations may be important to the judicial process, but they are not absolute. Where prior precedents are demonstrably unworkable, it is appropriate for the Court to reconsider them.

In deciding whether to overturn a prior precedent, this Court has regularly looked to workability, among assorted other factors, as an important lodestar for whether a prior case should stand. The Court has a particular responsibility to conduct this analysis in cases interpreting the Constitution.

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[*] All parties were given timely notice of and have consented to the filing of this brief. No counsel for a party authored any portion of this brief. No person or entity other than the *amici* signing this brief contributed money to preparing or submitting this brief.

A precedent can prove unworkable in several ways. A history of confusion in the lower courts, an unstable pattern of Supreme Court decisions, and a persistent lack of judicially manageable standards all suggest that a precedent is or has become unworkable. In such cases, *stare decisis* interests are weak.

This Court also considers the effects of leaving a frequently challenged and unstable precedent in place. Precedents likely to continue yielding unpredictable outcomes in the future are less entitled to *stare decisis* and may warrant overturning.

II. *Casey*'s undue burden test has proven persistently unworkable. The Court should overrule it now.

The *Casey* decision itself provided the first evidence of its unworkability. The plurality abandoned the *Roe* doctrinal framework, overruled at least two prior precedents, and applied the novel "undue burden" standard inconsistently to similar notification laws. This was enough for the dissenting Justices and contemporaneous observers to predict that the standard would prove unworkable going forward. They were right.

Since then, *Casey* has produced inconsistent outcomes lacking an intelligible principle. Across the two *Carhart* cases, *Whole Woman's Health* v. *Hellerstedt*, and *June Medical* v. *Russo*, the undue burden analysis has produced opposing results and undergone substantive evolutions of its own. It has failed to settle the legal controversies it originally sparked.

In the wake of *June Medical*, the status and meaning of the undue burden standard is more confused than ever. Lower courts lack clear guidance and will continue to divide deeply until *Casey* is overruled.

Finally, the traditional considerations favoring *stare decisis* do not apply to *Casey*'s undue burden test. *Casey* has forced the Court to distort other generally applicable doctrines and spawned new substandards that are themselves unworkable. *Casey* does not represent long-settled doctrine, rests on a foundation of flawed judicial reasoning, and boasts no traditional reliance interests. This Court should overrule it.

ARGUMENT

Since this Court's decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* effectively replaced *Roe*, the undue burden rule has been the controlling standard of this Court's abortion jurisprudence. It and whatever remains of *Roe* should now be overruled, and the question of abortion legislation returned to the political branches and to the people.

Stare decisis is not an absolute shield that protects failed precedents from subsequent review. "All Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions." *Ramos* v. *Louisiana*, 140 S.Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring). As the Court has repeatedly explained over the course of many decades, decisions that have proven unworkable—by producing confusion in the lower courts, failing to result in judicially manageable standards, and proving doctrinally unstable—are prime candidates for reversal. This is particularly true where, as here, the underlying decision is egregiously wrong and reliance interests are minimal. And of course, *stare decisis* interests are at their weakest in constitutional cases. See *id.* at 1413.

By these lights, the undue burden test cries out for reconsideration. The *Casey* plurality attempted to settle decades of controversy over the Court's abortion jurisprudence by abandoning the *Roe* v. *Wade* framework altogether, a major doctrinal departure. *Roe* had balanced a supposed individual privacy interest against the state's interest in protecting prenatal life, and it organized that balancing around the trimester framework. 410 U.S. 113, 162–63 (1973). *Casey* jettisoned this doctrine in favor of a new standard unknown to constitutional law: "undue burden." 505 U.S. at 876 (plurality op.). This novel test upended the Court's precedents and led to years of confusing and conflicting results in the lower courts. That confusion shows no signs of abating. This Court has revisited—and revised—the undue burden standard multiple times in recent years, even as the Court's precedents have become more unpredictable. This is not surprising: the undue burden standard is untethered to the Constitution's text, history, and structure; it lacks foundation even in this Court's precedents. *Casey* should be overruled.

I. *Stare decisis* does not shield unworkable and unpredictable precedents, like *Casey*, from reconsideration.

A. This Court has repeatedly emphasized that *stare decisis* is never absolute.

This Court has an acknowledged interest in the stability of its doctrine over time. The principle of *stare decisis* provides a means of "ensur[ing] that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986).

