

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 *AMICI CURIAE* CURRENT AND
FORMER PROSECUTORS AND LAW
ENFORCEMENT LEADERS, AND
FORMER STATE ATTORNEYS GENERAL,
FEDERAL AND STATE COURT JUDGES,
U.S. ATTORNEYS, AND U.S. DEPARTMENT
OF JUSTICE OFFICIALS
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are current and former prosecutors and law enforcement leaders, and former state attorneys

¹ Pursuant to S. Ct. Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have granted blanket consent for the filing of *amicus curiae* briefs. A full list of *amici curiae* is appended to this brief.

general, federal and state court judges, U.S. Attorneys, and U.S. Department of Justice officials who are committed to protecting the integrity of the justice system, upholding the Constitution and rule of law, and promoting safer and healthier communities.

Amici have decades of experience in safeguarding the integrity of the criminal legal system. They are united in their conviction that a core tenet of the pursuit of justice is the furtherance of impartial policies and practices that protect the well-being and safety of communities. Drawing on their collective experiences, *amici* recognize that trust in the rule of law and the justice system is the foundation for keeping communities safe.

Overturning decades of precedent and criminalizing abortion will rock this foundation. Instead of freeing the courts from the abortion question, banning abortions and opening the door to criminalization will inject courts into doctors' offices and individual health-care decisions across the country. This significant shift will put at risk the health and safety of all people who can bear children, particularly women of color and low-income women. It will erode public trust, undermine the legitimacy and efficacy of prosecutorial and law enforcement officials, and divert limited criminal justice resources that could otherwise be used to address real harm and promote public safety.

SUMMARY OF ARGUMENT

Upholding Mississippi's draconian pre-viability abortion ban (H.B. 1510) would not only eviscerate the constitutional right to abortion recognized for nearly 50 years in *Roe v. Wade* ("*Roe*") and its progeny, but would also invite the criminalization of women who make the personal decision to have abortions, as well

as the doctors and providers who safely facilitate these healthcare choices. Indeed, at least 18 states have criminal laws—including near-total abortion bans and laws affording personhood to fetuses, currently unenforceable due to *Roe*—that create the risk that women who obtain abortions and their healthcare providers will be prosecuted should *Roe* be overturned.

For the justice system to maintain its credibility and efficacy, it is critical that the public have confidence in the integrity of the rule of law and the justice system. The community must trust officials in the criminal legal system—including prosecutors and law enforcement officials—to be fair, independent, and unbiased actors who collectively strive to uphold public safety and protect society as a whole.

Criminalizing abortion will turn that tenet on its head. Instead of protecting some of the most vulnerable members of society—women of color and low-income women—gutting abortion rights may task justice system actors with going after these individuals and the healthcare providers who serve them, thereby undermining the public’s confidence in the operation and integrity of the system and its leaders. The erosion of these all-important bonds of trust will significantly hamper the ability of law enforcement officials and prosecutors to carry out their responsibilities to protect the health and safety of communities.

Banning abortions and creating the potential for criminalization will also create deeply concerning public health risks and dangers. Research has firmly established that laws criminalizing and restricting abortion lead to adverse health effects for women and children, and often do not even achieve their intended effect of reducing abortions. Instead, they increase the likelihood that women will obtain unsafe abortions or

attempt to end their pregnancies without clinical support, can deter women from seeking healthcare, and undermine the doctor-patient relationship. And these concerns are likely to disproportionately burden lower income women at greatest risk of poor health outcomes.

Finally, it is important to bear in mind that resources in the criminal justice system are inherently limited. Opening the door to criminalizing abortion will strain this overburdened system by diverting scarce resources away from prosecuting far more serious and dangerous crimes that truly impact public safety.

ARGUMENT

I. Eviscerating The Constitutional Right To Abortion Will Open The Door To Criminalizing Healthcare Providers And Women Who Seek Abortions

The Supreme Court settled the constitutional right to abortion nearly half a century ago: the Constitution guarantees every woman a “right to terminate her pregnancy before viability.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 871 (1992); see also *Roe v. Wade*, 410 U.S. 113 (1973). That essential holding of *Roe* has been the foundation upon which people have “organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail” for over four decades of “economic and social developments.” *Casey*, 505 U.S. at 856. Three generations have “come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society and to make reproductive decisions.” *Id.* at 860. “The 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.” *Id.* at 856. As the Court announced almost 30 years ago in *Casey*, “[t]he Constitution serves human values, and . . . the [] cost of overruling *Roe* for people who have ordered their thinking and living around that case [cannot] be dismissed.” *Id.* Yet, Mississippi blatantly ignored this foundational holding and enacted H.B. 1510, 2018 Leg., Reg. Sess. (Miss. 2018) (“the Act”), which bans abortion after 15 weeks of pregnancy, many weeks before viability.²

Because the Act unquestionably takes away from women the right to decide whether to continue a pre-viability pregnancy, it can only stand, as the State admits, if *Roe*’s essential holding falls.³ And one does not need a crystal ball to predict what will happen if the constitutional right to pre-viability abortion is eviscerated. Removing this long-presumed protection will leave the door wide open to the prosecution not only of the physicians who facilitate abortions, but also the women who have them.

