

DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION AND THE LIKELY END OF THE ROE V. WADE ERA

JEFFREY HANNAN*

INTRODUCTION

In *Jackson Women's Health Organization v. Dobbs*, the Fifth Circuit struck down a Mississippi law prohibiting abortion after the first fifteen weeks of pregnancy, except in cases of medical emergency or severe fetal abnormality.¹ The Supreme Court now considers that ruling in a case with massive ramifications for the status of abortion in the United States.² The question presented is broad: “[w]hether all pre-viability prohibitions on elective abortions are unconstitutional.”³ In ruling on this case, the Court will need to decide whether to overturn the two leading cases on abortion law in the United States, *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴ *Roe* established that prohibitions on abortion before the fetus becomes viable violate the Due Process Clause of the Fourteenth Amendment.⁵ *Casey* provides the “undue burden” standard of review Courts apply to determine the constitutionality of pre-viability abortion restrictions, which Mississippi claims should be overturned.⁶

Copyright © 2022 Jeffrey Hannan

* J.D. Candidate, Duke University School of Law, 2023, B.A., Washington University in St. Louis, 2018. Thank you to the editorial staff of the Duke Journal of Constitutional Law & Public Policy for providing guidance and insight. A special thank you to my parents, Steve and Cindy Hannan, for their endless support.

1. 945 F.3d 265, 269 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021).
2. *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619, 2619 (2021) (granting cert.).
3. Brief for Petitioners at i, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. July 22, 2021).
4. 410 U.S. 113 (1973), 505 U.S. 833 (1992).
5. *Roe*, 410 U.S. at 164.
6. *Casey*, 505 U.S. at 877 (plurality opinion); Brief for Petitioners, *supra* note 3, at 1. For a

This commentary will examine the parties' arguments and assess several possible outcomes in this case. As the respondents convincingly argue, the Court should uphold *Roe* and *Casey* and strike down the Mississippi law. The Court should reach this conclusion by finding that these cases were correctly decided, the precedents are workable, the precedents have not been outmoded by legal or factual developments, and the precedents engender significant reliance interests.

I. FACTS

In 2018, the Mississippi Legislature passed the “Gestational Age Act.”⁷ This Act prohibits abortion after fifteen weeks’ gestation except in cases of “medical emergency” or “severe fetal abnormality.”⁸ Medical emergencies involve cases in which a physician determines that an abortion is necessary to preserve the life of a pregnant woman whose life is endangered . . . or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function.⁹ Severe fetal abnormality encompasses cases in which the fetus is incapable of life outside the womb.¹⁰ Physicians that violate this law are subject to sanctions and may have their medical licenses revoked.¹¹

The legislature based this prohibition on several medical findings regarding prenatal development.¹² The statute notes that abortion “carries significant physical and psychological risks” to mothers.¹³ It identifies potential medical complications from abortions.¹⁴ The law states that the Legislature has deemed the usual means of performing abortion after fifteen weeks’ gestation to be a “barbaric practice” that is “dangerous” and “demeaning to the medical profession.”¹⁵

discussion of the undue burden standard, see *infra* Section III.

7. 2018 MISS. LAWS 393 (codified at MISS. CODE ANN. § 41-41-191 (2018)). This commentary will refer to this statute as “the Mississippi statute,” “the Mississippi law,” “the statute,” or “the law.”

8. MISS. CODE ANN. § 41-41-191(4)(b) (2018).

9. *Id.* § 41-41-191(3)(j). The statute refers only to pregnant “women” throughout its text. Similarly, both parties’ filings consider only pregnant “women,” as do all relevant cases cited in this commentary. While this terminology excludes people of other gender identities who become pregnant, this terminology will be used throughout this commentary to conform to the language in these sources.

10. *Id.* § 41-41-191(3)(h).

11. *Id.* § 41-41-191(6).

12. *Id.* § 41-41-191(2)(b).

13. *Id.* § 41-41-191(2)(b)(ii).

14. *Id.* § 41-41-191(2)(b)(iv).

15. *Id.* § 41-41-191(2)(b)(i)(8).

II. PROCEDURAL HISTORY

Respondents in this case are Jackson Women’s Health Organization—the only abortion clinic in Mississippi—and one of the Organization’s physicians.¹⁶ Respondents sued Thomas Dobbs, the Mississippi State Health Officer, to prevent the enforcement of the Gestational Age Act.¹⁷ Respondents argued that the statute violated the substantive liberty rights of their patients by preventing abortion prior to fetal viability, in direct contravention of the Due Process Clause.¹⁸

After granting a temporary restraining order blocking implementation of the statute,¹⁹ the District Court for the Southern District of Mississippi granted a permanent injunction and struck down the law for violating women’s Fourteenth Amendment due process rights.²⁰ The Fifth Circuit affirmed.²¹ The court distinguished between a *regulation* on abortion prior to viability—which may be lawful if the regulation does not impose an undue burden on the woman’s right to choose an abortion—and a *per se* unconstitutional ban on pre-viability abortions, which the court held described the Gestational Age Act.²²

After the temporary restraining order, the Mississippi Legislature enacted an even stricter law prohibiting physicians from performing abortions after a fetus’s heartbeat is detected.²³ The District Court similarly ordered a preliminary injunction, which the Fifth Circuit affirmed.²⁴ On petition, the Supreme Court granted certiorari as to one

16. Petition for Writ of Certiorari at 1, 9, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392).

17. *Id.* at ii. This commentary will refer to Petitioners as “Mississippi” throughout.

18. Complaint at 39, *Jackson Women’s Health Org. v. Currier*, 2018 U.S. Dist. LEXIS 45080, *aff’d sub nom.* *Jackson Woman’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *cert. granted* 141 S. Ct. 2619 (U.S. 2021); *see also* U.S. CONST. amend. XIV, § 1 (“No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

19. *Jackson Women’s Health Org. v. Currier*, 2018 U.S. Dist. LEXIS 45080, at *3, *aff’d sub nom.* *Jackson Woman’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *cert. granted* 141 S. Ct. 2619 (U.S. 2021).

20. *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 537–38 (S.D. Miss. 2018), *aff’d sub nom.* *Jackson Woman’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *cert. granted* 141 S. Ct. 2619 (U.S. 2021).

21. *Dobbs*, 945 F.3d at 269.

22. *Id.* For a discussion of the “undue burden standard used to determine whether pre-viability regulations on abortion are unconstitutional, see *infra* Section III.

