No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H, *et al.*,
Petitioner,
v.
JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,
Respondents.

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

BRIEF FOR *AMICI* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE LEADERSHIP CONFERENCE FOR CIVIL AND HUMAN RIGHTS AND 16 CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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September 20, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTRODUCTION
INTEREST OF *AMICI CURIAE*[1]

Amici, the Lawyers' Committee for Civil Rights Under Law ("the Lawyers' Committee"), The Leadership Conference on Civil and Human Rights ("The Leadership Conference"), and 16 other civil rights organizations,[2] are each committed to the promotion of civil rights throughout the country and the elimination of discrimination and inequality in any form.

The Lawyers' Committee is a nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's support in combating racial discrimination and vindicating the civil rights of African-Americans and other racial minorities. The Lawyers' Committee's principal mission is to secure equal justice for all through the rule of law. The organization has a strong interest in eliminating systemic and structural barriers to healthcare coverage for people of color, including access to reproductive healthcare, and has served as *amicus curiae* in relevant cases. *See, e.g.*, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief; letters reflecting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

[2] A list of the 16 other civil rights organizations as *amici curiae* is set forth below in Appendix 1a.

The Leadership Conference is a coalition of more than 220 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals.

SUMMARY OF ARGUMENT

Because Mississippi H.B. 1510 (hereinafter, the "Abortion Ban") bans abortions beginning at 15 weeks' gestation, it directly conflicts with this Court's unambiguous precedent that pre-viability abortion bans are unconstitutional. *Roe v. Wade,* 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833 (1992); *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring). Petitioners acknowledge this conflict by requesting that this Court overrule these landmark cases, which pregnant people have now relied upon for almost half a century.

To take the extraordinary step of rejecting *stare decisis*, this Court must determine whether a "special justification" exists. This Court looks not only to whether the original precedent was correct as a matter of law, but also to the "legitimate expectations of those who have reasonably relied" on the precedent and the "real-world effects on the citizenry." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part).

Yet, Petitioners have utterly failed to demonstrate such "special justification" in this case. Justice Kavanaugh recently distilled the three-part special justification framework in his concurring opinion in *Ramos* as follows: first, the correctness as a matter of law of the precedent; second, the precedent's "real-world effects on the citizenry"; and, third, whether overturning a long-established precedent would undermine the "legitimate expectations of those who have reasonably relied on [those] precedent[s]." *Id.*

This brief focuses on the practical significance of the viability line to women with low incomes, Black women, and women at the intersection of these two groups.[3] Because a change in the law would significantly affect and most grievously harm these groups, questions of "reliance interest" and "real-world effects" are of particular importance.

First, regarding reliance, overturning the viability line would create serious inequities for those who have relied on it. State policies limiting access to sex education, effective contraception, and basic reproductive healthcare have significantly contributed to incidences of unintended pregnancy among women with low incomes and Black women. These groups therefore disproportionately rely on access to abortion nationally and in Mississippi. Likewise, state regulations that increase the cost and time needed to access abortion have created additional reliance on the viability line, which provides pregnant people the time necessary to gather funds and navigate inflexible child care and work obligations in order to access the right.

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[3] Although this brief does not address whether *Roe* and *Casey* were correctly decided as a matter of law, we embrace and support Respondent's well-reasoned brief demonstrating that those cases were correctly decided.

Moreover, persistent race and gender discrimination has increased reliance on the viability line to maintain some access to abortion. Contrary to Mississippi's assertion that reliance should be disregarded due to "decades of advances for women" since *Roe*, Pet. Br. 35, Black women continue to face tremendous socioeconomic disadvantages. The reliance interests of pregnant people today—especially women with low incomes and Black women—are thus as strong as they were nearly 50 years ago.

Second, the demonstrable real-world effects of overturning *Roe* and *Casey* would be devastating for women with low incomes, and Black women in particular. Studies consistently show that access to abortion is associated with educational and economic advancement, and the denial of that right can have severe economic consequences on the people affected. In particular, permitting states to ban pre-viability abortions would disproportionately harm pregnant people with less access to resources to travel, resulting in many women with low incomes and Black women having little or no opportunity to exercise their right. Endorsing Petitioner's position would only cement a two-tiered system of abortion access, further compounding the grave effects of racial and socioeconomic stratification.

ARGUMENT

This Court has long maintained that "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Casey*, 505 U.S. at 871. *See also June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (quoting

Casey, 505 U.S. at 871) ("*Casey* reaffirmed 'the most central principle of *Roe* v. *Wade*,' 'a woman's right to terminate her pregnancy before viability.'")

Here, upholding the Abortion Ban would overturn the viability line set forth in *Roe* and *Casey*. Viability, the centerpiece of the constitutional inquiry, is medically understood as occurring at approximately 24 weeks' gestation.[4] Yet, if upheld, the Abortion Ban would proscribe abortion starting at 15 weeks, well before the established viability line. Thus, *stare decisis* is squarely at issue in this case.

This Court has stated that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (internal citations and quotation marks omitted). As a result, "even in constitutional cases, a departure from precedent 'demands special justification.'" *Id.* (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

In determining whether there is a "special justification" to overrule precedent, the Court's considerations are not limited to purely addressing legal considerations, but weighing the practical effects of maintaining versus overruling precedent: "[W]hen this Court reexamines a prior holding, its judgment is custom-

[4] "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Roe v. Wade*, 410 U.S. 113, 160 (1973). Courts, including the lower courts in *Jackson Women's Health*, have completely rejected pre-viability bans as unconstitutional under this precedent. *See Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019).

arily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Casey*, 505 U.S. at 854.