But the Court has been clear that precedents which do not advance this interest in intelligible predictability can and may be overruled. See *Citizens United* v. *FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) ("[W]hen fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent."). This is particularly true in constitutional cases. See *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997) (*stare decisis* interests lessened "when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions").

The fundamentally discretionary character of *stare decisis* follows from the fact that the doctrine has no formal roots in the Constitution. Rather, it represents a prudential judgment on the part of the judiciary. In that spirit, the Court has characterized the doctrine as "a principle of policy and not a mechanical formula of adherence to the latest decision" that is rooted in "the psychologic need to satisfy reasonable expectations." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940). In appropriate cases, that principle of policy can and should yield. "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court." *Hertz* v. *Woodman*, 218 U.S. 205, 212 (1910).

This Court has considered a variety of factors in considering whether to overturn a prior precedent. See *Ramos*, 140 S.Ct. at 1414 (Kavanaugh, J., concurring) (citing factors). The Court has placed particular emphasis on "workability" as a lodestar of the *stare decisis* analysis. *Montejo* v. *Louisiana*, 556 U.S. 778,

792 (2009); see also Lee Epstein et al., *The Decision to Depart (Or Not) From Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. Rev. 1115, 1138 (2015) ("Justices seem to agree that an unworkable precedent is one that the lower courts cannot apply coherently and consistently.").

In evaluating the workability of precedents in constitutional cases, this Court has considered them both retrospectively and prospectively. First, this Court considers how a precedent has held up since its issuance: in cases where "experience has pointed up the precedent's shortcomings," overruling may be appropriate. *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009). Second, the Court may look to the future course of the law and determine whether, going forward, a particular precedent is likely to prove dysfunctional. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545–47 (1985). As we shall see, *Casey* fails both tests.

B. Precedents that have proven historically unworkable are not entitled to *stare decisis*.

Where a precedent has proven to be "undermined by experience since its announcement," *Citizens United*, 558 U.S. at 364, the force of *stare decisis* wanes. In determining whether a precedent has accumulated a history of unworkability, key subfactors considered by the Court include the persistence of confusion among lower courts, the presence of doctrinal instability within the Supreme Court itself, and the failure of a given precedent to lead to judicially manageable standards for its implementation.

Lower courts will always be the first line of subsequent interpretation for any precedent handed down by this Court. The quality of a particular precedent will thus naturally show up in its ability (or lack thereof) to guide those courts toward consistent judgments. Where a precedent "has created confusion among the lower courts that have sought to understand and apply [a] deeply fractured decision," *Seminole Tribe of Fla.* v. *Fla.*, 517 U.S. 44, 64 (1996), overruling may be appropriate. See also *Nichols* v. *United States*, 511 U.S. 738, 746 (1994) (a high "degree of confusion following a splintered decision * * * is itself a reason for reexamining that decision"); *Payne*, 501 U.S. at 830 (a precedent that has "defied consistent application by the lower courts" may be ripe for overruling).

Another test of a precedent's historic workability is whether or not it facilitates the orderly development of the law by this Court itself. Where prior precedents "have been questioned by Members of the Court in later decisions," the force of *stare decisis* is limited. *Payne* v. *Tennessee*, 501 U.S. 808, 829–30 (1991). Parallel logic applies where a precedent has been undermined *sub silentio*: if a decision has had "its underpinnings eroded * * * by subsequent decisions of this Court," that transformation, when considered together with other factors, suggests that "*stare decisis* cannot possibly be controlling." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995).

Finally, a persistent failure to articulate judicially manageable standards for the implementation of a given precedent undermines the force of *stare decisis*. The failure to "enunciate the judicially discernible and manageable standard that it thought existed"

necessary for the implementation of a particular precedent "presages the need for reconsideration in light of subsequent experience." *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004); see also *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S.Ct. 2448, 2484 (2018) (noting that the lack of a clear or easily applicable standard counsels against *stare decisis*). Retaining a flawed doctrine would simply waste the time and energy of litigants: where "years of essentially pointless litigation" have followed from a given decision, such a history of failure may be sufficient to demonstrate that a particular precedent is "incapable of principled application" and therefore justify overruling it. *Vieth*, 541 U.S. at 306.