23. 2019 MISS. LAWS 349 (codified at MISS. CODE ANN. § 41-41-34.1 (2021)). Fetal heartbeats are usually detectable after approximately six weeks’ gestation. Jane Chertoff, *How Early Can You Hear Baby’s Heartbeat on Ultrasound and By Ear?*, HEALTHLINE (Sept. 26, 2018), <https://www.healthline.com/health/pregnancy/when-can-you-hear-babys-heartbeat>.

24. *Jackson Women’s Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam).

question: “[w]hether all pre-viability prohibitions on elective abortions are constitutional.”²⁵

III. LEGAL BACKGROUND

The legality of abortion has evolved over time and has traditionally depended in part on the stage of the fetus’s development.²⁶ Abortion in England was first criminalized in 1803.²⁷ Abortion of a fetus after “quickening”—the time when the fetus first recognizably moves *in utero*, at approximately sixteen to eighteen weeks—constituted a capital offense, whereas pre-quickening abortions were punished less severely.²⁸ In the United States, by 1840, only eight States had statutes addressing abortion.²⁹ By the 1950s, most states had banned abortion in nearly all circumstances, unless necessary to save the life of the mother.³⁰

In the seminal case on abortion regulation in the United States, *Roe v. Wade*, the Supreme Court recognized a woman’s fundamental right to receive an abortion, subject to some limitations.³¹ In *Roe*, an anonymous pregnant woman sought declaratory and injunctive relief from Texas’s law prohibiting her from receiving an abortion absent medical necessity.³² The Court stated that the Constitution guarantees a fundamental right to personal privacy, emerging out of the confluence of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.³³ The Court especially highlighted “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action” as a source of this right.³⁴ The Court found that this privacy right “encompass[es] a woman’s decision whether or not to terminate her pregnancy.”³⁵

The Court noted challenges that pregnant women face, including “a distressful life and future” due to an unwanted child, “[p]sychological harm,” impacts on “mental and physical health” from childcare, and

25. See Petition for Writ of Certiorari, *supra* note 16, at i (stating question one as “[w]hether all pre-viability prohibitions on elective abortions are constitutional”); *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619, 2619 (2021) (granting certiorari as to question one).

26. *Roe v. Wade*, 410 U.S. 113, 133–35.

27. *Id.* at 136.

28. *Id.* at 132–33, 136.

29. *Id.* at 138–39.

30. *Id.* at 139.

31. *Id.* at 155.

32. *Id.* at 120.

33. *Id.* at 152.

34. *Id.* at 153.

35. *Id.*

social stigmatization for unwed mothers.³⁶ The Court, however, also recognized the government’s “important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.”³⁷

To reconcile these competing interests, the Court in *Roe* adopted a trimester framework.³⁸ Under the trimester framework, state governments were prohibited from banning or regulating first-trimester abortions.³⁹ Yet, state governments *could* regulate second-trimester abortions in the interest of protecting the mother’s health.⁴⁰ Then, after the fetus becomes viable at the beginning of the third trimester, states could outright ban abortions to protect the fetus’s interest in “potential life,” except when abortions are necessary to protect the mother’s life or health.⁴¹ This structure reflected the Court’s reasoning that the government’s interest in safeguarding health and protecting potential life increased as the pregnancy progressed.⁴² The Court struck down the Texas law because it prohibited elective abortions in the first and second trimesters.⁴³

The Court abandoned the trimester framework in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁴ In *Casey*, five abortion clinics and one physician asked the Court to overturn a Pennsylvania law imposing several reporting, notification, and informed-consent requirements on women seeking abortions.⁴⁵ The statute also imposed reporting requirements on facilities that provided abortions.⁴⁶

In deciding whether to overturn precedent, the Court considered several factors. The Court primarily examined whether the resulting precedent proved workable in practice, whether subsequent legal or factual developments made outmoded the existing precedent, and whether the precedent engendered significant reliance interests since its adoption.⁴⁷

36. *Id.*

37. *Id.* at 154.

38. *Id.* at 163.

39. *Id.*

40. *Id.*

41. *Id.* at 163–64.

42. *Id.*

43. *Id.* at 164.

44. 505 U.S. 833, 873 (1992) (plurality opinion).

45. *Id.* at 844–45 (majority opinion).

46. *Id.* at 844.

47. *Id.* at 855.

The Justices splintered in their decision. A five-justice majority agreed that *stare decisis* compelled the Court to adhere to the “essential holding” of *Roe*.⁴⁸ The Court clarified that the Due Process Clause protects a woman’s right to abortion before viability, the State may prohibit abortions after viability, and at all times the State has a legitimate interest in protecting both maternal and fetal health.⁴⁹ Justices O’Connor, Kennedy, and Souter went further, holding that a state may not enact regulations that impose an “undue burden” on a woman’s ability to choose to obtain an abortion before viability.⁵⁰ The undue burden standard—a form of heightened scrutiny—asks whether a regulation “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁵¹ The three justices applied this standard in voting to strike down Pennsylvania’s requirement that abortion seekers notify their spouses because it granted husbands an effective veto over wives’ abortion rights and may discourage many women from seeking abortions.⁵² The plurality explained that “in a large fraction of the cases in which [the provision] is relevant” it imposes an undue burden.⁵³

The undue burden standard remained unchanged for over two decades until *Whole Woman’s Health v. Hellerstedt*.⁵⁴ In *Hellerstedt*, the Court struck down a Texas statute requiring that physicians performing abortions have admitting privileges at a hospital within thirty miles of the abortion location and that abortion facilities maintain the same health and safety standards as ambulatory surgical centers.⁵⁵ In applying the undue burden standard, the Court adopted a balancing test—examining both the burdens and benefits of the law in proportion to one another.⁵⁶ Using this analysis, the Court found that the

48. *Id.* at 846.

49. *See id.* at 874 (plurality opinion) (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision [to receive an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

50. *Id.*

51. *Id.* at 877.

52. *Id.* at 897.

53. *Id.* at 895. Specifically, the opinion notes that in this “large fraction” analysis, the provision “must be judged by reference to those for whom it is an actual rather than an irrelevant restriction.” *Id.* This means that courts should determine the denominator in this analysis by looking not to the *entire* pool of women under the government’s jurisdiction, but rather to the pool of women who will actually be affected by the restriction. *Id.* at 894–95.

54. 136 S. Ct. 2292 (2016).

55. *Id.* At 2300.