In his concurring opinion in *Ramos*, Justice Kavanaugh conducted a detailed analysis of the Court's *stare decisis* jurisprudence and distilled it into "three broad considerations that . . . can help guide the inquiry and help determine what constitutes a 'special justification' or 'strong grounds' to overrule a prior constitutional decision. 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

The first factor, which this brief does not address, is whether the precedent is "grievously or egregiously wrong" as a "matter of law." *Id.* at 1414–15. The second and third factors consider the real-world consequences of maintaining or overturning the decision, and whether "overruling the prior decision [would] unduly upset reliance interests." *Id.* Justice Kavanaugh explained that "[t]he second and third considerations together demand, in Justice Jackson's words, a 'sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.'" *Id.* (quoting Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334 (1944)).

In evaluating reliance, "the Court may examine a variety of reliance interests and the age of the precedent, among other factors." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). These considerations include analyzing whether overruling the decision would cause special hardships to those affected and would result in inequity: "[W]hether the rule is subject to a kind of reliance that would lend a special hardship

to the consequences of overruling and add inequity to the cost of repudiation." *Casey*, 505 U.S. at 854; *see also*, *June Medical*, 140 S. Ct. at 2134 (Roberts, C.J., concurring) ("The Court accordingly considers additional factors before overruling a precedent, such as . . . the reliance interests that the precedent has engendered.").

Mississippi claims, without basis, that "this Court is not in a position to gauge . . . societal reliance" and criticizes the Court for having done so in *Casey*. Pet. Br. 34. In fact, the Court has "gauged" societal reliance in cases other than *Casey*, including in *Dickerson v. United States*, 530 U.S. 428, 443 (2000), where the Court decided not to overrule *Miranda v. Arizona*: "We do not think there is [special] justification for overruling *Miranda. Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."

As Justice Kavanaugh makes clear, the reliance and real-world effects components are broad and enable the Court to consider the impact of maintaining or overruling a precedent on any group of affected persons. Additionally, the interests of those specially impacted, merit particular consideration: "Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894. *See also City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (quoting above language in *Casey* in finding that "when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant").

As detailed below, overturning the viability line would disproportionately impact women with low incomes and Black women, both nationwide and particularly in Mississippi. An examination of the substantial reliance interest in the decades-old viability line and the real-world effects upon these groups of overturning *Roe* and *Casey* illustrates that the practical considerations strongly undermine any argument of "special justification."

I. OVERTURNING THIS COURT'S ABORTION PRECEDENTS WOULD CREATE SERIOUS INEQUITIES FOR THOSE WHO HAVE RELIED ON THEM.

A. The State's Policies Limiting Access to Sex Education, Effective Contraception, and Basic Reproductive Healthcare Have Significantly Contributed to Disproportionate Reliance on Abortion Access by Women with Low Incomes and Black Women.

Mississippi has erected a number of barriers to access to reproductive healthcare and sex education, which have significantly contributed to the state's unintended pregnancy rate—the highest in the country.[5] Black women report substantially higher levels of unintended pregnancy than White women (72

[5] *Health of Women and Children: National Unintended Pregnancy*, AM.'S HEALTH RANKINGS (2020), https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/unintended_pregnancy/state/MS. Data was not available for 20 states. *Id.*

percent v. 46 percent).[6] These disproportionate figures are linked to state reproductive health policies, including limited sex education, lack of meaningful access to contraception and other reproductive health services, as well as failures to expand Medicaid. These policies have had a greater impact among women with low incomes and Black women—"the group for whom the law is a restriction." *Casey*, 505 U.S. at 894. Significantly, in 2018, Black women accounted for 72 percent of abortions performed in the state.[7]

This group's disproportionate reliance on abortion access is not limited to Mississippi. Nationally, women living with low incomes and Black women are more likely to have abortions.[8] According to the most recent national data, nearly half of all abortion patients live below the federal poverty line.[9] Despite comprising

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[6] *Preventing Unintended Pregnancy in Mississippi*, CTR. FOR MISS. HEALTH POL'Y 1 (May 2018), https://mshealthpolicy.com/wp-content/uploads/2018/07/Unintended-Pregnancy-Brief-FINAL-72018.pdf. Nationally, Black women experience unintended pregnancy at a rate of 63%, compared to 42% of White women. Michele Troutman et al., *Are Higher Unintended Pregnancy Rates Among Minorities a Result of Disparate Access to Contraception?,* CONTRACEPT. & REPROD. MED. 5, 16 (2020).

[7] Katherine Kortsmit et al., *Abortion Surveillance - United States, 2018,* Ctrs. for Disease Control and Prevention 6 (2020), https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf.

[8] Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, at 11, GUTTMACHER INST. (2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

[9] Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, AM. J. PUB. HEALTH (Dec. 2017), https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304042.

only 12.8 percent of all women in the United States,[10] Black women—who have suffered from decades of discrimination in healthcare, pay, housing, and more—had a poverty rate of 22.3 percent in 2019[11] and accounted for 33.6 percent of abortions performed nationally, according to data from 2018.[12] Black women also had the highest abortion rate of any racial group in the United States at approximately 21.2 abortions per 1,000 women compared to 6.3 per 1,000 women for non-Hispanic White women.[13] In addition, patients seeking abortions in the second trimester are disproportionately Black women, women living in poverty, and women with less education.[14]

State reproductive health policies do not adequately address, and, in fact, often contribute to, these realities. For example, state-mandated sex education curricula often fail to provide the information necessary for sexually-active people to make informed choices regarding their reproductive health. Thirty states, including Mississippi, Arkansas, Georgia, Louisiana, Missouri, and Tennessee, do not require state sex education curricula to include information about

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[10] Robin Bleiweis et al., *The Basic Facts About Women in Poverty*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), https://www.americanprogress.org/issues/women/reports/2020/08/03/488536/basic-facts-women-poverty/.