C. Precedents likely to continue producing unpredictable results in the future are not entitled to *stare decisis*.

The workability analysis is not simply retrospective, but prospective also. In considering whether a precedent is entitled to *stare decisis*, this Court takes into account the potential downstream consequences of retaining it into the future. Where "adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished." *Citizens United*, 558 U.S. at 379.

Specific factors the Court considers in this forward-looking assessment include whether "the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases" and whether "the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake," among others. *Id.*

II. The *Casey* undue burden test is unworkable and unpredictable, and not entitled to *stare decisis*.

The undue burden test was first articulated by a plurality of the Court in *Casey*, and it represented a major doctrinal departure. *Casey* abandoned the *Roe* framework and substituted a novel and amorphous standard—one unknown to other areas of law—in its stead. It has proven utterly unworkable and should be overruled.

Roe purported to balance an individual liberty interest in privacy against the state's interest in protecting prenatal life. 410 U.S. at 151. *Roe* pegged the strength of the state's interest to the trimester progression of a pregnancy: the later in time, the stronger the interest. *Id.* at 162–63. The decision immediately sparked a flurry of challenges to state abortion laws that forced the Court to repeatedly wade into debates about the contours of this standard. See, *e.g.*, *Planned Parenthood of Cent. Missouri* v. *Danforth*, 428 U.S. 52, 63 (1976); *Maher* v. *Roe*, 432 U.S. 464, 472 (1977); *Colautti* v. *Franklin*, 439 U.S. 379, 388 (1979); *Planned Parenthood Ass'n of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U.S. 476, 486 (1983); *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513 (1990).

Roe's approach proved controversial, and conceptually flawed, from the outset. In *Webster* v. *Reproductive Health Services*, a plurality of the Court pointed out that "[t]he key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle." 492 U.S. 490, 518 (1989) (plurality op.).

Casey attempted to address these shortcomings by abandoning the *Roe* framework altogether and substituting a new one: "[o]nly where state regulation imposes an undue burden on a woman's ability to make this [abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Casey*, 505 U.S. at 874 (plurality op.).

The undue burden test has not been an improvement over the pre-*Casey* line of authority. If the *Roe* line of cases led to an elaborate "code of regulations" of dubious constitutionality, *Webster*, 492 U.S. at 518 (plurality op.), *Casey* has given rise to a jurisprudential minefield, producing a succession of confusing and conflicted outcomes lacking any jurisprudential logic. The undue burden standard has become a textbook example of unworkability, and should now be overruled.

A. *Casey*'s undue burden standard departed from past precedent and was recognized early on as unworkable.

Casey itself provided the first evidence of its unworkability. The undue burden standard failed to garner a majority; it was proposed by the plurality opinion of a highly fractured court. *Cf. Alleyne* v. *United States*, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring) ("A decision may be 'of questionable precedential value' when 'a majority of the Court expressly disagreed with the rationale of a plurality.'" (cleaned up) (quoting *Seminole Tribe*, 517 U.S. at 66)). Two Justices proposed the familiar strict scrutiny test. 505 U.S. at 917 (Stevens, J., concurring in part and dissenting in part); *id.* at 929 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Four Justices would have applied

rational basis review. *Id.* at 981 (Scalia, J., concurring in the judgment in part and dissenting in part). Only three advocated the undue burden standard, a novel test without roots in either the Constitution's text or this Court's precedents.

Casey unsettled whole swaths of the law. The decision displaced and overruled the trimester-based framework announced in *Roe*. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y. L. Rev. 1185, 1208 (1992) ("[*Casey*] notably retreats from *Roe*."). The Opinion also overruled two other precedents. *Casey*, 505 U.S. at 870 (plurality op.) ("we must overrule * * * parts of *Thornburgh* and *Akron I*"); *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759–65 (1986) (invalidating requirement that women receive printed materials from state discouraging abortion); *City of Akron* v. *Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 437 (1983) (invalidating requirement that all second trimester abortions be performed in hospital).