56. *See id.* at 2309 (“The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”).

requirements of the statute did not meet the undue burden standard because “neither of these provisions confers medical benefits sufficient to justify the burdens upon [abortion] access that each imposes.”⁵⁷

IV. PETITIONERS’ ARGUMENT

Petitioners, representing the Mississippi government, chiefly argue that the Court should overturn *Roe* and *Casey*,⁵⁸ and that laws restricting pre-viability abortions should be assessed under a rational basis standard of review.⁵⁹ Alternatively, Petitioners argue that even if the Court upholds the undue burden standard for abortion restrictions, the Court should at least reject a bright line rule holding that all pre-viability abortion bans are unconstitutional.⁶⁰

A. The Statute Meets Rational Basis Review

Petitioners claim that sufficient justification exists to overcome *stare decisis* and overrule *Roe*’s and *Casey*’s requirements that heightened scrutiny be applied to abortion restrictions.⁶¹ Their argument primarily asserts that these cases were wrongly decided, the current doctrine is “hopelessly unworkable,” “[d]ecades of progress” have made the Court’s precedents obsolete, and “[r]eliance interests do not support retaining” these precedents.⁶²

First, Petitioners assert that *Roe* was wrongly decided because the Due Process Clause only protects rights that are either clearly enumerated in the Constitution or “ground[ed] in history and tradition.”⁶³ They argue that *Roe*’s “sweeping” application of the right to privacy is, conversely, “unmoored from constitutional text, structure, history, and tradition.”⁶⁴ Petitioners then assert that abortion is “a unique act” because it “destroy[s] human life,” differentiating abortion rights from all previous privacy or liberty rights recognized by the

57. *Id.* at 2300.

58. Brief for Petitioners, *supra* note 3, at 1.

59. *Id.* at 11. For a description of the rational basis review courts apply to statutes challenged under the Fourteenth Amendment, see *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (holding that the Constitution requires that statutes affecting non-fundamental liberty interests be “rationally related to legitimate government interests”).

60. See Brief for Petitioners, *supra* note 3, at 46 (“[T]his Court could reject a viability rule, clarify the undue-burden standard, and reverse on the ground that the [Gestational Age] Act does not im-pose an undue burden.”)

61. *Id.* at 14.

62. *Id.*

63. *Id.* at 15.

64. *Id.* at 15–16.

Court.⁶⁵ Petitioners conclude that because *Roe* and *Casey* fail to account for this distinction, they were incorrectly adjudicated and should not compel the court to adopt heightened scrutiny for abortion restrictions.⁶⁶

Second, Petitioners assert that the Court’s abortion precedents are “unworkable”⁶⁷ because there is “no objective way to decide whether a burden is ‘undue.’”⁶⁸ Petitioners assert that the Court faces an “administrability problem” in articulating “what *Casey* even means” given the competing interpretations of the undue burden standard in past cases applying it.⁶⁹ Petitioners contend that heightened scrutiny for abortion restrictions is also unworkable because it fails to “accommodate state interests” by “diminish[ing] a State’s pre-viability interests in protecting unborn life, women’s health, and the medical profession’s integrity.”⁷⁰ According to Petitioners, these interests are matters of policy and therefore should be left to state legislatures rather than to the courts.⁷¹ Petitioners state that it is important that state legislatures are unencumbered by “decades-stale” precedents in adapting existing laws—especially in the wake of advances in medicine and technology, which have changed society’s collective understanding of gestational development.⁷²

Third, Petitioners assert that legal and factual developments since *Roe* and *Casey* have rendered the Court’s abortion precedents outmoded.⁷³ Petitioners note that since *Roe* and *Casey*, the Court has never held that privacy or liberty interests justify a constitutional right to end human life—be it actual or “potential” life.⁷⁴ Petitioners also point to factual developments to support their claim that the Court’s precedents are obsolete.⁷⁵ Petitioners claim that modern social policies, such as laws preventing pregnancy discrimination and mandating

65. *Id.*

66. *Id.*

67. *Id.* at 19 (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009)).

68. *Id.* (quoting *Casey*, 505 U.S. at 877 (plurality opinion)).

69. *Id.* (citing *June Medical Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120–32, 2135–42, 2154–65 (2020) (plurality opinion)). Petitioners note that the plurality opinion and Chief Justice Roberts’s concurring opinion both concluded that the statute imposed an undue burden, but arrived at this conclusion after taking “different view[s]” of *Casey*, both of which differed from the dissent’s view. *Id.*

70. *Id.* at 20–21.

71. *Id.* at 21.

72. *Id.*

73. *Id.* at 28.

74. *Id.* (quoting *Harris v. McRae*, 448 U.S. 297, 325 (1980)).

75. *Id.* at 29.

parental leave, reduce unwanted pregnancies which could force women into “a distressful life and future,” a primary concern for the Court in *Roe*.⁷⁶ Petitioners also emphasize “safe haven” laws which allow women to leave unwanted infants in the care of the state, as well as the increased ease of access to effective contraceptives.⁷⁷ They claim these laws show that abortion is not needed to “enable ‘women to participate equally’” in the workforce and in social life.⁷⁸ According to Petitioners, this statement contradicts the assumptions that informed the plurality opinion in *Casey*.⁷⁹ Last, Petitioners discuss medical developments that have evolved since *Casey*, particularly scientific progress in assessing when fetuses are capable of experiencing pain.⁸⁰

Fourth, Petitioners state that no reliance interests compel the Court to retain heightened scrutiny for abortion challenges.⁸¹ Petitioners argue that claims of substantial reliance on the stability of the Court’s precedents are severely undermined because abortion has always been contentious and decided in the courts on “the narrowest of margins.”⁸² Petitioners also question whether reliance should apply to abortions at all, because abortion is “customarily ... an unplanned response to ... unplanned activity,”⁸³ rather than a planned activity around which individuals could reasonably form “long-term plans and commitments.”⁸⁴ Petitioners note that overturning *Roe* and *Casey* would “not itself bar a single abortion”; rather, it would merely allow states to decide for themselves which abortion laws should be codified.⁸⁵

Given these considerations, Petitioners assert that the court should reject heightened scrutiny in favor of rational basis review for abortion restrictions.⁸⁶ Petitioners conclude that the Gestational Age Act satisfies rational basis scrutiny because it rationally relates to the state’s interest in protecting the lives of the unborn,⁸⁷ protecting women’s

76. *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

77. *Id.*

78. *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

79. *See id.* at 30 (asserting that these contraceptive developments “undercut” *Casey*’s assumption about the necessity of abortion).