[11] *Id.*

[12] Katherine Kortsmit et al., *Abortion Surveillance - United States, 2018,* Ctrs. for Disease Control and Prevention 6 (2020), https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf.

[13] *Id*.

[14] Rachel K. Jones & Lawrence B. Finer, *Who Has Second-Trimester Abortions in the United States?*, 85 CONTRACEPTION 544, 546 (2012), https://pubmed.ncbi.nlm.nih.gov/22176796/.

contraception.[15] In Mississippi, specifically, public schools must teach one of only two state-approved sex education curricula—abstinence-only and abstinence-plus.[16] Abstinence-only programs generally exclude any information on the effectiveness of contraception.[17] Abstinence-plus curricula include information on contraception,[18] but prohibit any physical demonstration of proper contraception use.[19]

These policies impact Black adolescents to a greater degree than their White counterparts. Generally, Black adolescents are more likely to receive abstinence-only education than White adolescents because federally-funded abstinence programs are often directed at low-income areas, which are disproportionately comprised of Black people.[20] Without a clear understanding of

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[15] *Sex and HIV Education*, GUTTMACHER INST. (Sept. 1, 2020), https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education.

[16] *Mississippi Sex Education Law*, TEEN HEALTH MISS., https://teenhealthms.org/policy-and-advocacy/mississippi-sex-education-law/ (last visited Sept. 15, 2021).

[17] *See Abstinence Education Programs: Definition, Funding, and Impact on Teen Sexual Behavior* 2, KAISER FAM. FOUND. (June 1, 2018), https://files.kff.org/attachment/Fact-Sheet-Abstinence-Education-Programs-Definition-Funding-and-Impact-on-Teen-Sexual-Behavior.

[18] *Id.*

[19] *See* Andy Kopsa, *Sex Ed Without Condoms? Welcome to Mississippi*, THE ATLANTIC (Mar. 7, 2013), https://www.theatlantic.com/national/archive/2013/03/sex-ed-without-condoms-welcome-to-mississippi/273802.

[20] Sarah Smith Kuehnel, *Abstinence-Only Education Fails African American Youth*, 86 WASH. UNIV. L. REV. 1241, 1251 (2009), https://openscholarship.wustl.edu/law_lawreview/vol86/iss5/5.

proper contraceptive use, people are more likely to experience unintended pregnancy. Research shows that more than half of all American women will have experienced unintended pregnancy by age 45, and more than three in 10 will have had an abortion because of inconsistent or incorrect contraception use.[21]

Contraception use is, of course, directly linked with pregnancy rates. Although "[p]olicy can effect dramatic expansions in access to contraceptives," as the State contends, Pet. Br. 29, significant barriers to access remain in Mississippi. In fact, while the State notes, ironically, that "[b]y 2013, most women had no out-of-pocket costs for their contraception, as median expenses for most contraceptive methods, including the IUD and the pill, dropped to zero," *id.*, this is not a reality for many women living in Mississippi, where 19.2 percent of women of reproductive age are uninsured.[22]

Black women in Mississippi also face geographical barriers to contraceptive access. This group is significantly more likely to report relying on publicly-funded clinics and public insurance for birth control.[23] However, Mississippi's landscape virtually ensures they cannot access that care because 69 of 82 Mississippi counties

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[21] Adam Sonfield et al., *Moving Forward: Family Planning in the Era of Health Reform*, GUTTMACHER INST. 9 (2014), https://www.guttmacher.org/sites/default/files/report_pdf/family-planning-and-health-reform.pdf.

[22] *Health of Women & Children: Uninsured Women*, AM.'S HEALTH RANKINGS (2020), https://bit.ly/3kx7rOz.

[23] Tanya Funchess et al., *Racial Disparities in Reproductive Healthcare among Parous and Nulliparous Women in Mississippi*, 8 J. RACIAL & ETHNIC HEALTH DISPARITIES 304, 310-11 (2021), https://link.springer.com/content/pdf/10.1007/s40615-020-00783-x.pdf.

have three or fewer publicly-funded health clinics—with at least 21 having only one[24]—and 60 percent of all counties lack a single OB-GYN.[25] Compounding these barriers, Mississippi is also among only six states that allow pharmacists to refuse to dispense emergency contraception.[26]

The State also asserts that "given the many flaws in *Roe* and *Casey*, the possibility that contraception might fail is a weak ground for retaining them—particularly given contraceptive advances since *Casey*." Pet. Br. 34. People without adequate insurance, however, often cannot avail themselves of such "contraceptive advances." *Id.* The most effective forms of contraception "require[] . . . having insurance coverage or the ability to pay out-of-pocket . . . ."[27] For example, long-acting contraceptives can cost up to $1,300 without insurance.[28] Many uninsured people must, then, rely on more inexpensive methods of birth control, which are less effective.[29] As the Center for Mississippi Health Policy noted, "women who seek family services at publicly funded clinics are the least likely in the country to receive the long-acting

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[24] Eden Blackwell, *A Quick Look at Contraceptive Access in Mississippi*, CTR. FOR MISS. HEALTH POL'Y (May 17, 2019), https://mshealthpolicy.com/policy-points-contraceptive-need/.

[25] Funchess, *supra* note 23, at 311.

[26] *See Emergency Contraception*, GUTTMACHER INST. (Aug. 1, 2020), https://www.guttmacher.org/state-policy/explore/emergency-contraception.

[27] Funchess, *supra* note 23, at 311.