The *Casey* plurality promptly demonstrated the unmanageable nature of its new standard. The plurality could not command assent among those Justices in the majority on how the new rule should be applied, or even what precisely it meant. The plurality, for example, upheld an informed consent provision, *id.* at 881–87, while Justice Stevens, also in the majority, would have held that such provisions constitute an "undue burden." *Id.* at 920 (Stevens, J., concurring in part and dissenting in part). Justice Stevens went so far as to insist that his opinion featured the "correct application of the 'undue burden' standard." *Id.*

This was enough for the dissenting Justices and contemporaneous observers to recognize that the

standard would prove unworkable. Chief Justice Rehnquist concluded that "the undue burden standard presents nothing more workable than the trimester framework which it discards." *Id.* at 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). He predicted it "will not * * * result in the sort of 'simple limitation,' easily applied, which the joint opinion anticipates. In sum, it is a standard which is not built to last." *Id.* at 964–65. Justice Scalia called the undue burden standard "ultimately standardless" and "inherently manipulable," with the result that it "will prove hopelessly unworkable in practice." *Id.* at 986–87 (Scalia, J., concurring in the judgment in part and dissenting in part).

Those in favor of abortion rights were similarly confused. Two days after the decision, the New York Times quoted Janet Benshoof, president of the Center of Reproductive Law and Policy, as saying: "When push comes to shove, we're left with a legal standard I can't figure out. It looks like we're going to have to relitigate every restriction [that's been struck down]." Tamar Lewin, *The Supreme Court: Clinics Eager to Learn Impact of Abortion Ruling*, N.Y. Times, at A1 (July 1, 1992).

B. *Casey*'s undue burden test has proven unworkable in operation.

Since then, *Casey*'s undue burden standard has produced a string of logically untethered outcomes, one frequently following after another in quick succession. One searches in vain through the Court's precedents interpreting *Casey* for anything resembling a cohesive through-line.

That jurisprudential failure is not for lack of trying. This Court has attempted to revise and clarify the rule of *Casey* multiple times in cases regarding partial-birth abortion bans and hospital admitting-privileges requirements for abortion clinics—and yet these efforts have ultimately done no more than testify to *Casey*'s unworkability.

Consider, first, the twin *Carhart* cases involving bans on partial-birth abortion. In 2000, the Court invoked *Casey*'s undue burden analysis to invalidate a Nebraska state law banning partial-birth abortions. *Stenberg* v. *Carhart*, 530 U.S. 914, 922, 938 (2000) (*Carhart I*). According to the Court in that case, the Nebraska law imposed an undue burden on the right to obtain an abortion because, in its view, the statutory prohibition extended both to abortions "where a foot or arm is drawn through the cervix" and to cases "where the body up to the head is drawn through the cervix." *Id.* at 939. Any attempt to prohibit the former, the Court reasoned, would violate *Casey*'s undue burden standard, given that such abortions amounted to "the most commonly used method for performing previability second trimester abortions." *Id.* at 945.

Yet just seven years later, the Court upheld a *federal* law banning partial-birth abortions. The difference? The Court said the federal law identified "specific anatomical landmarks" to distinguish between the different types of abortions and adopted a somewhat narrower definition of "delivering" a fetus. *Gonzales* v. *Carhart*, 550 U.S. 124, 152 (2007) (*Carhart II*). So modified, this Court reasoned, such a law did *not* impose an undue burden on the right to obtain an abortion. *Id.* at 150.

Despite the Court's best efforts, the switch in time from *Carhart I* to *Carhart II* appears far removed from anything resembling coherent constitutional doctrine. Attempts to regulate categories of abortions based on the presence or absence of "specific anatomical landmarks" are altogether indistinguishable from legislation—the prerogative of Congress—and they are entirely devoid of any "judicially discernible and manageable standard." *Vieth*, 541 U.S. at 306.

For instance, what "anatomical landmarks" are dispositive? How common must a given abortion procedure be in order for attempts to ban it to amount to "undue burdens" under *Casey*? Why did the "respect for fetal life" justification go virtually unmentioned in *Carhart I*, but prove so central to the analysis of *Carhart II*?

In the end, while both *Carhart I* and *Carhart II* paid lip service to *Casey*, *Casey* did not predictably dictate the result. After all, none of the Justices who joined the majority in *Carhart I* joined the opinion of the Court in *Carhart II*. This strongly suggests that *Casey*'s undue burden standard, in practice, proves to be little more than an inkblot into which judges and Justices may read their own views—not a precedent conducive to doctrinal stability over time.

