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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have appeared frequently before this Court as counsel for parties, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amici, *e.g.*, *June Medical Servs. v. Russo,* Nos. 18-1323 & 18-1460 (U.S. June 29, 2020), addressing a variety of issues.

SUMMARY OF ARGUMENT

The lower court affirmed on the basis of this Court's precedents creating a right to destroy unborn children up until the point of "viability," precedents regarded far and wide as lacking serious legal warrant. While a lower court has no power to correct Supreme Court errors, this Court has that power and indeed – in the context of interpreting the Constitution – the *duty* to repudiate recognized errors. *Stare decisis* cannot trump adherence to the Constitution as the supreme law of the land, as that would make this Court a higher authority than the Constitution. This Court should grant review and disavow its egregious

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[1]Counsel of record for the parties received timely notice of the intent to file this brief, S. Ct. R. 37.2(a), and emailed written consent to its filing. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

abrogation of virtually all state police power to protect children and their mothers from the atrocity of abortion.

ARGUMENT

I. WHILE *STARE DECISIS* PLAYS AN IMPORTANT ROLE IN ADJUDICATION, THAT DOCTRINE CANNOT EXALT KNOWINGLY INCORRECT SUPREME COURT DECISIONS OVER THE CONSTITUTION ITSELF.

The doctrine of *stare decisis* – namely, the judicial practice of presumptively (but not always) declining to revisit settled legal matters – is essential to judicial efficiency. A court (not to mention the litigants) simply would not have the time to revisit and reanalyze from scratch every single step of a legal adjudication in every single case. Instead, a court properly relies upon the body of previous court decisions absent some good reason to reopen the particular matter in question.

However, the default assumption that prior decisions are correct cannot justify a *knowing* failure to follow *the Constitution*. The Supremacy Clause of the Constitution does *not* state,

> The Decisions of the supreme Court shall be the supreme Law of the Land, any Thing in this Constitution to the Contrary notwithstanding.

Not U.S. Const. art. VI, cl. 2.

To be sure, the Court need not *sua sponte* address and correct prior erroneous constitutional rulings. Indeed, this Court often notes when the parties have

not asked the Court to revisit past precedents. *E.g.*, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 483 (2010) ("The parties do not ask us to reexamine any of these precedents, and we do not do so"); *Fisher v. University of Texas*, 570 U.S. 297, 311 (2013) ("There is disagreement about whether *Grutter* [*v. Bollinger*, 539 U.S. 306 (2003),] was consistent with the principles of equal protection in approving this compelling interest in diversity. . . . But the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding"); *Northern Ins. Co. v. Chatham County*, 547 U.S. 189, 193 (2006) (discussing constitutional principles "which no party asks us to reexamine today"); *Barr v. Amer. Ass'n of Political Consultants*, No. 19-631, slip op. at 9 n.5 (U.S. July 6, 2020) (plurality) ("Before overruling precedent, the Court usually requires that a party ask for overruling, or at least obtains briefing on the overruling question").

Moreover, the Court may decline an invitation to reexamine past precedent where there do not appear to be strong reasons to believe the past decision improperly construed the Constitution. As this Court explained in *Cook v. Moffat & Curtis*, 46 U.S. 295, 309 (1847), where

> the [constitutional] questions involved . . . have already received the most ample investigation by the most eminent and profound jurists, both of the bar and the bench, [and thus] it may be well doubted whether further discussion will shed more light, or produce a more satisfactory or unanimous decision[, then] the court do [sic] not think it necessary or prudent to depart from the safe maxim of *stare decisis*.

See also, e.g., Evans v. Michigan, 568 U.S. 313, 328 (2013) (declining to overrule precedents when, *inter alia*, "the logic of these cases still holds"); *United States v. Reidel*, 402 U.S. 351, 356 (1971) (noting that Supreme Court precedent "has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today" and noting that a subsequent decision "did not overrule [the prior holding] and we decline to do so now");

Nevertheless, if fidelity to the Constitution is to be a hallmark of this Court as an institution of laws, not of men, then the Justices *must* prefer a faithful reading of the Constitution to an acknowledged false reading, regardless of whether a past majority of this Court, in a previous ruling, has embraced the false interpretation. "No interest which could be served by so rigid an adherence to *stare decisis* is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution." *Graves v. Schmidlapp*, 315 U.S. 657, 665 (1942). Hence, there is no proper place under our Constitution for a Court or Justice to say, "We are persuaded that *Ruling A* erroneously interpreted the Constitution, but we will nevertheless adhere to that ruling in preference to the Constitution itself."

To embrace an incorrect judicial interpretation of the Constitution (*stare decisis* is not needed to defend *correct* decisions), rather than ruling as required by the Constitution, is to exalt court rulings above the Constitution, in violation of both the *actual* Supremacy Clause, U.S. Const. Art. VI, cl. 2 (the Constitution is the "supreme Law of the Land"),[2] and

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[2]"The Supremacy Clause conspicuously does not include 'decisions by the United States Supreme Court' when naming

the judicial oath of office (in which the judge or Justice pledges fidelity to the Constitution).