80. *Id.* (quoting *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015)).

81. *Id.* at 31.

82. *Id.* at 31–32 (quoting *Payne v. Tennessee*, 501 U.S. 808, 829 (1991)).

83. *Id.* at 34 (quoting *Payne*, 501 U.S. at 856) (alteration in original).

84. *Id.*

85. *Id.* at 35–36.

86. *Id.* at 36.

87. *Id.* at 36–37.

health,⁸⁸ and protecting the integrity of the medical profession.⁸⁹

B. Viability is Not a Barrier to Prohibiting Abortions

Alternatively, Petitioners contend that pre-viability abortion prohibitions may pass heightened scrutiny and that the Gestational Age Act meets this standard.⁹⁰ Petitioners argue that even if there exists a substantive right to abortion, nothing in the Constitution or in historical precedent mandates that viability serve as the point at which the undue burden test must begin to apply. Therefore, Petitioners contend, pre-viability restrictions are not *per se* unconstitutional.⁹¹ Petitioners criticize viability as a meaningless cutoff point.⁹² They argue that even after viability a fetus still relies on “artificial aid” to survive,⁹³ and consequently, pre-viability fetuses are similar to post-viability fetuses; they simply “need[] a little more help.”⁹⁴

Petitioners argue that the Gestational Age Act should be upheld under two alternative theories even if the Court maintains the viability line as the cutoff point.⁹⁵ First, Petitioners assert that the statute meets any level of scrutiny—even strict scrutiny—because the state’s interests in protecting unborn life and maternal health, as well as the “medical profession’s integrity,” are “compelling” at fifteen weeks of pregnancy.⁹⁶ Petitioners claim the act is narrowly tailored to these interests because it exempts abortions in cases of medical emergency or severe fetal abnormality.⁹⁷

Second, Petitioners claim that the statute meets the undue burden standard articulated in *Casey*.⁹⁸ Petitioners note that *Casey*’s undue burden standard does not prohibit pre-viability legislation.⁹⁹ For example, *Casey* upheld prohibitions on abortions for minors without

88. *Id.* at 37.

89. *Id.*

90. *See id.* at 38 (asserting that the Court should reverse the Fifth Circuit’s judgment that the statute is unconstitutional even if it continues to apply heightened scrutiny).

91. *Id.* at 39.

92. *Id.* at 40.

93. *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 160 (1973)).

94. *Id.*

95. *Id.* at 45–46.

96. *Id.* at 46. For a discussion of strict scrutiny, see *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (stating that strict scrutiny requires that the Government prove that a law is “narrowly tailored” to a “compelling interest” (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennet*, 564 U.S. 721, 734 (2011))).

97. Brief for Petitioners, *supra* note 3, at 46.

98. *Id.*

99. *Id.* at 46–47.

parental consent or a judicial bypass, regardless of viability.¹⁰⁰ Petitioners explain that pre-viability restrictions have been constitutionally permitted where the restriction is not a substantial obstacle in a “large fraction” of relevant cases.¹⁰¹ Petitioners apply this analysis to the Gestational Age Act, and conclude that because Respondents only provide abortions up to 16 weeks and “at most 4.5% of the women who obtained abortions from respondents did so after 15 weeks’ gestation,”¹⁰² the statute does not impose a burden on “a significant number of women.”¹⁰³ Furthermore, Petitioners point to evidence that over 90% of abortions in 2018 took place at or before 13 weeks’ gestation, and conclude that there is no undue burden because most women seeking abortions are not affected by the statute.¹⁰⁴

V. RESPONDENTS’ ARGUMENT

Respondents begin their brief by asking that the Court dismiss the case entirely, noting that Petitioners originally only argued for overruling *Roe* and *Casey* in a “threadbare footnote” within their Petition for Certiorari.¹⁰⁵ Respondents state that the Court has previously thrown out cases when petitioners rely on wholly different arguments from those expressed in their petitions.¹⁰⁶ In the remainder of the brief, Respondents chiefly argue that the Court should uphold *Roe* and *Casey*.¹⁰⁷ Respondents then assert that Mississippi’s proposed alternative legal schemes are legally insufficient.¹⁰⁸

A. *There is No Justification for Overruling Casey and Roe*

Respondents emphatically state that *Roe* and *Casey* are settled law, particularly with regard to pre-viability abortion restrictions.¹⁰⁹

100. *Id.*

101. *Id.* at 47 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992) (plurality opinion)).

102. *Id.*

103. *Id.* (quoting *Casey*, 505 U.S. at 895).

104. *Id.* (citing *CDCs Abortion Surveillance System FAQs: Abortion Surveillance—Findings and Reports*, CTNS. FOR DISEASE CONTROL AND PREVENTION (Nov. 25, 2020), https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm [https://perma.cc/33EE-Z2PY]).

105. Brief for Respondents at 11, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. filed Sept. 13, 2021) (citing Petition for Writ of Certiorari, *supra* note 16, at 5–6 n.1).

106. *Id.* (quoting *Visa Inc. v. Osborn*, 137 S. Ct. 289, 289–90 (2016) (mem.)).

107. *Id.*

108. *Id.* at 43 (“Its barebones discussion of its proposed alternatives highlights that any abandonment of viability would be no different than overturning *Casey* and *Roe* entirely.”).

109. *See id.* at 4–5 (“For all the reasons the Court so deliberately set forth in *Casey*, that

Respondents argue that prohibiting abortion bans before viability is the “central principle” underlying these cases.¹¹⁰ Respondents emphasize that *Casey* makes clear that “viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify” abortion bans.¹¹¹

Next, Respondents reject Mississippi’s arguments for overruling the viability line.¹¹² Respondents contend that the Court in *Casey* already considered and rejected all the arguments Mississippi presented in upholding *Roe*’s “central holding” that pre-viability abortions cannot be banned by law.¹¹³ In response to Petitioners’ contention that the viability line lacks grounding in the Court’s jurisprudential history, Respondents highlight a litany of Fourteenth Amendment cases.¹¹⁴ Pointing out that these cases guarantee “the right to make family decisions and the right to physical autonomy,”¹¹⁵ Respondents posit that “‘physical autonomy’ and ‘bodily integrity’ are integral components of” the Due Process Clause’s liberty protections,¹¹⁶ implicitly analogizing to abortion.