Decisions of this Court after the *Carhart* cases have cast further doubt on the workability of the undue burden standard. Most notably, five years ago the Court attempted a major reconstruction of *Casey's* essential underpinnings. In *Whole Woman's Health* v. *Hellerstedt*, a five-justice majority of the Court held that a pair of Texas statutes requiring abortion clinic doctors to have admitting privileges at local hospitals, and requiring that abortion clinics meet the health

and safety standards of ambulatory surgical centers, imposed undue burdens on abortion access under *Casey*. *Whole Woman's Health* v. *Hellerstedt*, 136 S.Ct. 2292, 2300, *as revised* (June 27, 2016).

This decision was no straightforward application of *Casey*: in *Whole Woman's Health*, the Court rewrote the undue burden test, holding that "[t]he rule announced in *Casey* * * * requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S.Ct. at 2309. This reimagination of *Casey* as a cost-benefit analysis was a stark admission of the quintessentially legislative function that courts have usurped—a function more commonly associated with regulatory agencies. See E.O. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (requiring cost-benefit analysis of agency rules).

From a doctrinal standpoint, the Court's recasting of *Casey*'s undue burden standard was a development that raised more questions than it answered. For one thing, the opinion "reveal[ed] little about how balancing would work if the government's interest in fetal life were more directly at stake." Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After* Casey/Hellerstedt, 52 Harv. C.R.-C.L. L. Rev. 421, 463 (2017). That was precisely the concern identified in *Carhart II*, and yet *Whole Woman's Health* brought the Court no closer to addressing it. And how would a judge ever undertake such balancing in the first place? Asking whether a state interest in protecting fetal life or ensuring informed decisions about abortion outweighs any burdens on the abortion decision is like asking "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp.*

v. *Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). A court cannot "objectively * * * weig[h]" or "meaningful[ly] * * * compare" the "imponderable values" involved. *June Medical Services LLC* v. *Russo*, 140 S.Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in judgment).

Nor could the cost-benefit approach credibly appeal to prior practice for its justification: the Court's evolution of the doctrine was immediately decried by Justice Thomas as a "free-form balancing test" that was "contrary to *Casey*." *Whole Woman's Health*, 136 S.Ct. at 2324 (Thomas, J., dissenting). Justice Thomas pointed out, at length, that the *Casey* line of cases knew nothing of such a standard—until the Court suddenly invented it. *Id.* at 2324–25 (citing *Mazurek* v. *Armstrong*, 520 U.S. 968 (1997)).

The conclusion that *Whole Woman's Health* represented a step beyond prior readings of *Casey* was not limited to the decision's opponents. In the wake of *Whole Woman's Health*, sympathetic observers noted both that the undue burden standard had undergone revision and that the impact of the shift remained uncertain. See, *e.g.*, Ziegler, *supra*, at 461–62 (while *Whole Woman's Health* "infused the undue-burden test with new meaning," at present "the full scope of the undue-burden test remains unclear.").

Besides reworking the undue burden standard itself, the Court has repeatedly changed and distorted other doctrines in an effort to render the undue burden framework workable. The Court has made novel exceptions to generally applicable doctrines for standing, facial challenges, and more. For example, litigants cannot usually assert third-party standing. *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004). Yet this

Court regularly allows abortion providers to assert the claims of women seeking abortions, *June Medical*, 140 S.Ct. at 2118, even though they themselves may bring as-applied challenges. See, *e.g.*, *Carhart II*, 550 U.S. at 167. Again, courts normally require a showing that a statute is unconstitutional in virtually all its applications before facially invalidating the law, *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), and yet in the context of abortions a plaintiff need only satisfy a minimal—constantly shifting—burden. Under *Casey*, a court may facially invalidate an abortion law if "it will operate as a substantial obstacle to a woman's choice to undergo an abortion" in "a large fraction of the cases in which [it] is relevant." 505 U.S. at 895.

