No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief of National Advocates for Pregnant Women, Ancient Song Doula Services, Birth Rights Bar Association, Black Women's Blueprint, CHOICES Memphis Center for Reproductive Health, Elephant Circle, Every Mother Counts, Healthy and Free Tennessee, Human Rights in Childbirth, March for Moms, National Perinatal Association, North American Society for Psychosocial Obstetrics & Gynecology and PUSH for Empowered Pregnancy as *Amici Curiae* in Support of Respondent

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Interest of *Amici Curiae*[1]

Amici National Advocates for Pregnant Women (NAPW), Academy of Perinatal Harm Reduction, Ancient Song Doula Services, Birth Rights Bar Association, Black Women's Blueprint, CHOICES Memphis Center for Reproductive Health, Elephant Circle, Every Mother Counts, Healthy and Free Tennessee, Human Rights in Childbirth, March for Moms, National Perinatal Association, North American Society for Psychosocial Obstetrics & Gynecology, and PUSH for Empowered Pregnancy are organizations that advocate for the health and rights of all people in the United States who have the capacity to become pregnant.

While not every woman will become pregnant or give birth, the overwhelming majority of women will. By the time they are in their 40s, approximately 85% of American women will have become pregnant and experienced at least one birth, 33% will have experienced a pregnancy loss, and approximately 25% will have had an abortion.[2] These experiences are overlapping and not exclusive. For example, 59% of the women under age 35—and 89% of the women over 35—who have abortions are already mothers.[3]

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[1] Pursuant to Rule 37.6, *amici* affirm that no person other than *amici* or counsel funded or made a monetary contribution intended to fund the preparation or submission of this brief, and no counsel for a party authored this brief in whole or in part. All parties have consented to the filing of *amicus* briefs.

[2] *See* NAPW, *Pregnancies and Pregnancy Outcomes in the United States* (Sept. 2021), bit.ly/pregnancyoutcomes2.

[3] *Id*.

Amici's work focuses on the rights of women who are subjected to coercion and control not because they exercise their right to access abortion, but because they continue their pregnancies.[4] As the brief explains, the protections established by this Court's decisions in *Roe* and *Casey* are central to the dignity, personhood, and well-being of *all* six million people who become pregnant annually in the United States, including the four million who continue their pregnancies to term and the one million who have the dishearteningly common experience of pregnancy loss.[5] Nonetheless, since 1973, there have been more than 1,600 documented instances of women being arrested, prosecuted, convicted, detained, or forced to undergo medical interventions that would not have occurred but for their status as pregnant persons whose rights state actors assumed could be subordinated in the interest of fetal protection.[6]

These cases do not entail trivial intrusions on penumbral rights. They are serious deprivations, by officials cloaked with state authority, of physical liberty and other explicitly guaranteed rights:

- In Iowa, a pregnant woman who fell down a flight of stairs was reported to the police after seeking

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[4] Although the term "women" is used here and elsewhere, people of all gender identities may become pregnant and seek abortion care. *See Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021).

[5] NAPW *supra* note 2.

[6] NAPW, *Arrests and Deprivations of Liberty of Pregnant Women, 1973-2020* (Sept. 2021), bit.ly/arrests1973to2020.

help at a hospital. She was arrested for "attempted fetal homicide."[7]

- A Tennessee woman who sought to avoid a sheriff's pursuit was charged with evading arrest *and* felony reckless endangerment because she was pregnant.[8]
- Marshae Jones, an Alabama woman who lost a pregnancy as a result of being shot in the stomach during an altercation, was charged with manslaughter, in an indictment alleging she "did intentionally cause the death of unborn Baby Jones by initiating a fight knowing she was five months pregnant."[9]
- In South Carolina, a woman who was eight months pregnant attempted suicide by jumping out of a window. Despite suffering severe injuries, she survived, but was arrested and jailed for homicide by child abuse.[10]
- An Oklahoma judge took "custody" of a pregnant woman's fetus to prevent her release from jail, and

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[7] MICHELLE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 86-87 (2020).

[8] Affidavit of Complaint, *State v. Kohr*, No. 14W5022 (General Sessions Ct. Nov. 12, 2014).

[9] Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. DAVIS L. REV. 195, 198-203 (2020).

[10] Foster, *Woman faces charge of killing unborn child during August suicide attempt*, THE HERALD (Feb. 21, 2009), https://www.heraldonline.com/news/local/article12250463.html.

set a bail amount eight times that for the putative father arrested on an identical charge.[11]

- Alabama prosecutors have charged more than 500 women under the State's "chemical endangerment" law—on the theory that the unborn, from the moment of fertilization, are children; and being pregnant and using any amount of any controlled substance is the same as bringing a child to a methamphetamine lab. Among those prosecuted were women who took a controlled substance pursuant to a valid prescription; who used marijuana to address severe epilepsy (as an alternative to prescribed medications known to cause fetal damage); and who ingested half a valium tablet when panicked by threatened violence from an ex-boyfriend.[12]
- In Mississippi, Latice Fisher was charged with second-degree murder for experiencing a stillbirth. Prosecutors have charged other women who experienced stillbirths with depraved-heart homicide and culpable-negligence manslaughter.[13]

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[11] *In re Unborn Child of Starks*, 18 P.3d 342 (2001).

[12] Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), https://www.propublica.org/article/when-the-womb-is-a-crime-scene.

[13] *See* Philips, *Infant Death Case Heading Back to Grand Jury*, STARKVILLE DAILY NEWS, May 8, 2019, https://www.starkvilledailynews.com/infant-death-case-heading-back-to-grand-jury/article_cf99bcb0-71cc-11e9-963a-eb5dc5052c92.html; GOODWIN at 34-45; *State v. Buckhalter*, 119 So. 3d 1015 (2013).