To reach this conclusion one need only look to the logic of *Marbury v. Madison*, 5 U.S. 137 (1803). In *Marbury*, this Court addressed the question whether the judiciary could rule that a legislative act was "repugnant to the constitution" and thus "void" – i.e., unconstitutional. *Id.* at 180. The answer was "yes" – precisely because the Constitution bound both the legislature and the judiciary.

The notion of a written constitution, Chief Justice Marshall explained for the Court, was that such document "form[s] the fundamental and paramount law of the nation," *id.* at 177, which "establish[es] certain limits not to be transcended" by the various branches (Marshall calls them "departments") of the federal government, *id.* at 176. These branches, of course, include the judiciary: "courts, as well as other departments, are bound by that instrument." *Id.* at 180. Thus, while "[i]t is emphatically the province and duty of the judicial department to say what the law is," *id.* at 177, the courts must "decide the case . . . conformably to the constitution," *id.* at 178. In case of a conflict between the Constitution and some other source of law, the Constitution, as "a paramount law," *id.*, must prevail. Applying this logic to the particular case of unconstitutional legislation, the "great jurist of our Court," *Trump v. Vance*, No. 19-635 (U.S. July 9, 2020, explained in *Marbury*:

So if a law be in opposition to the constitution; if

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the sources of law at the top of the legal food chain." Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1, 6 (2007).

> both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
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> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

5 U.S. at 178. But since the Constitution also is "a rule for the government of courts," *id.* at 180, it follows that judicial acts – court rulings – must likewise be subordinate to the Constitution.[3] Consider the same passage from *Marbury* quoted above, altered to insert "precedent" in place of the references to legislation:

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[3]As Prof. Michael Paulsen has written:

> Under Chief Justice John Marshall's reasoning (and Alexander Hamilton's before him in *Federalist* No. 78), the duty and power of judicial review do not mean the judiciary is supreme over the Constitution. Rather, the duty and power of judicial review exist in the first place because the Constitution is supreme *over the judiciary* and governs its conduct. As Marshall wrote in *Marbury*, "the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."

Michael S. Paulsen, *The Irrepressible Myth of* Marbury, 101 Mich. L. Rev. 2706, 2709 (2003) (footnote omitted; emphasis in original).

> So if a precedent be in opposition to the constitution; if both the precedent and the constitution apply to a particular case, so that the court must either decide that case conformably to the precedent, disregarding the constitution; or conformably to the constitution, disregarding the precedent; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any precedent of the courts; the constitution, and not such precedent, must govern the case to which they both apply.

This is only common sense. Moreover, as Chief Justice Marshall continued, the judicial oath of office reinforces the same obligation of fidelity to the Constitution:

> . . . it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.
>
> Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. *How immoral to impose it on them, if they were to be used as the instruments, and the* ***knowing*** *instruments, for violating what they swear to support!*
>
> . . .
>
> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this

oath, becomes equally a crime.

Id. at 179-80 (emphasis added).[4]

II. THIS COURT SHOULD NOT, IN THE NAME OF *STARE DECISIS*, EXALT *ROE* AND *CASEY* OVER THE CONSTITUTION.

The decision below rests upon this Court's flawed precedents. This Court declared in *Roe v. Wade*, 410 U.S. 113 (1973), as modified in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that abortions – the intentional slaying of human beings before birth – are constitutionally protected, and that the state cannot outlaw such violence before the child has become "viable." Abortion advocates, recognizing the doctrinal flimsiness of this Court's abortion jurisprudence, invoke the doctrine of *stare decisis* as counseling adherence to *Roe* and *Casey* even though they were wrongly decided. This Court should decline that invitation. Instead, if this Court agrees that *Roe* and *Casey's* disallowance of state legal protection for babies of 15 weeks' gestation is inconsistent with a faithful reading of the Constitution, this Court is duty-bound to prefer fidelity to the Constitution over fidelity to its own contrary precedent.[5]

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[4]Of course, judicial precedent can be consulted for its information function and persuasive weight: there is value in reading and considering what a prior court thought about a question. But that is quite different from treating such a prior opinion as equivalent – or superior – to constitutional text.

[5]It would be especially ironic to prefer adherence to *Roe* and *Casey* over the Constitution where *Roe* itself marked a dramatic

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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departure from previous understanding of the state police power in the area of abortion. *Compare Missouri ex rel. Hurwitz v. North*, 271 U.S. 40 (1926) (rejecting Fourteenth Amendment Due Process and Equal Protection challenge to revocation of physician's license for commission of an abortion); *Ex parte Jackson*, 96 U.S. 727, 736 (1877) (recognizing instruments or instructions for the "procuring of abortion" as "matter deemed injurious to the public morals" and "corrupting"); *Hawker v. New York*, 170 U.S. 189 (1898) (upholding disqualification of physician from practice of medicine based on prior felony conviction of abortion).