Respondents next refute Petitioners’ argument that *Casey* and *Roe*’s viability line is unworkable.¹¹⁷ Respondents differentiate between pre-viability abortion *regulations*—examples of which Petitioners cited in their brief to show *Casey*’s unworkability—and pre-viability abortion *bans*, which have never been upheld and do not fall under the purview of the undue burden test.¹¹⁸

Respondents refute Petitioners’ claims that factual developments make *Roe* and *Casey* obsolete.¹¹⁹ In response to Petitioners’ contention that doctors’ understanding of when viability occurs may change as science progresses, Respondents assert that viability has consistently

decision must be taken to have settled the question presented.”).

110. *Id.* at 9.

111. *Id.* at 13 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 860 (1992) (majority opinion)).

112. *Id.* at 15.

113. *See id.* at 16 (“After carefully considering every argument for overruling *Roe*—including criticisms of its constitutional analysis and substantive due process in general and claims related to advances in science and medicine—the Court decided to preserve *Roe*’s central holding that ‘the woman has a right to choose to terminate her pregnancy’ up until viability.” (citing *Casey*, 505 U.S. at 870)(plurality opinion)).

114. *Id.* at 17–18.

115. *Id.*

116. *Id.* at 18.

117. *Id.* at 22.

118. *Id.* at 23.

119. *Id.*

been understood to occur at twenty-three to twenty-four weeks since *Casey* was decided, suggesting that our current estimate is settled science.¹²⁰ Further, Respondents cite *Casey*'s holding that “[w]henver it may occur,’ viability ‘marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on’ abortion.”¹²¹

In response to Petitioners’ claims about medical advances in understanding fetal development, including fetal pain, Respondents reiterate that the Court considered and rejected these arguments in *Roe* and in *Casey*.¹²² Regarding the widespread adoption of contraceptives over the past several decades, which Petitioners claim reduces the need for abortion access, Respondents note that currently over one in four women choose to end pregnancies, demonstrating that abortion is necessary for many.¹²³

Respondents conclude their defense of *Roe* and *Casey* by emphasizing that these precedents protect women’s ability to participate equally in society.¹²⁴ Respondents highlight the many harms that women face without access to pre-viability abortions, including greater health risks, loss of educational and career opportunities, increased likelihood of experiencing poverty, and negative economic impacts.¹²⁵

B. Petitioners Offer No Alternative to the Viability Line that Would Sustain a Stable Right to Abortion

In their second section, Respondents reject Petitioners’ alternative grounds for upholding the Gestational Age Act should the Court uphold *Roe* and *Casey*.¹²⁶ First, Respondents state that if the Court declines to determine which standard of review should apply to abortion restrictions, future courts will have no guidance in assessing other states’ abortion restrictions.¹²⁷ Per Respondents, leaving the standard of review undetermined—even without directly overturning

120. *Id.* at 24–25 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 860 (1992) (plurality opinion)).

121. *Id.* at 24 (quoting *Casey*, 505 U.S. at 860).

122. *Id.* at 32.

123. *Id.* at 35.

124. *Id.*

125. *Id.* at 38–40.

126. *Id.* at 43.

127. *See id.* (arguing that Petitioners’ “proposal would leave women, state officials, and the lower courts at sea”).

Roe and *Casey*—would signal that “anything goes” and open the door for future courts to uphold bans at any stage of pregnancy.¹²⁸ Respondents emphasize that this uncertainty would lead to significant burdens on women seeking abortions and incentivize many women to perform abortions outside the medical system, posing great health risks and potential criminal liability.¹²⁹

Respondents similarly refute Mississippi’s alternative solution that the Court uphold the statute under an undue burden analysis.¹³⁰ In response to Petitioners’ claim that relatively few women will be impacted should Respondents be forced to end abortion care a week earlier—at fifteen weeks rather than the sixteen week cutoff currently used at Jackson Women’s Health Organization—Respondents stress that constitutional protections exist regardless of the size of the protected minority.¹³¹ Respondents conclude that upholding the ban under either of Petitioners’ proposed alternatives would functionally result in the same consequences as overturning *Roe* and *Casey* entirely—“attempts by half the states in the Nation to forbid abortion entirely, and a judiciary left without tools to manage the resulting litigation.”¹³²

VI. ORAL ARGUMENT

A. Petitioners’ Oral Argument

The Justices’ questions at oral argument suggested that a majority of the Court intends to overturn *Roe* and *Casey* in their entirety. The Mississippi Solicitor General, Scott Stewart, began oral argument by reiterating that Mississippi not only believes the Gestational Age Act is constitutional, but also that *Roe* and *Casey* should be overturned.¹³³ Justice Sotomayor pointedly asked him whether the Court would “survive the stench” created by reversing precedent on such a politically divisive issue, especially when the sponsors of the challenged bill directly stated they were enacting the law “because we have new justices” on the Supreme Court.¹³⁴ During this exchange, she also stated

128. *Id.* at 45.

129. *Id.* at 46.

130. *Id.* at 47.

131. *Id.* at 49.

132. *Id.* at 50.

133. Transcript of Oral Argument at 4–6, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. argued Dec. 1, 2021).

134. *Id.* at 14–15.

that *Casey* already “went through every one of” the *stare decisis* factors in assessing whether to uphold *Roe*, and Mississippi was simply articulating that it disagreed with the Court’s determination.¹³⁵

The conservative Justices asked Mr. Stewart several rhetorical questions to poke holes in the liberal Justices’ defenses of *Roe* and *Casey*.¹³⁶ Justices Sotomayor and Breyer then pressed Stewart to distinguish *Roe* from the other Substantive Due Process cases Mississippi argued should still be upheld.¹³⁷ Justice Kagan added that, to her, it appeared that the United States was in exactly the same situation now as it was in when *Roe* was decided, except that fifty additional years of precedent have accumulated in the interim.¹³⁸

Chief Justice Roberts asked Mr. Stewart to explain why Mississippi focused so heavily on overturning *Roe* and *Casey* in its brief when it hardly mentioned such a prospect in its petition for certiorari.¹³⁹ Mr. Stewart did not mention the change in the Court’s composition that occurred between the two filings.¹⁴⁰ He instead insisted that Mississippi was simply trying to present every possible argument to support its law.¹⁴¹

Justice Kavanaugh asked whether Mississippi believed the Constitution permitted the government to “itself prohibit abortion” uniformly across the country—Mr. Stewart said it did not.¹⁴² Justice Kavanaugh then suggested that Mississippi was essentially arguing that the Constitution was “silent” on abortion and that therefore the issue

135. *Id.* at 16.