[28] *How Can I Get an IUD?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/birth-control/iud/how-can-i-get-an-iud (last visited Sept. 15, 2021).

[29] *See id.*

reversible contraceptives."[30] In fact, Black women in Mississippi are more likely to report using a less effective method of birth control.[31] The impact of the policies that impede affordable and effective contraceptive access are substantial.

Yet, Mississippi has failed to expand Medicaid,[32] an action that could help meaningfully address these issues, as well as the state's infant mortality rate, which is the highest in the country.[33] In Mississippi, there are 43,000 uninsured women of reproductive age in the Medicaid coverage gap, 58 percent of whom are Black.[34] However, the State rejected an effort to provide a full year of Medicaid coverage to women after giving birth, despite evidence showing that extended coverage would improve health outcomes for mothers and babies.[35] As a consequence of the State's deficient

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[30] Funchess, *supra* note 23, at 311.

[31] *Contraceptive Access, Choice, & Utilization: A Survey of Mississippi Women,* CTR. FOR MISS. HEALTH POL'Y 3 (July 2019), https://mshealthpolicy.com/wp-content/uploads/2019/07/Contraceptive-Access-Issue-Brief-July-2019.pdf.

[32] *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Sept. 8, 2021), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/.

[33] *State Health Facts: Infant Mortality Rate by Race/Ethnicity*, KAISER FAM. FOUND. (2018), https://tinyurl.com/yx7ce3xe. This disparity is also found in nearby states like Alabama, Arkansas, Georgia, Louisiana, Missouri, Tennessee, and Texas.

[34] Judith Solomon, *Closing the Coverage Gap Would Improve Black Maternal Health* 11, CTR. FOR BUDGET & POL'Y PRIORITIES (July 26, 2021), https://www.cbpp.org/sites/default/files/7-26-21health.pdf.

[35] Associated Press, *Mississippi: No Extension of Postpartum Medicaid Coverage*, U.S. News & World Report (Mar. 30, 2021, 9:05pm), https://www.usnews.com/news/best-states/mississippi/

policy decisions: "[T]he 2019 Health of Women and Children Report ranked Mississippi 50th among the states overall in promoting the health of women, infants and children."[36]

Ultimately, through a systemic effort to limit access to appropriate sex education, effective contraception, and health insurance, the State has significantly contributed to the reliance on the care it now seeks to restrict.

B. Restrictive Abortion Laws and Other Deliberative State Actions Have Increased Reliance on the Viability Line

Due to historic systemic discrimination, women with low incomes and Black women have endured financial and logistical barriers to the constitutional right to abortion. Since *Roe*, access to abortion care has become increasingly difficult. Within that time, states have passed more than 1,300 restrictions to abortion care, including onerous requirements for patients and impossible regulations for providers.[37] The number of

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articles/2021-03-30/mississippi-no-extension-of-postpartum-medicaid-coverage; *see also* Solomon, *supra* note 34, at 10 ("A recent study of maternal mortality from 2006 to 2017 found that while the overall maternal mortality ratio (deaths per 100,000 live births) rose over the period, it was lower in expansion versus non-expansion states. The difference was greatest among Black mothers[.]")

[36] Michele Goodwin, *Banning Abortion Doesn't Protect Women's Health*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/opinion/roe-abortion-supreme-court.html.

[37] Elizabeth Nash & Lauren Cross, *2021 is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST. (Apr. 2021), https://www.guttmac

abortion facilities in Mississippi fell from eight in 1992 to only one today.[38] Likewise, Louisiana, which had 17 abortion facilities in 1992, now has just three.[39] Kentucky now has just one abortion clinic, down from nine in 1992.[40] Missouri had 12 clinics in 1992, but now has one.[41] And finally, Ohio had 45 clinics in 1992, but now has only 10.[42]

The unavailability of clinics, itself, has made abortion access largely hinge on time. Pregnant people now need time to gather funds for both medical and travel costs, time off from work, and time for travel. As discussed below, the increased logistical burdens associated with greater travel distances disproportionately impact Black women.[43]

Burdensome and medically unnecessary restrictions on abortion access also prolong the time it takes for a person to receive abortion care. For example,

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her.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades (last updated June 14, 2021).

[38] Jessica Arons, *The Last Clinics Standing*, AM. CIV. LIBERTIES UNION, www.aclu.org/issues/reproductive-freedom/abortion/last-clinics-standing (last visited Sept. 15, 2021).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Liza Fuentes & Jenna Jerman, *Distance Traveled to Obtain Clinical Abortion Care in the United States and Reasons for Clinic Choice*, 28(12) J. WOMEN'S HEALTH 1623, 1627–28 (2019), https://www.liebertpub.com/doi/pdf/10.1089/jwh.2018.7496.

Mississippi, along with 12 other states,[44] compels patients seeking an abortion to make two trips to an abortion facility to obtain care—the first to receive state-directed, in-person counseling, which includes information designed to discourage abortion; and, the second at least 24 hours later, when the procedure can be performed.[45] The requirement further postpones care by necessitating additional travel, lodging, and/or childcare arrangements. In fact, studies found Mississippi's in-person counseling requirement was linked to "a slight increase in second trimester abortions in the state."[46] These requirements create significant reliance on the viability line, which grants pregnant people the time needed to access their right despite state-imposed obstacles.

Moreover, women with low incomes and Black women are more likely to experience delays in care due to the State's failure to take actions that may alleviate the financial burdens associated with abortion services, as more time is needed to gather the requisite funds.[47] Without insurance coverage, abortion services can be expensive. According to the most recent data, the average cost of an abortion ranges from $500 to $1,195, not including additional nonmedical costs, such as

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[44] *State Laws and Policies: Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Sept. 1, 2021), www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.