Not just pregnant women's physical liberty is at stake, but their right to life: A Washington, D.C. judge ordered a pregnant woman to undergo cesarean surgery without her consent knowing that the operation might kill the woman. Neither she nor her baby survived.[14]

As explained below, when challenged, courts nationwide have often recognized the unlawfulness of these state actions—but not before extraordinary and irreparable harm is inflicted on individuals, families, and the well-being of other women threatened with prosecution. This body of experience refutes a central premise of petitioners' plea to this Court: that the protections established in *Roe* and *Casey* are only important to the subset of pregnant women who seek and have abortions. Moreover, these experiences—both the abuses and the struggles to vindicate basic rights—have much to teach about the consequences, for the "real world" and the "legal system," *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring in part), that would result were this Court to discard the foundational rules of constitutional law *Roe* and its progeny established.[15]

Summary of Argument

Although Petitioners accept that the fateful step they ask the Court to take demands attention to "intervening facts," reliance interests, and "consequences," their briefing ignores directly

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[14] GOODWIN at 92-96.

[15] *See* Editorial, *A Woman's Rights*, (eight-part series), N.Y. TIMES, Dec. 28, 2018, https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html

relevant and critically important realities about what is at stake.

First, although *Roe* and *Casey* affirmed the right to abortion, the principles and restraints on governmental action they recognized—rooted in the personhood status of all pregnant women under the Constitution—fully and equally protect the millions of women with wanted pregnancies. The Fourteenth Amendment, this Court emphasized in *Casey*, does not disable government from advancing interests in potential life, but it forbids doing so by exercising state power to control the lives of women who are pregnant.

Yet for decades women across America have been subjected to state actions that flout these basic constitutional principles—and indeed go far beyond the assertions of control over pregnant women that the *Casey* Court recognized to be plainly impermissible. Indeed, when arrests, prosecutions, detentions, and medical interventions are pursued in the interest of "unborn life," Pet. Br. 2, pregnant women's entire range of constitutional rights are cast aside and their basic human dignity ignored.

The principle of pregnant women's full and equal legal status animating *Roe* and *Casey* has received a measure of ultimate vindication in these cases. Courts in all but three States have such rebuffed coercive measures, often on grounds that closely track *Casey*'s condemnation of fetal-risk-based "dominion" over pregnant women's lives.

These favorable judicial decisions leave vast harms unremedied. Many of the women subjected to pregnancy-based prosecutions and forced medical

interventions—overwhelmingly low income, and disproportionately Black and Brown—lack means to contest them effectively, and an appellate reversal cannot restore the life of a person taken by court-ordered surgery, or time spent detained, incarcerated, or subjected to degrading treatment. Nor do case-by-case rulings secure the compliance of officials who persistently ignore constitutional limits. And these ever-present threats of prosecution themselves inflict harms—as women are deterred from accessing care that would improve pregnancy outcomes, lest doing so bring them under authorities' surveillance.

This decades-long experience bears directly on petitioners' request that the Court overturn *Roe* and *Casey*. Abandoning those decisions necessarily entails abandoning the foundational premises that secure the full and equal constitutional status of all pregnant women. The rule petitioners seek would give each State—and every state actor—the confidence to curtail pregnant women's rights as they see fit, whenever they perceive a risk to "unborn life."

These documented cases, finally, give the lie to petitioners' claims that overruling *Roe* and *Casey* would have modest or even benign consequences in cases involving the right to abortion—that women themselves will not be prosecuted, and that a constitutional rule that makes pregnant women's rights a State-by-State matter would promote thoughtful legislative deliberation or the virtues of a federal system. Prosecutors—who have sought punishment on theories that giving birth to a healthy baby who had been subject to a perceived risk of harm in utero is felony "child abuse" or that experiencing a pregnancy loss is murder—will not hesitate to bring

the full weight of their power to bear against women who seek abortions or are suspected of doing so. Nor does experience give any reason to believe their actions will await—or respect—legislative decision-making.

ARGUMENT

I. *Roe* and *Casey* Affirm the Full Constitutional Personhood of All Pregnant Women and Deny States Authority to Control Their Lives in the Interest of Fetal Protection.

A defining error of petitioners' argument is to treat *Roe* and its progeny as settling only a right to abortion, thereby constraining only States' power to override, in the interest of "potential life," pregnant women's decision-making on that subject.

But the rules of constitutional law Mississippi seeks to jettison do much more than that. As this Court has made clear, the rules *Roe* announced rest on principles about pregnant women's full and equal status under the Constitution that apply fully outside the abortion setting and that impose restrictions on state action taken based on pregnancy.

As Justice Stevens emphasized, the *Roe* Court's holdings derive from a "fundamental premise": Pregnant women—*but not* the "developing organisms" they carry—are *persons* entitled to full and equal protection under the Fourteenth Amendment. *Casey*, 505 U.S. at 914. Accordingly, for nearly fifty years individual States and officials "have [had] no power to overrule that national arrangement by themselves declaring that fetuses have rights *competitive with the constitutional rights of pregnant women*," *id.* at 913

n.2 (quoting Dworkin, 59 U. CHI. L. REV. 381, 400-01 (1992)).

The reasons there has been "no dissent," *id.* at 913, from this holding are apparent from the Fourteenth Amendment's text: Section One makes being "*born*" the determinative event for substantive guarantees to attach, and Section two demands that "persons" be defined in a nationally uniform way. Neither was a slip of the legislative pen: Each resolved a fundamental question over which the Nation had fought a Civil War. *Compare Dred Scott v. Sanford*, 60 U.S. 393 (1857); U.S. Const. art. I, § 2, cl. 3.