136. *See id.* at 19 (“CHIEF JUSTICE ROBERTS: . . . [W]as [viability] an issue in [*Roe*]? . . . MR. STEWART: . . . My understanding is no. . . . CHIEF JUSTICE ROBERTS: In fact, if I remember correctly, . . . Justice Blackmun said that the viability line was—actually was dicta.”); *see also id.* at 22–24. In this exchange, Justice Sotomayor stated that many Due Process cases rely on extratextual Constitutional interpretations, and that overturning *Roe* would threaten these cases. *Id.* at 22–23. Justice Barrett interjected and asked Mr. Stewart whether he believed overturning *Roe* would have such an effect; he replied that it would not. *Id.* at 24.

137. *Id.* at 26–27. Specifically, Justice Sotomayor asked Mr. Stewart to explain why his argument would not also necessitate overturning *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Obergefell v. Hodges*, 576 U.S. 644 (2015). Transcript of Oral Argument, *supra* note 133, at 27.

138. Transcript of Oral Argument, *supra* note 133, at 34.

139. *Id.* at 37.

140. After Mississippi filed its Petition for Certiorari, but before it filed its merits brief, Justice Ginsburg died and was replaced with Justice Barrett. *See* Barbara Sprunt, *Amy Coney Barrett Confirmed To Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> (stating that Justice Barrett was confirmed on October 26, 2021). For further discussion of this change and its potential impacts on this case, see discussion *infra* Section VII.A.

141. Transcript of Oral Argument, *supra* note 133, at 38.

142. *Id.* at 43.

should be decided on a state-by-state basis.¹⁴³

B. Respondents' Oral Argument

Arguing for the Respondents, Center for Reproductive Rights attorney Julie Rikelman stated that Mississippi's law was unconstitutional for three reasons: *stare decisis* supports *Roe* and *Casey*, these cases were correctly decided, and the law would harm women.¹⁴⁴

Chief Justice Roberts pressed Ms. Rikelman on why Respondents believed viability was an appropriate point after which women's right to choose to have an abortion may be restricted, noting the United States "share[s] that [viability] standard with the People's Republic of China and North Korea."¹⁴⁵ Ms. Rikelman responded that only a bright-line viability rule would be workable for the courts, and predicted that if Mississippi's 15-week ban were allowed, nothing would stop states from enacting bans even sooner in pregnancy.¹⁴⁶

Justice Barrett questioned why safe haven laws do not nullify Respondents' arguments about the burdens of raising an unwanted child, because mothers can simply relinquish their babies to the state.¹⁴⁷ Justice Gorsuch asked why the undue burden standard could not simply be applied to pre-viability abortion bans.¹⁴⁸ Justice Alito continued the Chief Justice's line of questioning about the viability line. He posited that the mother's interests do not change on the day of viability, and then asked what philosophical arguments support Respondents' contention that the fetus's interest in life manifests at viability.¹⁴⁹ Ms. Rikelman responded that viability is the most logical point between conception and birth for the government to draw a clear line.¹⁵⁰

Justice Thomas asked whether Respondents believed the right to abortion was founded in the right to privacy, autonomy, or some other protection.¹⁵¹ Ms. Rikelman stated that abortion is protected by the right to "liberty" ensured by the Fourteenth Amendment, emphasizing

143. *Id.*

144. *Id.* at 47–48.

145. *Id.* at 53–54.

146. *Id.*

147. *Id.* at 55–56. For a discussion of safe haven laws, see *supra* notes 77–79 and accompanying text.

148. Transcript of Oral Argument, *supra* note 133, at 62.

149. *Id.* at 65–66.

150. *Id.* at 66.

151. *Id.* at 71.

that in past cases regarding “family, marriage, and childrearing” the Court has applied Due Process at “a higher level of generality.”¹⁵²

As he did during Mr. Stewart’s argument, Justice Kavanaugh asked why the Court should not simply take a “neutral” position and leave abortion for the states to decide individually, given the divisiveness of abortion law and the Constitution’s silence on the issue.¹⁵³ Turning to *stare decisis*, he continued by listing several landmark cases in which the Court overturned precedent on constitutional issues, and asked why the Court shouldn’t similarly overturn *Roe* if it concluded it was “seriously wrong.”¹⁵⁴

After Ms. Rikelman’s argument, United States Solicitor General Elizabeth Prelogar argued on behalf of the United States in support of the Respondents. Her argument emphasized the fundamentality of abortion rights and the negative consequences Respondents believed would occur should the Court overturn precedent.¹⁵⁵ The most significant exchange was a contentious line of inquiry in which Justice Alito tested General Prelogar’s interpretation of what being “wrongly decided” means for a case in *stare decisis* analysis.¹⁵⁶ He asked whether a decision being “egregiously wrong”—without more—was sufficient to overturn a past decision.¹⁵⁷ He then asked, if not, whether a Court deciding a segregation case immediately after deciding *Plessy v. Ferguson* could overrule *Plessy* despite no changes in legal or factual circumstances since the case was decided.¹⁵⁸ General Prelogar first pointed to the facts that “had become clear” about separate-but-equal segregation after *Plessy* as sufficient to overrule the case.¹⁵⁹ She later clarified that she meant that the facts already supported overruling *Plessy* “the moment it was decided.”¹⁶⁰ She went on to state that the Court has never overruled precedent solely because it concluded the

152. *Id.* at 73.

153. *Id.* at 77; *see also id.* at 107 (“JUSTICE KAVANAUGH: . . . When you have those two interests at stake and both are important, as you acknowledge, why not—why should this Court be the arbiter rather than Congress, the state legislatures, state supreme courts, the people being able to resolve this?”).

154. *Id.* at 79–80.

155. *See id.* at 84–85 (arguing that the right to choose is “fundamental” and that the “real-world effects of overruling [*Roe*] and [*Casey*] would be severe and swift”).

156. *Id.* at 93.

157. *Id.* at 91.