[45] MISS. CODE ANN. § 41-41-33.

[46] Rachel K. Jones & Jenna Jerman, *Characteristics and Circumstances of U.S. Women Who Obtain Very Early and Second-Trimester Abortions*, PLOS ONE (2017), https://doi.org/10.1371/journal.pone.0169969.

[47] *Id*. at 2.

transportation, childcare, and lodging.[48] As one district court acknowledged, "[i]n some instances, poor women must choose between paying for an abortion and paying for other basic necessities, such as rent." *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 83 (M.D. La. 2017). Yet, despite having the highest poverty rate in the country at 19.6 percent—with 30.7 percent of Black people and 21.2 percent of women in the state living in poverty[49]—Mississippi refuses to use state funds to cover abortion for people on Medicaid.[50] The State also does not permit plans offered through the State's health insurance exchange to cover abortion outside of the case of rape, incest, or life endangerment, limiting the ability of pregnant people to offset some abortion costs.[51]

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[48] *Medicaid Coverage of Abortion*, GUTTMACHER INST. (Feb. 2021), https://www.guttmacher.org/evidence-you-can-use/medicaid-coverage-abortion#.

[49] *Mississippi*, Talk Poverty, https://talkpoverty.org/state-year-report/missi ssippi-2020-report/ (last updated 2020).

[50] *State Funding of Abortion Under Medicaid*, GUTTMACHER INST. (Aug. 1, 2021), www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid. 33 states and D.C. have exceptions for Medicaid coverage of abortion in cases of rape, incest, and life endangerment. *Id.* Additional exceptions vary by state. *Id.*

The same is true for neighboring states, where Black and Latina women make up a substantial proportion of the uninsured reproductive-age women in the Medicaid coverage gap: Texas (75%), Georgia (62%), Tennessee (25%), and Alabama (43%). *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Sept. 8, 2021), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/; Solomon, *supra* note 34, at 11.

[51] *State Facts About Abortion: Mississippi*, GUTTMACHER INST. (Jan. 2021), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-mississippi. Eleven other states go further, limiting the circumstances in which private insurance may cover

For these reasons, State policies that restrict access to abortion care substantially increase reliance on the viability line for women with low incomes and Black women.

C. Persistent and Severe Socioeconomic Disparities Create a Strong Reliance Interest for Women with Low Incomes and Black Women.

Mississippi argues there is no reliance interest in the precedent, contending that "[m]any laws (largely post-dating *Roe*) protect equal opportunity" and have led to "decades of advances" for women, independent of the right to abortion. Pet. Br. 35. Though Petitioners claim many women "have reached the highest echelons of economic and social life," *id.*, this is not the case for countless others, particularly women with low incomes and Black women. Today, race and gender wage disparities, occupational segregation, and discrimination persist,[52] and the COVID-19 pandemic has further exacerbated economic inequity for this group.[53] Yet, Mississippi has failed to enact policies or even basic protections to meaningfully advance equity.

Because of these realities, any restrictions to abortion access will be particularly harmful to women

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abortion as well. Alina Salganicoff et al., *Coverage for Abortion Services in Medicaid, Marketplace Plans, and Private Plans,* KAISER FAM. FOUND. 9 (2019), https://files.kff.org/attachment/issue-brief-coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans.

[53] Rasheeta Chandler et al., *The Impact of COVID-19 Among Black Women: Evaluating Perspectives and Sources of Information*, 26 ETHNICITY & HEALTH 80 (2020), https://www.tandfonline.com/doi/epub/10.1080/13557858.2020.1841120?needAccess=true.

living with low incomes and Black women. The viability line provides a minimum level of protection against state encroachment into the amount of control these women have over their reproductive lives. Restrictions to abortion access, on the other hand, are correlated with negative economic outcomes, as discussed below. For economically vulnerable women, restrictions to the viability line—which provides time to gather funds for abortion costs—will likely result in these women falling further behind socially and economically, especially in states like Mississippi. Thus, overruling the viability line would contribute a significant hardship to women with low incomes and Black women adding to existing inequities.

Nationally, persistent structural discrimination has meant that any economic gains have not been felt equally by all women. As of 2019, Black women made, on average, 20 percent less than White women,[54] despite having the highest rate of labor force participation among women.[55] In Mississippi, a long-running wage gap disproportionately harms Black women.[56] This group receives only $0.56 cents for every dollar a White man makes in Mississippi (White

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[54] *Data About the Gender Pay Gap for Black Women,* LEAN IN, https://leanin.org/data-about-the-gender-pay-gap-for-black-women# (last visited Sept. 15, 2021).

[55] *Labor Force Characteristics by Race and Ethnicity, 2019*, at 10, U.S. BUR. OF LAB. STATS. (2020), https://www.bls.gov/opub/reports/race-and-ethnicity/2019/pdf/home.pdf.