Roe's recognition of the "national arrangement" the Fourteenth Amendment codified does not, as petitioners' *amici* insist, mean that this Court "effectively declare[d] [developing fetuses] to be beyond ... protection of our legal system." Glendon Amicus Br. at 8. Rather, doing so prohibits States from pursuing interests in "unborn life" or affording fetal "protections" that would "override the rights of the pregnant woman." See *Roe*, 410 at 162. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), elaborated on this central distinction: The decision did not deny the *legitimacy* of the interests Missouri sought to advance by requiring a pregnant woman's husband's consent to an abortion, which included recognizing paternal interests in the potential life and encouraging marital candor. But adding those to the State's interest in potential life, the Court held, did not allow *subtracting* from the pregnant woman's right to make the decision for herself. *Id.* at 71.

Casey made clear that *Roe*'s protections and constraints on state power, apply to all pregnant

women. Without the judicially enforceable liberty right *Roe* recognized, the Court explained, "the State might as readily restrict a women's right to choose to carry a pregnancy to term as to terminate it..." *Id.* at 859.[16]

Casey gave a particularly full account of *this* aspect of *Roe* in striking down a provision requiring that a pregnant woman notify her husband of her decision to obtain an abortion. The Court did not question Pennsylvania's recognition of a husband's "concern [for]the growth and development of the fetus [his wife] is carrying," or the father's interest in the child, once born. *Id*. at 896 (quoting *Danforth*, 428 U.S. at 69). But those interests and "state regulation," the Court explained, "take[] on a very different cast" before birth—because they burden the "bodily integrity of the pregnant woman," and "the right of the *individual* ... to be free from unwarranted governmental intrusion into matters so fundamentally affecting [that] person." *Id.* (quoting *Eisenstadt v. Baird,* 405 U.S 438, 453 (1972)) (emphasis original).

That pregnant women have the same rights of bodily integrity as do men, *Casey* emphasized, followed from this Court's landmark late-twentieth-century Equal Protection precedents. A less-than-full-right was consonant with the Court's own prior view "that women's 'special responsibilities as the center of home and family life' precluded [their] full and

[16] As *Casey* recognized, if all that were required in these situations were a "rational basis," Pet. Br. 10, a stated concern with avoiding disabled offspring's becoming public charges would suffice to support eugenic sterilization. *Cf. Buck v. Bell*, 274 U.S. 200 (1927).

independent legal status under the Constitution." 505 U.S. at 897-98 (quoting *Hoyt v. Florida,* 368 U.S. 57, 62 (1961)). But it would be "repugnant to [the] present understanding of ... the rights secured by the Constitution." *Id.*

In invalidating Pennsylvania's provision, the Court again emphasized the distinction between the legitimacy of the State's purposes—promoting communication between spouses on matters of importance—and the impermissibility of the means, a "[legally] enforceable" duty to notify. *Id.* Sustaining that authority, *Casey* next observed, would entitle a State to require notification "before engaging in [*any*] conduct [carrying] risks to the fetus," and "if the ... interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should [be compelled to] notify their husbands before drinking alcohol or smoking [or]... undergoing any type of surgery that may have complications." 505 U.S. at 898.

The Fourteenth Amendment forbids such state impositions, *Casey* concluded, because pregnant women, whatever their marital status, "do not lose their constitutionally protected liberty," 505 U.S. at 898, and because a legitimate solicitude for a "husband's interest in the life of the child his wife is carrying does not permit the State to empower him [with] the kind of dominion ... that parents exercise over their children." *Id.* Nor did *Casey* announce a mere rule of non-delegation; it took as given that *Pennsylvania* could not, in the interest of potential life, exercise this "troubling degree of control" over pregnant women's life activities, because the Constitution protects against "the abuse of

*governmental pow*er, even where that power is employed for the supposed benefit of a member of the individual's family," *id.* (emphasis added).

Critically, the control the Court recognized to be a constitutionally intolerable diminution of women's legal status involved a (hypothetical) regime of state-required *notification*, to one concerned individual, about activity that might possibly affect a pregnancy outcome. The notion that similar interests could be a "predicate" for control through criminal prosecution and civil actions, *see infra*—was beyond the Court's contemplation. *Casey*, 505 U.S. at 915 (Stevens, J. concurring) ("Our whole constitutional heritage rebels at the thought of giving ... government the power to control women's bodies") (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)).[17]

The Court's decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), affirmed this constitutional understanding. *Ferguson* invalidated a program in which medical staff at a public hospital secretly searched their pregnant patients for evidence of drug use, turned such confidential medical information over to police and prosecutors, and assisted in the arrest of patients from their hospital

[17] In view of this extensive discussion, joined by five Justices, it is simply untenable to posit, as individual prosecutors and judges occasionally have, that *Roe*'s recognition of a legitimate "interest in potential life," 410 U.S. at 163, *supports* authority to regulate pregnant women's lives, so long as their abortion decisions are sufficiently unhindered. *See In re A.C.* 573 A.2d 1235, 1255 (1990) (en banc) (Belson, J. dissenting in part); *State ex. rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 748 (Wis. 1997) (Crooks, J., dissenting). Rather, the validity of the interest and permissibility of means are distinct requirements.

beds. The program was justified as a means of advancing fetal health interests by deterring women from using drugs. Nonetheless, the presence of valid, benevolent, and nonpunitive motives, the Court held, could not justify the chosen means—subjecting pregnant women to law enforcement searches that would, absent individualized probable cause or consent, be unconstitutional as applied to any other person. *Id.* at 81. Nor, the Court concluded, did the government's concern for fetal well-being make out the sort of "special need" that could justify less-than-full Fourth and Fourteenth Amendment protection for pregnant women. *Id.* at 84.