Even this sub-standard has spawned new confusion: *Whole Woman's Health* explained that *Casey*'s "large fraction" should be calculated by looking only to "those [women] for whom [the provision] is an actual rather than an irrelevant restriction," 136 S.Ct. at 2320 (quoting *Casey*, 505 U.S. at 895). But as Justice Alito and others have observed, by this accounting, "we are supposed to use the same figure (women actually burdened) as both the numerator and denominator"—which will always equal 100%. *Id.* at 2343 n.11 (Alito, J. dissenting). This makes no sense, and so "[t]he proper standard for facial challenges is unsettled in the abortion context." *Id.* Lower courts have not been shy to say that "The Court * * * has not been clear about how to define the numerator and denominator for the fraction, about what qualifies as a fraction that is 'large,' or about whether it is a percentage or a fractional number possibly larger than one." *Preterm-Cleveland* v. *McCloud*, 994 F.3d 512, 534 (6th Cir. 2021).

Casey has not only proved doctrinally unstable, it has introduced uncertainty into other doctrines and areas of law. The undue burden test is unworkable.

C. *Casey*'s undue burden test, in whatever form it persists, will continue to produce unpredictable results.

As unstable as this Court's interpretations of the undue burden test have already proven to be, there is ample evidence that the unpredictability and judicial splintering *Casey* caused will only continue. This is because the precise contours of *Casey*'s undue burden analysis remain undefined to this day.

Last year, this Court decided *June Medical Services* v. *Russo*, 140 S.Ct. 2103 (2020), which involved a challenge to a Louisiana statute that was "almost word-for-word identical" to the statute held invalid in *Whole Woman's Health*. *Id.* at 2112. *June Medical* produced a four-Justice plurality opinion finding that the Louisiana statute imposed an undue burden on the right to obtain an abortion and thus fell within the ambit of *Whole Woman's Health*—and by extension *Casey*. *Id.* at 2112–13. That plurality also affirmed its commitment to the benefit-balancing re-interpretation of *Casey* outlined in *Whole Woman's Health*, stating that *Casey* "requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's 'asserted benefits against the burdens' it imposes on abortion access." *Id.* at 2112 (quoting *Whole Woman's Health*, 136 S.Ct. at 2310).

Chief Justice Roberts concurred with the judgment on *stare decisis* grounds, but disagreed with the undue burden standard as recast by *Whole Woman's*

Health, reasoning that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." *June Medical*, 140 S.Ct 2103, 2136 (2020) (Roberts, C.J., concurring in the judgment). The four dissenting Justices, for their parts, similarly rejected *Whole Woman's Health*'s benefit-balancing test. *Id.* at 2149–53 (Thomas, J., dissenting), 2154–55 (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., dissenting), 2178–80 (Gorsuch, J., dissenting).

Given the divisions between the majority in *June Medical*, the current meaning of the undue burden standard for lower courts and litigants is entirely unclear. In *Marks* v. *United States*, 430 U.S. 188, 193 (1977), the Court explained that when "no single rationale explaining the result [of a case] enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'" (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Since the Chief Justice rejected the reasoning both of *Whole Woman's Health* and that offered by the *June Medical* plurality, while concurring in the *June Medical* judgment, the *Marks* rule suggests the Chief Justice's interpretation of *Casey* controls, and the cost-benefit addendum to the undue burden test is no longer operable.

But that conclusion is not universally shared. Indeed, this issue has already caused a circuit split in the lower courts. Compare *Hopkins* v. *Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) ("Chief Justice Roberts's vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is

controlling. * * * In light of Chief Justice Roberts's separate opinion, 'five Members of the Court reject[ed] the *Whole Woman's Health* cost-benefit standard.'" (quoting *June Medical*, 140 S.Ct at 2182 (Kavanaugh, J., dissenting))); *EMW Women's Surgical Ctr., P.S.C.* v. *Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020) (same), with *Planned Parenthood of Indiana & Kentucky, Inc.* v. *Box*, 991 F.3d 740, 752 (7th Cir. 2021) ("The split decision in *June Medical* did not overrule the precedential effect of *Whole Woman's Health* and *Casey*."); *Whole Woman's Health* v. *Paxton*, 978 F.3d 896, 904 (5th Cir. 2020), *reh'g en banc granted, opinion vacated*, 978 F.3d 974 (5th Cir. 2020) ("*Whole Woman's Health*'s articulation of the undue burden test as requiring balancing a law's benefits against its burdens retains its precedential force."). Given that "[l]egal clashes have erupted nationally over the vexing interplay between *Marks* and *June Medical*," *id.* at 919 (Willett, J., dissenting), this question will inevitably have to be resolved by the Court.