[56] *Map: Equal Pay and Pay Transparency Protections*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/wb/equal-pay-protections (last visited Sept. 15, 2021); NAT'L WOMEN'S L. CTR. & MISS. BLACK WOMEN'S ROUNDTABLE, *Women Driving Change: A Pathway To A Better Mississippi* 11–13 (Sept. 2019), https://nwlc.org/wp-content/uploads/2019/09/final_nwlc_MS_Report.pdf.

women make $0.75), less even than the national average of $0.63.[57] Moreover, "[a]mong the top-five occupations, in which Black women are overrepresented, three have average annual wages that are less than $18,000."[58]

While the State lauds the employment protections that have benefited some women, it has failed to take meaningful action to establish these protections for its own residents. Mississippi is the only state in the country that has failed to enact an equal pay law, and one of only five states to refuse to enact a minimum wage law.[59] This means that tipped workers in Mississippi—one-third of whom are Black women—may receive only $2.13 an hour in wages from their employers.[60]

Moreover, Mississippi's efforts to lure companies to the state by ensuring a pro-business environment have prevented wage growth:

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[57] *Wage Gap for Black Women State Rankings*, NAT'L WOMEN'S L. CTR. (Mar. 2021), https://nwlc.org/wp-content/uploads/2021/03/Black-Women-Wage-Gap-State-By-State-2021-v2.pdf; *Resource: The Wage Gap, State by State*, NAT'L WOMEN'S L. CTR., https://nwlc.org/resources/wage-gap-state-state/ (last visited Sept. 15, 2021).

[58] Anne Price & Jhumpa Bhattacharya, *Mississippi is America: How Racism and Sexism Sustain a Two-Tiered Labor Market in the US and Constrict the Economic Power of Workers in Mississippi and Beyond* 11, INSIGHT CTR. (2020), https://insightcced.org/wp-content/uploads/2020/10/INSIGHT_Mississippi-Is-America-brief_3.pdf.

[59] *Minimum Wages for Tipped Employees*, U.S. DEP'T OF LAB. (Aug. 1, 2021), www.dol.gov/agencies/whd/state/minimum-wage/tipped (last visited Sept. 16, 2021).

[60] *Id.*

> Mississippi policymakers continually recruit industries and employers that provide very few positions that pay middle-income wages . . . One reason that wages are low in Mississippi is because factories, branch plants, and other facilities relocated to the state in search of low wages, fewer labor protections, lack of unionization, and the extensive use of workers employed by temporary staffing agencies.[61]

Reliance on the viability line is therefore more acute for women with low incomes and Black women, especially those in Mississippi.

Rather than acknowledge a reliance interest in the precedent by any group of affected persons, the State insists that any reliance is not reasonable because people have long understood that *Roe* and *Casey* were in peril. Pet. Br. 34-35. Yet, nearly all people alive today of reproductive age were born after *Roe*, and have been "free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." *Casey*, 505 U.S. at 860. Given the continued economic disparities for women with low incomes and Black women, maintaining the rights espoused in *Roe* and *Casey* are even more crucial today.

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[61] Price & Bhattacharya, *supra* note 58, at 4–5.

II. THE REAL-WORLD EFFECTS OF OVERTURNING *ROE* AND *CASEY* ON WOMEN WITH LOW INCOMES AND BLACK WOMEN WOULD BE DEVASTATING.

A. The Right to Abortion Promotes Educational and Economic Opportunity for Women With Low Incomes and Black Women.

As this Court opined nearly thirty years ago, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856.

Increased abortion access has had a demonstrably positive economic impact on women, and on Black women in particular. When people have the ability to decide if, when, and how many children to have, they are able to make conscious determinations about other aspects of their lives, including education and work. A literature review conducted by the Institute for Women's Policy Research found that abortion access increased college attainment for women, with "[i]ncreases in postsecondary attainment . . . concentrated among Black women, who had much larger decreases in teen fertility than White women."[62] The same review also found that abortion legalization in the 1970s, following *Roe*, led to a 9.6 percent increase in Black women's

[62] INST. FOR WOMEN'S POL'Y RSCH., *The Economic Effects of Abortion Access: A Review of the Evidence* 2 (July 2019), https://iwpr.org/wp-content/uploads/2020/07/B377_Abortion-Access-Fact-Sheet_final.pdf.

college graduation rate[63] and that abortion access resulted in a 6.9 percent increase in Black women's labor market participation rate, which was three times higher than the corresponding rate for women generally (2 percent).[64] Further, abortion access may alleviate labor market problems faced disproportionately by Black women. For example, women in states with better reproductive healthcare face less occupational segregation, increased job mobility, and increased access to non-wage benefits such as paid sick days and leave, as well as promotional opportunities.[65] These impacts compound over generations: Children born to women with abortion access had lower rates of poverty, were more likely to graduate college, and were less likely to receive public assistance as adults.[66]

Conversely, the financial consequences of abortion denial can be severe. One study revealed that individuals who were denied abortions and eventually gave birth were four times more likely to have household incomes below the federal poverty level and were more

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[63] *Id.* (citing Joshua D. Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms*, RSCH. LAB. ECON. (Jan. 21, 2000)).

[64] *Id.* (citing David E. Kalist, *Abortion and Female Labor Force Participation: Evidence Prior to Roe v. Wade*, 25 J. LAB. RSCH. 503 (2004)).

[65] *See* Kate Bahn et al., *Linking Reproductive Health Care Access to Labor Market Opportunities for Women*, CTR. FOR AM. PROGRESS (Nov. 21, 2017), https://www.americanprogress.org/issues/women/reports/2017/11/21/442653/linking-reproductive-health-care-access-labor-market-opportunities-women.