II. Even With *Roe* and *Casey* in Place, State Power Has Been Used to Violate Pregnant Women's Constitutional Rights.

Although *Roe* and *Casey* established constitutional principles equally applicable to state abortion laws and to other exercises of state power directed at pregnant women, these principles have been discarded in situations involving those who seek, successfully or not, to continue their pregnancies and give birth. In more than 1,600 cases, across every State, state actors, including police and prosecutors, health-care and child-welfare workers, and judges have, relying on interests in "unborn life," deprived pregnant women of virtually every constitutional right, including the right to life. When challenged, the vast majority of such efforts have failed. The path has often entailed "undergo[ing] a criminal prosecution [or conviction]," *Doe v. Bolton*, 410 U.S. 179, 188 (1973)—and such "vindication," in critical respects, was incomplete and inadequate.

Women have been arrested, prosecuted, and

detained on the theory that, by becoming pregnant, otherwise legal acts or omissions, health conditions, and decisions permissible to non-pregnant people may be treated as crimes. Similarly, pregnancy has provided the basis for compelled medical procedures and treatments that cannot be imposed on parents, siblings, and cousins to save their relative's life. Such government actions have relied on interpretations of criminal statutes that make no mention of pregnancy or pregnant women, sometimes based on legislative declarations of fetal "personhood" that were ostensibly "precatory."[18] Prosecutors in numerous states have also used laws previously interpreted to reach third-party attacks on pregnant women as a basis for proceeding against the woman herself.[19] Those laws have been relied upon to justify arresting and prosecuting pregnant women who experienced miscarriages and stillbirths, although most arrests involved births of healthy babies with no adverse pregnancy outcome reported.[20]

A significant number of the arrests and prosecutions have involved allegations of ingesting an "illegal" drug, thereby transforming drug use or dependency by one group of people, pregnant women, into criminal "child abuse," "chemical endangerment" or "drug distribution" or, if there is a coincidental pregnancy loss, "murder." In these cases, state law did

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[18] Paltrow & Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POLITICS, POL. & L. 299, 322-26 (2013).

[19] *Id*. at 322-23.

[20] *Id*. at 310, 317-18.

not actually make ingesting drugs illegal, let alone prohibit pregnancy and drug use; nor were the substances controlled *because* of concerns about fetal development.[21] Indeed, scientific evidence has compellingly refuted beliefs that such substances cause fetal harm or pregnancy loss, and establishes that associated risks are no greater or less than those for legal substances commonly used.[22]

That is precisely what this Court in *Casey* foresaw and held constitutionally repugnant: that the logic of policing pregnant women based on fetal risk would sweep in activities that are independently protected (such as refusing invasive medical intervention), ones, such as smoking or consuming alcohol that are lawful, but unhealthy, and everyday activities, such as driving or going to work, that no one would think could be the subject of criminal law. *See, e.g.*, *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993). Experience has shown *Casey* to have been prescient. The criminal complaint in *State v. Zimmerman*, identified drinking alcohol and smoking cigarettes while pregnant as grounds for charges of attempted first-degree intentional homicide.[23] In Utah, a woman who delivered twins, one of whom was stillborn, was charged with fetal homicide, based on health care providers' belief that the stillbirth might have been

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[21] *Id*. at 323.

[22] Terplan et al., *The Effects of Cocaine and Amphetamine Use During Pregnancy on the Newborn: Myth versus Reality*, 30 J. Add. Dis. 1 (2011); *see also* NAPW, *Drug Use and Pregnancy* (Sept. 2021), bit.ly/pregnancyandruguse.

[23] Complaint, Nos. 96-F-368, 96-CF-525 (Wis. Cir. Ct. Racine County, Sept. 18, 1996).

avoided had she accepted their recommendation and not delayed undergoing cesarean surgery.[24]

Falling down a flight of stairs, planning a home birth, and being diagnosed with HIV are not unlawful activities, but the co-occurrence of pregnancy and their presumed risks of fetal harm made each the basis for coercive state interventions.[25] In Indiana, a woman who was approximately 33 weeks pregnant attempted suicide. She survived and did everything she could to ensure that her baby did; the baby was born alive but did not survive. She was charged with murder and feticide and incarcerated without bail for more than a year.[26]

Authorities have also deprived pregnant women of their physical liberty through civil actions and ones pursuant to "child welfare" laws. Pregnant women have been held in locked psychiatric wards, some under 24-hour guard, and detained in treatment programs.[27] Parties in family court cases have asked courts to prevent pregnant women from leaving the jurisdiction, *see Wilner v. Prowda*, 158 Misc. 2d 579 (N.Y. Sup. Ct. 1993), or have treated a woman's interstate travel while pregnant as a form of "appropriation of the child...in utero." *Sara Ashton*

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[24] *State v. Rowland*, No. 041901649 (Dist. Ct. 3d Apr. 7, 2004).

[25] Paltrow & Flavin at 316.

[26] GOODWIN at 32-34.

[27] *See, e.g.*, Steinkraus, *Pregnant, Addicted Woman Asks for Help, Gets Locked Up*, J. TIMES (Racine, Wis.), May 11, 2005; *In re Tanya P.*, No. 530069-93 (N.Y. Sup. Ct. New York County Feb. 24, 1995); *see also id.* at 38.

McK. v. Samuel Bode M., 111 A.D.3d 474, 475 (N.Y. Sup. Ct. 2013).

State judges have shown scant regard for pregnant women's constitutional rights in medical settings. Angela Carder, a 27-year-old woman who was critically ill and 25 weeks pregnant, agreed, along with her family and physicians, on treatment designed to keep her alive for as long as possible. The hospital, however, convened an emergency hearing to determine the "rights of the fetus."[28] Despite knowing that cesarean surgery could kill Ms. Carder, the trial court ordered it, and a panel of the District of Columbia Court of Appeals upheld the order, reasoning that "the mother's [explicitly invoked] interest in her bodily integrity" and the risks, including "postoperative embolism," and, "in some cases... death," were not "dispositive," in light of the fetus's "chance of surviving delivery." *In re A.C.*, 533 A.2d 611, 617 (D.C. 1987). The fetus was born alive, but was not in fact viable and died two hours later. Ms. Carder died two days later, with the surgery listed as a contributing factor. *Id.* at 612. The court's opinion offered "condolences" to the family. *Id.* at 611.