158. *Id.* at 92; *see also Plessy v. Ferguson*, 163 U.S. 537, 548 (1896). In *Plessy*, the Court upheld a Louisiana law that segregated passenger cars on trains by race. *Id.*

159. Transcript of Oral Argument, *supra* note 133, at 92.

160. *Id.* at 93.

previous decision was wrong.¹⁶¹

In questioning General Prelogar, Chief Justice Roberts made clear that “the thing that is at issue before us today is [a ban at] 15 weeks,” casting aside General Prelogar’s warnings about subsequent state bans at even earlier stages that will likely follow should the Court overrule *Roe*.¹⁶² Justice Gorsuch concluded his questioning by asking if Respondents would be able to articulate any other principled line if the Court were to strike down the viability line.¹⁶³ General Prelogar reiterated that viability is the only principled line that can be drawn.¹⁶⁴

VII. ANALYSIS

A. *How the Court Should Rule*

The Court should refuse to overturn *Roe* and *Casey* and subsequently uphold the lower courts’ rulings striking down the Mississippi law. Petitioners have failed to convincingly assert that these precedents are unworkable, have been outmoded by legal and factual developments, or have not engendered significant reliance interests.¹⁶⁵

Perhaps Mississippi’s most serious argumentative error is conflating an abortion *regulation* with an abortion *ban*.¹⁶⁶ In asserting that the Court’s precedents are unworkable, Petitioners primarily attack the undue burden standard announced in *Casey*.¹⁶⁷ Yet, this standard only applies to abortion regulations. *Casey* makes clear that “a State *may not prohibit* any woman from making the ultimate decision to terminate her pregnancy before viability.”¹⁶⁸ Even accepting Petitioners’ assertion that the undue burden standard is applicable here and that “[t]here is no objective way to decide whether a burden is

161. *Id.* at 94–95.

162. *Id.* at 101.

163. *Id.*

164. *Id.*

165. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (plurality opinion) (noting that in assessing whether to overrule a past ruling, the Court considers the rule’s “workability,” whether it is subject to “reliance,” and whether laws of facts have changed since the rule was decided so as to make the rule inapplicable).

166. *See* Brief for Respondents, *supra* note 105, at 23 (noting this inconsistency); *see also* Brief for the United States as Amicus Curiae Supporting Respondents at 11, No. 19-1392 (U.S. filed Sept. 20, 2021) (noting the same).

167. *See* Brief for Petitioners, *supra* note 3, at 19–22 (discussing the workability of heightened scrutiny for abortion restrictions while failing to distinguish between a mere regulation and an outright ban).

168. *Casey*, 505 U.S. at 879 (emphasis added).

‘undue,’”¹⁶⁹ this does not necessitate overturning *Casey*. A ban on abortions at fifteen weeks necessarily imposes a “substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,”¹⁷⁰ and therefore automatically fails to meet the undue burden standard.¹⁷¹ Thus, the standard remains workable for laws like the Gestational Age Act.

Mississippi also neglects to articulate any factual developments since *Roe* and *Casey* that require that the Court overturn these precedents. Petitioners point to “safe haven” laws enacted after *Casey*, claiming they nullify the burdens of raising an unwanted child.¹⁷² However, this ignores the fact that adoption was available to mothers when *Roe* was decided, and the Court determined that the burdens of pregnancy alone were sufficient to protect abortion rights.¹⁷³ Similarly, the increase in access to contraception since *Roe* and *Casey* is not helpful for Petitioners’ argument. As Respondents point out, contraceptives are not universally available for all women—especially not for women of lower socioeconomic status.¹⁷⁴ Abortion remains an essential tool in preventing the burdens of unwanted pregnancy and childbirth, as evidenced by the fact that one in four women today have chosen to receive an abortion,¹⁷⁵ and by the fact that thousands of abortions are performed in Mississippi every year.¹⁷⁶

Respondents are also correct in refuting Mississippi’s assertion that no reliance interests exist based on *Roe* and *Casey*. Mississippi is wrong that individuals have not relied on *Roe* and *Casey* because of the Court’s “fractured, unsettled jurisprudence” on abortion restrictions. Although the Court has disagreed in applying the undue burden standard to abortion *regulations*,¹⁷⁷ the Court has never wavered on

169. Brief for Petitioners, *supra* note 3, at 19 (quoting *Casey*, 505 U.S. at 877).

170. *Casey*, 505 U.S. at 877.

171. *See id.* (defining an undue burden as imposing a substantial obstacle on the woman seeking an abortion).

172. Brief for Petitioners, *supra* note 3, at 29.

173. Transcript of Oral Argument, *supra* note 133, at 57.

174. Brief for Respondents, *supra* note 105, at 35.

175. *Id.*

176. *See* 2019 CTRS. FOR DISEASE CONTROL AND PREVENTION, ABORTION SURVEILLANCE – UNITED STATES ANN. REP. 14 tbl.2 (tallying over 3,000 abortions performed in Mississippi in the previous year).

177. *Compare* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112–13 (2020) (approving of the District Court’s approach to determining an undue burden, which it conducted by assessing both whether the statute imposes a “substantial obstacle” as well as whether it imparts any “health-related benefit[s]”), *with id.* at 2135–36 (Roberts, C.J., concurring) (stating that *Casey* requires no such balancing test, and that the undue burden standard instead mandates only that

Casey's prohibition of pre-viability abortion *bans*, so reliance based on this precedent is reasonable. Mississippi is correct that abortions are in almost all cases an “unplanned response” to “unplanned activity.”¹⁷⁸ Access to abortion, however, permeates decision-making in a variety of ways, affecting personal and professional decisions in a profound manner. Women choose to enter relationships, move in with partners, embark on certain career paths, and much more with the knowledge that abortion access frees them from the burdens of an unplanned pregnancy. It is overly myopic to doubt the existence of reliance on *Roe* and *Casey* merely because the specific act of becoming pregnant is often unanticipated.

Similarly, Respondents correctly counter Petitioners' alternative argument that the viability line should be discarded.¹⁷⁹ Petitioners' first alternative—that the Court uphold the statute and leave the standard of review issue for another day—would leave courts with no standard to apply to the numerous other abortion prohibitions that would immediately come into effect in other states.¹⁸⁰ Their second alternative—that the Court should uphold the statute under the undue burden standard because it doesn't impose a substantial obstacle for “a significant number of women”¹⁸¹—is incongruous with how that language was applied in *Casey*. In *Casey*, the Court used this “large fraction” language to identify the pool of women to be assessed in the undue burden analysis. Regarding the spousal notification requirement at issue in *Casey*, the Court asked what proportion of women would face a substantial obstacle among the pool of “married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement.”¹⁸² These women form the denominator of the equation; the test asks how many women *who are impacted by the restriction* are unduly burdened. The analogous cohort in *Dobbs* is the pool of women who want or need to receive abortions after fifteen weeks. Among these women, 100% face a substantial obstacle from the statute,

the Court assess whether the statute imposes a “substantial obstacle” to abortion access).