As the deepening circuit split shows, the undue burden standard is an unstable doctrine. And neither of the competing lower court approaches will stabilize it. If the Chief Justice's *June Medical* concurrence controls (as it should), the Court has executed a *second* U-turn over the interpretation of *Casey*'s undue burden standard in the space of four years. If the Chief Justice's concurrence does *not* control, and *Whole Woman's Health*'s re-interpretation of the undue burden test stands, then the Court has substantially revised the *Casey* standard, indicating once more that the undue burden test is not stable.

No wonder Judges across the country have bemoaned the undue burden standard as unworkable.† As Judge Frank Easterbrook has despairingly observed:

> [A] court of appeals cannot decide whether requiring a mature minor to notify her parents of an impending abortion, when she cannot persuade a court that avoiding notification is in her best interests, is an "undue burden" on abortion. The "undue burden" approach announced in [*Casey*] does not call on a court of appeals to interpret a text. Nor does it produce a result through interpretation of the Supreme Court's opinions. How much

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† See, *e.g.*, *Preterm-Cleveland*, 994 F.3d at 524 (Batchelder, J.) ("whether [a] law creates a 'substantial obstacle'" for women seeking an abortion is "a question more easily asked than answered because the [Supreme] Court has suggested differing ways of identifying a 'substantial obstacle'"); *Nat'l Abortion Fed'n* v. *Gonzales*, 437 F.3d 278, 290-96 (2d Cir. 2006) (Walker, J., concurring) ("In the end, I cannot escape the conclusion that, in these abortion cases, the federal courts have been transformed into a sort of super regulatory agency—a role for which courts are institutionally ill-suited and one that is divorced from accepted norms of constitutional adjudication."); *Richmond Medical Ctr. for Women* v. *Herring*, 570 F.3d 165, 181 (4th Cir. 2009) (Wilkinson, J., concurring) ("[M]atters of such medical complexity and moral tension as partial birth abortion should not be resolved by the courts, with no semblance of sanction from the Constitution they purport to interpret. Indeed, the sheer mass of medical detail summoned in this case has led us far beyond the ambit of our own professional competence."); *Okpalobi* v. *Foster*, 190 F.3d 337, 354 (5th Cir. 1999) (Wiener, J. and Parker, J.) ("The *Casey* Court provided little, if any, instruction regarding the type of inquiry lower courts should undertake to determine whether a regulation has the 'purpose' of imposing an undue burden on a woman's right to seek an abortion.").

> burden is "undue" is a matter of judgment, which depends on what the burden would be * * * and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators). Only the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute[.]

949 F.3d 997, 998–99 (7th Cir. 2019) (Easterbrook, J., concurring in denial of rehearing *en banc*). When the lower courts cannot consistently apply—or even understand—a standard after nearly thirty years of development, something is wrong.

Litigants have long since stepped in to exploit this uncertainty. *Casey*'s failure to provide adequate guidance for state legislatures has led national abortion rights organizations to immediately file for an injunction any time a law protecting prenatal life is enacted—if only to "give it a try." See, *e.g.*, *Women's Med. Prof'l Corp.* v. *Voinovich*, 130 F.3d 187, 218–19 (6th Cir. 1997) (Boggs, J., dissenting) ("The post-*Casey* history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the *Peanuts* comic strip * * * * I doubt that the lawyers and litigants will ever stop this game. Perhaps the Supreme Court will do so."). Some are even willing to go to questionable lengths in these efforts. See *Azar* v. *Garza*, 138 S.Ct. 1790, 1793 (2018) ("The Government also suggests that opposing counsel made 'what appear to be material misrepresentations and omissions' that were 'designed to

thwart this Court's review.'") (quoting Pet. for Cert. 26.).