When that court reheard the case en banc, with the benefit of full briefing and expert input, it held that the order violated Ms. Carder's right to "accept or refuse medical treatment," 573 A.2d at 1245, noting a body of authority consistently denying government power to compel "one person to permit a significant intrusion upon his or her bodily integrity" including where a life-saving skin graft or bone marrow

[28] GOODWIN at 92-93.

transplant was at issue. *Id*. at 1243-44.[29]

In Florida, a woman thought to be at risk for a miscarriage was held captive at a hospital and forced to undergo cesarean surgery she did not want to further state interests in potential life. Neither the detention nor the surgery prevented the pregnancy loss, though they kept the woman from caring for her two young children. *Burton v. State*, 49 So. 3d 263 (Ct. App. 1st Dist. 2010).

The *A.C.* opinion noted that cases involving overriding pregnant women's medical decision-making are often decided without procedural protections afforded litigants in the most mundane civil matters. 573 A.2d at 1248. And in other cases, pregnant women's other fundamental constitutional guarantees and dignitary interests have likewise been cast aside.[30] Health care professionals have impermissibly searched pregnant patients to gather "incriminating" evidence. *See Ferguson*, 532 U.S. at 84-85. Pregnant women have been forced to undergo intimate medical examinations, and have had confidential medical information unconstitutionally disclosed. *See In re Unborn Child Corneau*, No. CP-00-A-0022 (Mass. Juv. Ct. Attleboro Div. Aug. 29, 2000); *State ex rel. Angela M.W.*, 561 N.W.2d 729. They have had bail set at levels calculated not to

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[29] *Compare id.* and *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (confirming competent person's Fourteenth Amendment liberty interest in refusing unwanted medical treatment) with Paltrow & Flavin at 325 (discussing cases involving pregnancy and unconsented medical interventions).

[30] Paltrow & Flavin at 325-31.

secure their appearance, but instead to ensure that they (and the fetus) would remain jailed or that they would not become pregnant again.[31] Their religious liberties have been trammeled. An Illinois trial court ordered Darlene Brown to submit to blood transfusions she refused on religious grounds, endowing a "temporary custodian" with the right "to consent" to the "invasive medical procedure," performed by doctors who "'yelled at and forcibly restrained, overpowered and sedated' her." *In re Fetus Brown*, 689 N.E.2d 397, 399-400 (Ill. App. 1997).[32] State control affects pregnant women of all races, although Black pregnant women are vastly more likely to be reported by hospital staff, arrested, and subjected to felony charges.[33]

To an overwhelming extent (and with important exceptions), when these actions have been challenged, the results have been consistent with the principles articulated in *Roe* and *Casey*. Many cases have been dismissed by trial courts or eventually dropped by prosecutors, and the vast majority of state appellate decisions have held the prosecutions and civil

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[31] *See State v. Young* (S.C. Ct. Gen. Sess. Oct. 5, 1989); *In re Unborn Child of Starks*, 18 P.3d at 343-44; Renewed Pet. for Writ of Habeas Corpus, *In Re Chelsea Becker*, No. 19CM-5304 (Cal. Ct. App. July 6, 2020).

[32] The appellate court overturned that decision and held there was no basis for appointing a guardian ad litem for the fetus.

[33] Paltrow & Flavin at 333; *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 164-76 (2d ed. 2017).

interventions unlawful.[34] A number of decisions have explicitly referenced or relied on this Court's decisions or ruled on constitutional grounds that track those in *Casey*. Thus, the court in *Prowda*, rejecting a husband's request to enjoin his wife's relocation, underscored that "'women do not lose their constitutionally protected liberty when they marry'...or when they are pregnant," and that a "State may not give to a man the kind of dominion over his wife that parents exercise over their children." 158 Misc.2d at 582-83 (quoting 505 U.S. at 898). In *Kilmon,* the Maryland Court of Appeals, echoing *Casey*, rejected the State's attempt to use its reckless endangerment law to criminalize a pregnant woman's

[34] Civil decisions: *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (en banc); *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. Ct. 1997); *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994). Criminal decisions: *Arms v. State*, 471 S.W.3d 637 (Ark. 2015); *Cochran v. Commonwealth*, 315 S.W.3d 325 (Ky. 2010); *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); *Kilmon v. State*, 905 A.2d 306 (Md. 2006); *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992); *Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016); *People v. Jorgensen*, 41 N.E.3d 778 (N.Y. 2015); *State v. Armstard,* 991 So. 2d 116 (La. 2008); *State v. Wade*, 232 S.W.3d 663 (Mo. App. 2007); *State v. Martinez*, 137 P.3d 1195 (N.M. App. 2006); *Herron v. State*, 729 N.E.2d 1008 (Ind. App. 2000); *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. App. 1999); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. App. 1997); *State v. Dunn*, 916 P.2d 952 (Wash. App. 1996); *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. App. 1995); *Collins v. State*, 890 S.W.2d 893 (Tex. App. 1994); *State v. Luster*, 419 S.E.2d 32 (Ga. App. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. App. 1991); *People v. Hardy*, 469 N.W.2d 50 (Mich. App. 1991). *But see State v. Green*, 474 P.3d 886 (Okla. Crim. App. 2020); *Ex Parte Ankrom*, 152 So. 3d 397 (Ala. 2013); *Whitner v. State*, 492 S.E. 2d 777 (S.C. 1997).

activities based on the potential "effect ... on the child she is carrying," because doing so would reach:

> not just the ingestion of unlawful controlled substances but a whole host of...activity...—everything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that are contraindicated during pregnancy, ...to not maintaining a proper and sufficient diet, to avoiding ... prenatal medical care, . . . failing to wear a seat belt [or] violating other traffic [safety] laws in ways that [risk] ...exacerbating personal injury to her child, to exercising too much or too little.