178. Brief for Petitioners, *supra* note 3, at 34 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion)).

179. *See id.* at 38 (arguing that the Court should reject any rule that would bar a state from prohibiting elective abortions pre-viability, regardless of how it decides on the question of scrutiny for abortion regulations).

180. *See* Brief for Respondents, *supra* note 105, at 41–43 (noting laws in multiple states prohibiting abortion before viability).

181. Brief for Petitioners, *supra* note 3, at 47 (quoting *Casey*, 505 U.S. at 895).

182. *Casey*, 505 U.S. at 895.

namely, that the statute makes their abortion illegal.¹⁸³

Last, there is a strong case that Mississippi used improper means to argue that *Roe* and *Casey* should be wholly overruled. Mississippi's Petition for Certiorari was filed on June 15, 2020,¹⁸⁴ while Justice Ginsburg was still alive and serving on a Court where Chief Justice Roberts served as the ideological “swing vote” on abortion cases.¹⁸⁵ Months before Petitioners filed their merits brief in July 2021,¹⁸⁶ Justice Ginsburg died and was replaced by Justice Barrett, marking a rightward shift in the Court's alignment on abortion. Petitioners likely thought that the Court's new composition would be more receptive to an argument for overruling *Roe* entirely, so they changed direction to emphasize this option in their merits brief.¹⁸⁷ Courts have declined to accept arguments made in this manner in the past.¹⁸⁸ The Court should also do so here, as Petitioners' approach—and their attempt to hide their obvious motivations¹⁸⁹—represent the worst in judicial gamesmanship and further emphasize the partisan undercurrent in this case.

B. How the Court Will Likely Rule

Justices Breyer, Kagan, and Sotomayor will most likely vote to strike down the Gestational Age Act based on their reasoning in *Hellerstedt*.¹⁹⁰ Based on the dissents in *June Medical*, Justices Thomas, Alito, Gorsuch, and Kavanaugh will likely vote to uphold the statute,

183. The only clinic in the state doesn't offer abortions after sixteen weeks. Brief for Respondents, *supra* note 105, at 6–7. Arguably, the lack of clinics available to perform abortions past sixteen weeks means women who desire an abortion from week sixteen onwards are not affected by the statute. However, these women's legal rights are still altered by the law, regardless of the factual circumstances within the state. Additionally, the law still imposes a substantial obstacle in preventing their abortion access—the obstacle is just rendered moot by the presence of an additional obstacle (the Clinic not providing services after 16 weeks).

184. Petition for Writ of Certiorari, *supra* note 16, at 1.

185. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) (siding with the plurality in striking down the abortion restriction, though solely on *stare decisis* grounds).

186. Brief for Petitioners, *supra* note 3, at 1.

187. See Kate Shaw et al., *Fourth Dimension Feminism*, STRICT SCRUTINY, at 8:57 (Dec. 1, 2021), <https://strictscrutinypodcast.com/podcast/fourth-dimension>. In this podcast episode, law professors Kate Shaw, Melissa Murray, and Leah Litman note that Justice Barrett's presence on the Court likely motivated Mississippi's decision to pursue a more aggressive stance on overturning *Roe* and *Casey*.

188. See *supra* notes 106 and accompanying text.

189. See *supra* notes 139–141 and accompanying text.

190. See generally *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (citing *Casey* and *Roe* favorably and striking down a restriction affecting both pre- and post-viability abortions).

and likely to overturn *Roe* and *Casey*.¹⁹¹ Justice Barrett—a conservative justice who has previously indicated support for the pro-life movement,¹⁹² will likely side with the other conservative Justices, potentially lending a decisive fifth vote.

Despite his dissent in *Hellerstedt*, Chief Justice Roberts’s concurrence in *June Medical* suggests that his allegiance to *stare decisis* may prevent him from siding with the other conservative Justices.¹⁹³ Such a concurrence would only affect the outcome if it enticed another conservative Justice to sign on, creating a 4-2-3 split. Justice Kavanaugh is the most likely target.¹⁹⁴ However, given Justice Kavanaugh’s supportive framing of Mississippi’s position as a “neutral” middle ground justified by the Constitution’s “silence” on abortion,¹⁹⁵ it appears just as likely that he could vote to overturn *Roe* and *Casey* entirely.

VIII. CONCLUSION

Roe and *Casey* are unlikely to survive in their current form. *Dobbs* presents an opportunity for the Supreme Court’s conservative wing to untether the judiciary and state legislatures from nearly five decades of precedent on abortion restrictions, and the Court will most likely take this opportunity in some form. Based on oral argument, a wholesale overturning of these cases is more likely than not. Although the ultimate form of the Justices’ opinions is still to be determined, *Dobbs* likely signals the end of *Roe* and *Casey*’s hold over all prohibitions on pre-viability abortions.

191. See generally *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2142–53 (2020) (Thomas, J., dissenting) (stating that the restriction should be upheld); *id.* at 2153–71 (Alito, J., dissenting) (rejecting the undue burden standard as applied in *Hellerstedt* and by the majority in the present case); *id.* at 2171–82 (Gorsuch, J., dissenting) (stating that the Court lacked the power to strike down the law); *id.* at 2182 (Kavanaugh, J., dissenting) (agreeing with Justice Alito).

192. See Adam Liptak, *Amy Coney Barrett, Trump’s Supreme Court Pick, Signed Anti-Abortion Ad*, N.Y. TIMES (May 19, 2021), <https://www.nytimes.com/2020/10/01/us/amy-coney-barrett-abortion.html>.

193. Compare *Whole Woman’s Health*, 136 S. Ct. at 2330 (Alito, J., dissenting) (disagreeing with the majority’s undue burden approach in a dissent joined by Chief Justice Roberts), with *June Med.*, 140 S. Ct. at 2134–36 (Roberts, C.J., concurring in the judgment) (concurring with the majority on *stare decisis* grounds despite disagreeing with the majority’s “balancing” approach to the undue burden test).

194. See Kate Shaw & Melissa Murray, *Hysterical Lady Brains*, STRICT SCRUTINY, at 8:30 (May 24, 2021), <https://strictscrutinypodcast.com/podcast/hysterical> (discussing whether Justice Kavanaugh would be open to a less forceful rejection of *Roe* and *Casey*).

195. See *supra* notes 142–143, 153–154 and accompanying text.