In short, nearly thirty years after *Casey*, the meaning of the undue burden standard is more unsettled than ever. Jurisprudential problems are not dissolving; they are mushrooming. Lower courts now find themselves consumed with *interpretations of interpretations* of *Casey*'s undue burden test, a problem that will continue indefinitely unless this Court intervenes to break the cycle. None of this is surprising considering "[n]othing in the text or original understanding of the Constitution establishes a right to an abortion." *Jackson Women's Health Org.* v. *Dobbs*, 945 F.3d 265, 277 (Ho, J., concurring). Casey's trajectory of failure provides powerful evidence that the undue burden test was flawed from the start.

D. The balance of *stare decisis* considerations weighs in favor of overruling *Casey*.

Casey has proven uniquely unworkable, and the various other prudential considerations that can favor *stare decisis* weigh against its application to *Casey*. See *Ramos*, 140 S.Ct. at 1414–15 (Kavanaugh, J., concurring) (Court weighs whether the precedent is "egregiously wrong"; whether it has caused "significant negative jurisprudential or real-world consequences"; and whether "overruling the prior decision would unduly upset reliance interests").

First, the zigzagging, unpredictable path of this Court's judgments after *Casey* strongly suggests that the decision was not only wrong, but "egregiously wrong." *Id.*

Consider: In the two *Carhart* cases, the Court found itself forced to legislate the finer medical

nuances of partial-birth abortion, reaching sharply divergent outcomes in the space of seven years. *Whole Woman's Health* shifted the landscape further, adopting a novel benefit-balancing framework not present in *Casey* itself or its immediate sequelae. And *June Medical* may have changed the game yet again—producing five votes in favor of a repudiation of *Whole Woman's Health*'s new take on *Casey*, but leaving lower courts profoundly confused about how to implement the decision.

All along, Justices have continued their criticism that the undue burden standard is too subjective. Indeed, even prominent abortion advocates have said *Casey* "offer[ed] no guidance as to which laws are an undue burden and which are not" and concede that the test remains "confusing to apply." Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 Tex. L. Rev. 1189, 1220 (2017); see also Elizabeth A. Schneider, *Workability of the Undue Burden Test*, 66 Temp. L. Rev. 1003, 1004 (1993) ("The discretionary nature of the undue burden test renders it unworkable. It is a standard which cannot be applied by state courts consistently, predictably, and without prejudice."). The undue burden standard is an extra-constitutional innovation that fails to offer any principled means of resolving the cases brought to this Court.

Second, the undue burden standard has yielded significant "negative jurisprudential consequences," *Ramos*, 140 S.Ct. at 1415 (Kavanaugh, J., concurring), as seen in the utter doctrinal confusion the *Casey* decision has unleashed.

Third, *Casey* can claim no strong reliance interests. The decision lacks any serious claim to

"antiquity"—*Casey* was itself a major doctrinal departure from *Roe* and its progeny. *Montejo*, 556 U.S. at 792. Moreover, *Casey* has not given rise to contractual or other prospective reliance interests, which this Court has said are most weighty. *Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved"). Indeed, the *Casey* plurality recognized that the Court's abortion jurisprudence did not implicate traditional reliance interests. See *Casey*, 505 U.S. at 856.

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Considered as a whole, the *Casey* undue burden standard has simply not "develop[ed] in a principled and intelligible fashion." *Vasquez*, 474 U.S. at 265. Quite the opposite: *Casey*'s undue burden standard has proven profoundly unworkable.

Unless *Casey* is overruled, that chaos is poised to continue well into the future. Before enshrining the undue burden standard into law, *Casey* famously pronounced that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851. Such metaphysical ideals are not easily enforced by judges: in *June Medical*, the Chief Justice observed that "[t]here is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *June Medical*, 140 S.Ct at 2136 (Roberts, C.J., concurring in the judgment).

And yet that is exactly what courts have been forced to do since *Casey*'s rule was first announced.

Nearly three decades on, the undue burden test has proved so murky that courts have repeatedly fallen back on the conflicting moral and jurisprudential intuitions that *Casey* purported to sideline.

This status quo is untenable. Where a legal doctrine has repeatedly failed to offer clarity—where it has proved unworkable in the past and will likely engender unpredictable consequences in the future—its existence constitutes an open invitation to judges to interpret it according to their own policy preferences, usurping the constitutional prerogatives of the legislature. *Roe* and *Casey* should be overruled, and the question of abortion legislation should be returned to the states.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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