905 A.2d at 311.

Welch reasoned similarly in holding that construing Kentucky's criminal abuse law to authorize prosecutions of women based on fetal risks allegedly associated with drug ingestion would render the statute unconstitutionally vague. The court emphasized that the defendant:

> could [instead] have been a pregnant alcoholic, or .... addicted to self-abuse by smoking, or by abusing ... over-the-counter medicine; or [to a] sport creating serious risk of prenatal injury..., or [she might] drive[] over the speed limit, or [not] wear the prescription lenses she knows she needs to see the dangers of the road.

864 S.W.2d at 283.

Likewise, the New York Court of Appeals in *Jorgenson* overturned a manslaughter conviction

based on the defendant's involvement in a car crash in which she was alleged, among other things, to have not been wearing a seatbelt, leading to the death of her newborn. The court held that prosecutions of pregnant women based on fetal risks "should [not] be left to the whim of the prosecutor," *id*. at 781, explaining that "one could find it 'reckless' for a pregnant woman to disregard her obstetrician's specific orders concerning bed rest; shovel a walkway; ... carry groceries; or disregard dietary restrictions." 41 N.E.3d at 781.

As these and many other cases cited in footnote 34 attest, relief is often granted on state law statutory interpretation grounds that incorporate *Casey*'s central teaching—that there is a fundamental difference between measures that advance fetal protection non-coercively or that operate solely against third parties, and measures that effectively control the pregnant person. Other decisions have noted, as did *Casey*, that *Roe* also protects the right to continue a pregnancy. Thus, in overturning a conviction of a woman for delivery of a controlled substance to a minor (through the umbilical cord) the court in *Johnson*, 602 So. 2d 1288 recognized that "[p]rosecution of pregnant women for engaging in activities harmful to their fetuses or newborns" can "unwittingly increase the incidence of abortion." *Id.* at 1296. *See also State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) (dismissing charges after woman obtained an abortion to avoid

prosecution for "child endangerment" based on allegedly inhaling paint vapors while pregnant).[35]

A number of decisions have referenced, as did this Court in *Ferguson*, the body of compelling empirical and expert evidence concerning the actual operation and consequences of coercive interventions and punitive actions against pregnant women. *See* 532 U.S. at 84 n.23. Indeed, every leading medical organization to have addressed the issue agrees that punitive responses "discourag[e] women who use drugs from seeking prenatal care," and as a result "harm[], rather than advance [maternal,] prenatal [and child] health." *Id.*[36]

State *courts'* respect for the lines *Casey* drew has been matched by state *legislatures*' extraordinary reluctance to give law enforcement the power to arrest women in relationship to their pregnancies. In the nearly five decades that pregnancy-based criminal punishment has been debated and litigated, only one state statute authorizing such prosecutions has *ever*

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[35] Although it is difficult to know how frequently abortions result from fear of prosecution, one study reported that two-thirds of the women surveyed who reported using cocaine during their pregnancies considered having an abortion. *See* Flavin, *A Glass Half Full? Harm Reduction Among Pregnant Women Who Use Cocaine*, 32 J. DRUG ISSUES 973, 985 tbl.2 (2002). *See also* Bowers, et al., *Tennessee's Fetal Assault Law: Understanding its impact on marginalized women*, 11 (2019) https://www.sisterreach.org/uploads/1/3/3/2/133261658/full_fetal_assault_rpt_1.pdf (documenting that fear of arrest and incarceration prompted substance-using women to seek unwanted abortions).

[36] *See* NAPW, *Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women* (June 1, 2021), bit.ly/medicalgroupsstatements.

been enacted: a Tennessee law that was in effect briefly, before being permitted to lapse, because it was found to produce tragic, perverse health consequences of the type experts have long feared.[37] Legislatures elsewhere have rejected innumerable similar measures, opting instead for laws aimed at improving access to prenatal care and treatment.[38]

It is critical, however, to highlight the ways in which these kinds of favorable judicial decisions fail to adequately protect pregnant women's rights. When an appellate court overturns a pregnancy-based prosecution, or invalidates an impermissible court-ordered medical intervention, its decision does not remedy the indignities, harms, and constitutional wrongs inflicted. To take the extreme example, the post-mortem holding in *A.C.* provided no relief to the woman whose death was attributed to the impermissible court-order, which resulted from proceedings that should never have occurred. When the South Carolina Supreme Court in *McKnight*, 661 S.E. 2d 354, granted Regina McKnight habeas relief—based on her attorney's failure to proffer medical evidence that the stillbirth prosecuted as homicide-by-

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[37] *See* Boone & McMichael, *State-Created Fetal Harm*, 109 GEO. L.J. 475, 501 (2021) (finding that Tennessee's "fetal assault" law "resulted in twenty fetal deaths and sixty infant deaths" in 2015 alone); Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WILLIAM & MARY L. REV. 3 (2019); *see also* Haffajee, et al., *Pregnant Women with Substance Use Disorders—The Harm Associated with Punitive Approaches*, 384 N. ENGL. J. MED. 2364 (2021).

[38] *See generally* LAURA E. GÓMEZ, MISCONCEIVING MOTHERS (1997); GUTTMACHER INST. *Substance Use During Pregnancy*, (Sept. 1, 2021), https://www.guttmacher.org/print/state-policy/explore/substance-use-during-pregnancy.

drug-ingestion had in fact been caused by an infection—she had served *eight years* in prison. In granting relief, the court also described "the thrust" of other neglected medical evidence: "studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor." *Id*. at n.2.[39] Even when charges are dismissed at earlier stages, the harm and stigma inflicted by arrests and detention, and resulting family separation, for crimes that do not exist, are similarly irreparable.