[66] INST. FOR WOMEN'S POL'Y RSCH., *The Economic Effects of Abortion Access: A Review of the Evidence* 2 (July 2019), https://iwpr.org/wp-content/uploads/2020/07/B377_Abortion-Access-Fact-Sheet_final.pdf (citing Elizabeth Oltmans Ananat et al., *Abortion and Selection*, 91 REV. ECON. & STAT. 124 (2009)).

likely to report being unable to afford basic necessities.[67] A 2020 working paper found that abortion denial corresponds with a 78 percent increase in the amount of overdue debt and an 81 percent increase in negative public records, including bankruptcy and eviction.[68] The researchers observed:

> [T]he impact of being denied an abortion on collections is as large as the effect of being evicted and the impact on unpaid bills is several times larger than the effect of losing health insurance. Although imprecisely estimated in our setting, it appears that denying a woman an abortion reduces her credit score by more than the impact of a health shock resulting in a hospitalization or being exposed to high levels of flooding following Hurricane Harvey.[69]

Thus, the viability line's practical effects, and the significant real-world social and economic costs of

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[67] Diana G. Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108(2) AM. J. PUB. HEALTH 407, 410–12 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5803812/pdf/AJPH.2017.304247.pdf; Advancing New Standards in Reproductive Health, *Turnaway Study*, BIXBY CTR. FOR GLOB. REPRODUCTIVE HEALTH, www.ansirh.org/sites/default/files/publications/files/turnaway_study_brief_web.pdf (last visited Sept. 15, 2021) (hereinafter, "Turnaway Study").

[68] Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26662, 2020), https://www.nber.org/system/files/working_papers/w26662/w26662.pdf. Notably, this working paper drew on data collected in the Turnaway Study, *supra* note 67.

[69] Miller et al., *supra* note 68, at 29 (internal citations omitted).

overturning the precedent, weigh strongly in favor of reaffirming this Court's prior holdings.

B. The Abortion Ban's Real-World Effects Would Strip Away the Right to Abortion for Women with Low Incomes and Black Women.

If the Court upholds the Abortion Ban, people in large regions of the United States will be unable to access their constitutional right to abortion in their home state. Several states, including Louisiana, Alabama, Georgia, South Carolina, Tennessee, Kentucky, Ohio, Arkansas, Missouri, Iowa, North Dakota, Utah,[70] and Oklahoma,[71] are poised to enforce pre-viability bans that are currently enjoined or pending entry into force.[72] Eleven states have "trigger laws" that will outlaw abortion altogether if this Court overturns *Roe* entirely.[73] If these laws are allowed to take effect, they

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[70] *State Laws and Policies: State Bans on Abortion throughout Pregnancy*, GUTTMACHER INST. (Aug. 1, 2021), www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

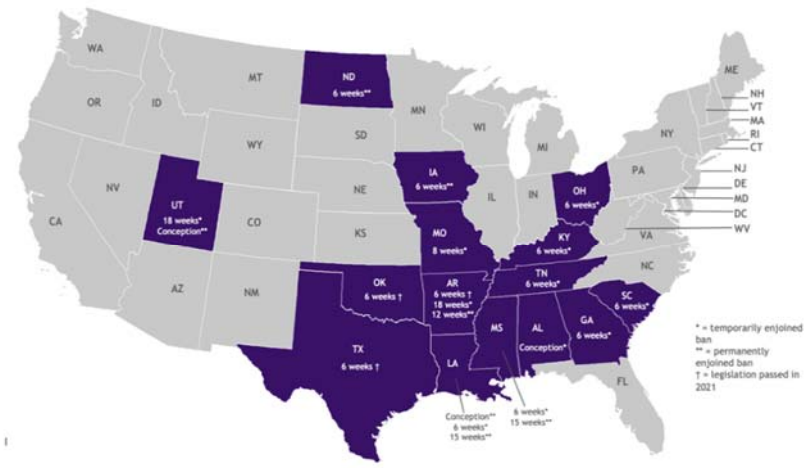
[71] Caroline Kelly, *Oklahoma Governor Signs Near-Total Abortion Ban Into Law*, CNN (Apr. 26, 2021, 6:32 PM), https://www.cnn.com/2021/04/26/politics/abortion-ban-oklahoma/index.html.

[72] During the pendency of this case, a Texas law went into effect banning abortion at six weeks into pregnancy, Tex. Health & Safety Code § 171.204(a)—effectively banning abortion for over 85% of patients in Texas. Emergency Appl. Writ Inj. *Whole Woman's Health v. Jackson*, No. 21A__ 6 (2021). Virtually the only people in Texas now able to obtain an abortion are those who can travel to another state for care. *Id.*

[73] *State Laws and Policies: Abortion Policy in the Absence of Roe*, GUTTMACHER INST. (Sept. 1, 2021), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe.

will radically curtail abortion access. The national average travel distance required to access care will immediately increase from 36 miles to a staggering 280 miles.[74]

As a practical consequence, access to abortion would become further stratified across racial and socioeco-



nomic lines. Pregnant people with the resources to travel will be the only ones in certain states with meaningful access to the right, further compounding those very socioeconomic inequities. Indeed, this Court recognized nearly 50 years ago that travel is prohibitive to accessing abortion care, emphasizing that the petitioner in *Roe* "could not afford to travel . . . in

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Oklahoma and Texas have also passed trigger bans that will go into effect in fall 2021. *Id.*

[74] *See* Quoctrung Bui et al., *What Happens if Roe v. Wade is Overturned?*, N.Y. TIMES (Oct. 15, 2020), https://www.nytimes.com/interactive/2020/10/15/upshot/what-happens-if-roe-is-overturned.html.

order to secure a legal abortion under safe conditions." 410 U.S. at 120. And, again, this Court recognized just last year that "the burdens of . . . increased travel would fall disproportionately on poor women, who are least able to absorb them." *June Medical*, 140 S. Ct. at 2130.