And as McKnight's case and many others demonstrate, when these cases do proceed, the risks of unreliable and unfair outcomes are intolerably high. Defendants in these cases are seldom positioned to litigate federal constitutional defenses or "put the prosecution to its proof" when offered the chance to avoid draconian punishment for a nonexistent offense by pleading guilty to a minor charge. And individual criminal prosecutions are overseen by busy trial judges who are ill-equipped to handle the kinds of systemic constitutional claims and class-wide

[39] The case's disposition was poignant but not atypical. Although McKnight consistently maintained that the "crime"—homicide-by-pregnancy-risk—was nonexistent and could not constitutionally *have been made a crime*, she agreed to plead guilty, in exchange for a promise to not re-try her or seek further incarceration. *See* Lester and Veer, Editorial, *A Measure of Justice for Regina McKnight*, STATE (Columbia, S.C.), July 1, 2008, *available at* bit.ly/ReginaMcKnight.

evidence that are commonplace in civil litigation involving abortion laws.[40]

Significantly, when appellate courts have rejected prosecutions on broadly applicable grounds—*e.g.*, recognizing that "child" under a State's criminal code does not include a fetus or that third-party liability does not support pregnancy-based liability—*those* rulings rarely have ongoing restraining effect. Prosecutors bring new cases alleging violations of (trivially) "different" statutes.

For example, after the Kentucky Supreme Court held that the State's child abuse law did not authorize prosecution of women based on pregnancy and the use of a controlled substance, *Welch*, 864 S.W.2d at 284, a prosecutor in the same county charged another woman identically. *Commonwealth v. Harris*, No. 02-CR-00008 (Cir. Ct. Wayne County Apr. 16, 2002). After that charge was dismissed, Ina Cochran was indicted for "wanton endangerment in the first degree," a prosecution the state supreme court would reject as "basically identical to" the one *Welch* held impermissible 17 years earlier. *See Cochran v. Commonwealth*, 315 S.W.3d 325, 328 (2010). Similarly, despite the Arkansas Supreme Court's ruling in *Arms v. State*, 471 S.W.3d 637 (2015), denying the power to prosecute pregnant women's

[40] When appellate courts reverse convictions, they are strongly disposed to do so on narrow grounds, leaving even substantial, well-preserved constitutional claims unresolved. Although the Constitution's prohibitions on race and sex discrimination, for example, apply to prosecutors and police officers, the prospect of obtaining relief on that basis in a criminal prosecution is vanishingly remote. *See United States. v. Armstrong*, 517 U.S. 456, 469-70 (1996).

drug use under a law criminalizing "introduction of a controlled substance into the body of another person," prosecutors there continue, in the name of fetal protection, to charge women under that provision.[41]

Even when state laws *explicitly* prohibit its use against a pregnant woman herself, prosecutors persist. Thus, a Missouri "personhood" provision—which was before this Court, but not ruled upon, in *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989)—directs that it *may not* be applied "against a woman for indirectly harming her unborn child by failing to properly care for herself." Mo. Rev. Stat. § 1.205.4. Nevertheless, prosecutors have invoked it repeatedly to justify charging scores of pregnant women, including one who admitted to using marijuana once while pregnant and another who drank alcohol.[42] And in California, despite court rulings over many decades rejecting the use of the State's criminal code to prosecute women in relationship to pregnancy outcomes, a prosecutor recently charged two women who experienced pregnancy losses—blamed, without scientific basis, on controlled substance use—with violating the State's feticide law, notwithstanding statutory text expressly forbidding the provision's use to prosecute any "act [that] was ... consented to by the mother of the fetus."

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[41] *See, e.g.*, *State v. Gilbreath*, No. CR-2017-1 (Cir. Ct. Izard County Jan. 9, 2017); *State v. Norton*, No. CR-2016-40-4 (Cir. Ct. Fulton County July 28, 2016).

[42] *See State v. K.L.*, No. 03CR113048 (Cir. Ct. Chariton County Dec. 13, 2004); *State v. Lohnstein*, No. 0611-CR08757, Opp. to Mot. to Dismiss (Cir. Ct. St. Charles County Oct. 17, 2007); *Wade*, 232 S.W.3d at 665 (rejecting State's reliance on Section 1205 for prosecution of a woman based on pregnancy).

Cal. Pen. Code § 187(b). One woman, Adora Perez, poorly advised by her lawyer, pled guilty to manslaughter, even though *that* law does not apply to pregnancy or fetuses, even for third-party assailants. She is currently serving an 11-year sentence for experiencing a pregnancy loss. A second, Chelsea Becker, spent 16 months in jail before the feticide charge was dismissed.[43]

Finally, and of great importance, the real-world harms of these punitive and coercive approaches ramify beyond the individual women arrested and prosecuted. When pregnancy and all its potential outcomes may be treated as crimes and when activities that pose *potential* risks of fetal harm are subject to prosecution or "civil" detentions —and when candid communication with health-care providers is treated as inculpatory evidence—what will be deterred is not the disfavored activity, but rather contact with medical and supportive services most likely to mitigate risks and improve outcomes.

III. The Consequences of Overruling *Roe* Would Be Far-Reaching and Disastrous for All Pregnant Women.

The realities of *Roe*'s and *Casey*'s reach and real-world operation have much to say about what would happen—and not happen—were this Court to accept petitioners' invitation to repudiate these decisions.

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[43] Wigglesworth, *Judge dismisses murder charge against Central Valley woman whose baby was stillborn*, L.A. TIMES, May 20, 2021, https://www.latimes.com/california/story/2021-05-20/murder-charge-dropped-against-woman-who-suffered-stillbirth.

First, because *Roe* and *Casey* rest fundamentally on an understanding of pregnant women's personhood under the Fourteenth Amendment, *see supra*, a decision overturning them would, necessarily, entail a repudiation of that principle. Each State would then, as a matter of constitutional law, have carte blanche to announce, and enforce, fetal interests "competitive with the constitutional rights of pregnant women." 505 U.S. at 914 n.2 (Stevens, J. concurring). Pregnant women would be identified as—in the words of the judge who had approved compelled, life-ending surgery in *A.C.*—"a special class of persons," 573 A.2d at 1256, not entitled to "full and independent legal status under the Constitution." 505 U.S. at 897. The "degree of authority" and "dominion" over the lives of women who continue pregnancies this Court pronounced "troubling" and "repugnant," *id.*, would be constitutionally unexceptionable. And the criminal punishments and civil detentions imposed would be "reviewed"—*i.e.*, rubber stamped—for "rational basis." It might fairly be said that each of the roughly five million annual pregnancies that *are not* terminated by abortion—and every new day of those pregnancies—would, under petitioners' proposed constitutional revision, be a potential crime or justification for state intervention.

As for the real-world and "legal system" consequences of overruling *Roe* and *Casey*, it bears emphasis that both the flagrant violations and the vindications described in part II occurred while *Roe* and *Casey* have been the law of the land. Although cases have seldom been decided explicitly on constitutional grounds, this Court's precedents have exerted a strong and discernable gravitational pull. While reflecting many flagrant abuses, 1,600 arrests

and other deprivations of pregnant women's rights are a very small fraction of total pregnancies (and only approximately 20 involved women accused in connection with an alleged illegal abortion).[44] It is no coincidence that state courts have overwhelmingly enforced the distinction between "fetal protection" measures that are and are not antagonistic to pregnant women's liberty and that legislatures nationwide have been equally consistent in respecting that bright line. But this would surely change were this Court to replace *Casey*'s red signal with a green light, and vest state actors with the power to "override the rights of the pregnant woman," *Roe*, 410 U.S. at 162, as they see fit. The full damage that such a change in law would inflict—on pregnancy outcomes and on the types of people whom prosecutors (and constituents) view as deserving of surveillance, punishment, and correction—would be disturbingly large.

The decades-long experience in pregnancy cases *not* involving abortion also refutes petitioners' assurances of minimal—and overwhelmingly benign—consequences of overruling *Roe* for the roughly one million women who do decide to terminate a pregnancy. First, it can no longer be maintained that, were *Roe* overruled, women who seek and obtain abortions would not be prosecuted. Decades of instances of prosecutors' pursuing criminal charges against women who gave birth to healthy babies but allegedly risked some harm to them while pregnant establishes that such actors would not hesitate to prosecute a woman who had or attempted

[44] NAPW *supra* note 6.

to have an abortion prohibited under state law. And no less than in non-abortion settings, *see supra* part II, these individual prosecutions are unsuited to fairly and accurately resolving the complex factual and constitutional questions that would arise.

Nor is there any merit to petitioners' drumbeat claims that overturning *Roe* would "return" matters relating to pregnancy and abortion to legislative deliberation and resolution. If the experience described in part II establishes anything, it is that *prosecutors* need not—and will not—wait for proper legislative authorization before proceeding against pregnant women; indeed they will not be deterred by clear legislative directives that a criminal law may not be applied to the pregnant woman herself; there is no shortage of criminal statutes to attempt to enforce, and elected local prosecutors risk nothing by pressing existing, ill-fitting general criminal laws into service.[45]

Experience also belies petitioners' assurances that overturning *Roe* would harness the benefits expected under a functioning federal system. In cases described in part II, state officials (and spouses and prospective fathers) sought to restrain the movement of pregnant women who chose to carry to term. In a State that is willing, as a number appear to be, to grant a private cause of action to anyone who believes that an abortion law violation is being attempted, a right of action to prevent pregnant women from leaving the State for actual or suspected abortion

[45] NACDL, *Abortion in America: How Legislative Overreach is Turning Reproductive Rights into Criminal Wrongs* (2021) nacdl.org/abortioncrimreport.

purposes would be no stretch. There would be no assurance in those cases that women's federal right to travel would fare any better in state-court balancing than the rights to life and bodily integrity the initial decisions in *A.C.* were quick to subordinate.

Least plausible of all are petitioners' promises that overruling *Roe* will spare this Court from hard cases and harsh criticism. To be sure, a regime that provides for abortion restrictions to be upheld on rational basis grounds would achieve quietude of a sort: *Plessy v. Ferguson*, 163 U.S. 537 (1896) "spared" the Court from hearing cases challenging racial segregation; and, as long as *United States v. Miller*, 307 U.S. 174 (1939) governed, Second Amendment claims received swift dismissal. But decisions like those—and the ones in *Dred Scott,* 60 U.S. 393, or *Hoyt*¸ 368 U.S. 57, which approved diminished personhood status for a category of people—did not immunize the Court from criticism or achieve widespread acceptance.

Indeed, even if the Court were to announce a federal hands-off approach to state statutes banning abortion at a certain stage of pregnancy, the maximalist designs of new laws would ensure this Court's docket would not be free of "abortion cases"—with disputes involving the Full Faith and Credit Clause, the right to travel, States' power to regulate extraterritorially and obtain personal jurisdiction, congressional power, and the rights of free exercise, association, informational privacy, and bodily integrity—often arising in cases where (by design) lower federal courts' power to reach federal questions was uncertain.

In the face of so much experience bearing directly on what the tragic real-world and legal system consequences of jettisoning *Roe* would be, a decision that credited petitioners' wishful, evidence-free set-piece would be unworthy of this Court.

Conclusion

Respect for the full and independent legal status under the Constitution of all people who can or have become pregnant compels affirming the decision of the court of appeals.

Respectfully submitted,

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