Moreover, research shows Black women face significant barriers to travel and are thus less likely to travel long distances to obtain abortion care. Studies reveal that "Black patients were half as likely to travel each category of distance"—0–25 miles; 25–49 miles; 50+ miles—"compared with white patients,"[75] and that "[a]bortion patients who were white, college-educated, U.S.-born, [greater than] 12 weeks pregnant, and lived outside metropolitan areas were more likely to travel farther" for abortion care.[76] This "may reflect that [White patients] have more material, informational, and social resources to be able to travel."[77]

Working a minimum wage job full-time, it would take a Mississippian about two-and-a-half weeks of wages to cover abortion fees alone.[78] This expense is

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[75] Liza Fuentes & Jenna Jerman, *Distance Traveled to Obtain Clinical Abortion Care in the United States and Reasons for Clinic Choice*, 28(12) J. WOMEN'S HEALTH 1623, 1627 (2019), https://www.liebertpub.com/doi/pdf/10.1089/jwh.2018.7496.

[76] *Id*. at 1623.

[77] *Id.* at 1629.

[78] Minimum wage in Mississippi is $7.25 for employers covered by the Fair Labor Standards Act. *State Minimum Wage Laws*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/minimum-wage/state#ms (last updated Aug. 1, 2021); *Fee Schedule*, JACKSON WOMEN'S HEALTH ORG., https://jacksonwomenshealth.com/fee-schedule/ (last visited Sept. 16, 2021) ("Surgical Abortion (12.1 – 13.6 weeks LMP) – $700" and "Surgical Abortion (14.1 – 16.0 weeks LMP) – $800").

compounded by travel costs, inflexible work schedules,[79] lack of paid sick leave,[80] disproportionately low wages among women of color,[81] and child care obligations,[82]—the burdens of which are multiplied by state-mandated waiting periods and two-trip requirements.[83]

The burdens of additional travel time not only hinder abortion access on a systemic scale, but they have also hindered actual patients of the Respondent under prior restrictive abortion regimes. Specifically, in 2006 and 2007, an abortion restriction prevented Jackson Women's Health Organization from providing abortion care after 12 weeks. During that time, 600–

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[79] Daniel Schneider & Kristen Harknett, *It's About Time: How Work Schedule Instability Matters for Workers, Families, and Racial Inequality*, HARV. SHIFT PROJECT (Oct. 2019), https://shift.hks.harvard.edu/files/2019/10/Its-About-Time-How-Work-Schedule-Instability-Matters-for-Workers-Families-and-Racial-Inequality.pdf.

[80] NAT'L WOMEN'S L. CTR. & MISS. BLACK WOMEN'S ROUNDTABLE, *Women Driving Change: A Pathway To A Better Mississippi* 29–31 (Sept. 2019), https://nwlc.org/wp-content/uploads/2019/09/final_nwlc_MS_Report.pdf.

[81] Scott Brown et al., *Leave Experiences of Low-Wage Workers* 2, U.S. DEP'T OF LAB. (Nov. 2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA_LowWageWorkers_January2021.pdf; NAT'L WOMEN'S L. CTR., *supra* note 80, at 14.

[82] Two-thirds of the Clinic's current patients have children. Am. Compl. ¶ 30.

[83] Mississippi and neighboring states require a patient to make at least two trips to an abortion clinic, separated by 24 to 72 hours, before the procedure can be performed. MISS. CODE ANN. § 41-41-33; *State Laws and Policies: Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Sept. 1, 2021), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.

700 patients "told the clinic that they lacked the resources to travel to another provider."[84] A study performed in Wisconsin demonstrates that this trend is not unique to that 12-week ban nor to Mississippi. After a spate of anti-abortion legislation caused two of the state's five abortion clinics to close, the average distance to an abortion provider increased by 20 miles.[85] The study found "significant racial disparities in who is most affected by abortion clinic closures, with increases in distance increasing birth rates significantly more for Black, Asian, and Hispanic women," and with "Black births increasing the most."[86]

Coupled with existing burdensome restrictions, a retreat from the viability line would, in effect, serve as a *de facto* ban of pre-viability abortion in portions of the United States, particularly for Black women. It is estimated that over 4,000 women are denied desired abortions because of gestational limits every year,[87] but this figure will increase considerably if states are able to enact earlier limits. If viability no longer serves as the singular point after which states can proscribe abortion, this would open the floodgates for states to enact more onerous restrictions, or ban

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[84] *See* Bonnie Scott Jones & Tracy A. Weitz, *Legal Barriers to Second-Trimester Abortion Provision and Public Health Consequences*, 99 AM. J. PUB. HEALTH 623, 628 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2661467/pdf/623.pdf.

[85] Joanna Venator & Jason Fletcher, *Undue Burden Beyond Texas: An Analysis of Abortion Clinic Closures, Births, and Abortions in Wisconsin* 1, 30 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26362, Oct. 2019), https://www.nber.org/system/files/working_papers/w26362/w26362.pdf.

[86] *Id.*

[87] Turnaway Study, *supra* note 67, at 1.

abortion altogether, earlier and earlier in the pregnancy period.

Ultimately, pre-viability bans will cement the two-tiered system of abortion access in those states that heavily regulate abortion, whereby individuals with higher incomes, disproportionately White, may be able to access the right, while those with low incomes, disproportionately people of color, will be effectively precluded.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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Counsel for Amici Curiae

September 20, 2021

APPENDIX

APPENDIX: List of *Amici Curiae*

Alliance for Justice

American Federation of State, County and Municipal Employees

Black Women's Roundtable

Equality California

Indivisible Project

League of Women Voters of the United States

Matthew Shepard Foundation

NAACP Legal Defense and Education Fund, Inc. (LDF)

National Action Network Washington Bureau

National Coalition on Black Civic Participation

National Association of Social Workers

The National Council of Negro Women, Inc.

National Health Law Program

National Urban League

People's Parity Project

Service Employees International Union (SEIU)