Eight states have pre-*Roe* criminal abortion bans still on the books, though with *Roe* in place they cannot be enforced.⁴ At least ten more states—Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, South Dakota, Tennessee and Utah—have post-*Roe* criminal anti-abortion laws, which ban all or nearly all abortions; attempts to implement

² The Act contains extremely limited exceptions for “medical emergency” and “severe fetal abnormality.” H.B. 1510 § 1.4.

³ See Pet. Br. at 1–5.

⁴ See the Guttmacher Inst., *Abortion Policy in the Absence of Roe*, (Sept. 1, 2021), [#https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe#](https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-ro).

these laws would undoubtedly result if *Roe* were overturned.⁵ All of these laws expressly subject abortion providers to criminal prosecution punishable by up to ten years of imprisonment.⁶ See, e.g., Ark. Code Ann. § 5-61-304(b) (“[p]erforming or attempting to perform an abortion is an unclassified felony with . . . imprisonment not to exceed ten (10) years”); see also Miss. Code Ann. § 41-41-45(4) (“[a]ny person, except the pregnant woman, who purposefully, knowingly or recklessly performs or attempts to perform or induce an abortion . . . shall be punished by imprisonment . . . for not less than one (1) year nor more than ten (10) years”).

Furthermore, conspiracy, attempt, and accomplice liability statutes could cast the criminal net even wider, subjecting people other than abortion providers to prosecution. Louisiana’s statute, for example, leaves open the prospect that an overzealous prosecutor could “charge anyone even remotely connected to an illegal abortion as a principal to that crime,” such as an abortion clinic receptionist who schedules appointments.⁷

⁵ See *supra* n. 4.

⁶ Regulation of abortion that does not constitute an outright ban but instead imposes medically unnecessary restrictions on abortion providers—commonly known as targeted regulation of abortion providers or TRAP laws—can further subject healthcare providers to potential criminal penalties. See Nat’l Ass’n of Crim. Def. Law., *Abortion in America: How Legislative Overreach Is Turning Reproductive Rights Into Criminal Wrongs*, 20, 22 (2021), <https://www.nacdl.org/getattachment/ce0899a0-3588-42d0-b351-23b9790f3bb8/abortion-in-america-how-legislative-overreach-is-turning-reproductive-rights-into-criminal-wrongs.pdf>. If the Court overturns or waters down *Roe* and its progeny, these regulations could be unfettered by constitutional limitations.

⁷ See *id.* at 11.

In addition to potentially criminalizing doctors, nurses, and other healthcare employees, these laws may facilitate the prosecution of women who seek abortions. Many anti-abortion laws either define an embryo or a fetus as a legal person, or state that life begins at the moment of conception.⁸ See, e.g., Ark. Code Ann. § 5-61-302(a)(6)(B) (“life begins at the moment of conception and the child in a woman’s womb is a human being”); see also Idaho Code § 18-8702(1) (“The life of each human being begins at fertilization, and unborn children have interests in life, health, and well-being that should be protected”). As the Court recognized many years ago in *Roe*, the concept of fetal personhood cannot logically and legally coexist with the concept of legal abortion.⁹ *Roe*, 410 U.S. at 156–57 (“if this suggestion of personhood is established, the . . . case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment”). Absent explicit exemptions of pregnant women from criminal liability, which some but not all of these laws contain, the fetal personhood provisions could leave open the possibility of criminally charging women who obtain

⁸ In addition, eleven states already have pending legislation that would establish fetal personhood if enacted. See Guttmacher Inst., *State Legislation Tracker: Major Developments in Sexual & Reproductive Health*, <https://www.guttmacher.org/state-policy> (last visited Aug. 10, 2021).

⁹ Supporters of the Act expressly invite the Court to recognize fetal personhood in this case. See, e.g., Br. of John M. Finnis and Robert P. George, at 2 (arguing that “prohibitions of elective abortions [are] constitutionally obligatory because unborn children are persons” under the Fourteenth Amendment); see also Br. of Ala. Ctr. for Law & Liberty, at 27 (“The Court should not only overrule *Roe* but also hold that the Constitution protects the child’s right to life”).

abortions. Indeed, thirty-eight states currently have fetal homicide laws. See Nat'l Conf. of State Legislatures, *States Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women* (May 1, 2018), www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx.

Some prosecutors have already pursued charges against pregnant women under fetal homicide laws. For example, in 2004, a Utah fetal homicide law was used to arrest Melissa Rowland who gave birth to twins, one of whom was stillborn. See Lynn M. Paltrow & Jeanne 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 Pl., Pol'y & L., 299, 323 (2013) citing *State v. Rowland*, No. 041901649 (Utah Dist. Ct. 3d Apr. 7, 2004) (Fuchs, J.). Ms. Rowland was charged with criminal homicide, a first-degree felony, based on allegations that she caused the stillbirth by refusing to have cesarean surgery two weeks earlier.¹⁰ See *id.* A spokesman for the Salt Lake County district attorney's office explained the basis for the prosecution, stressing the prevailing law: “[t]he decision came down to whether the dead child—a viable, if unborn, being as defined by Utah law—died as a result of another person's action or failure to take action. That judgment . . . is required by Utah's feticide law, which was amended in 2002 to protect the fetus from the moment of conception.” See Kirk Johnson, *Harm to*

¹⁰ Ms. Rowland later pled guilty to two counts of child endangerment—the homicide charge was dropped—and was sentenced to 18 months' probation. See Alexandria Sage, *Utah C-section Mom Gets Probation*, CBS News (Mar. 12, 2004), <https://www.cbsnews.com/news/utah-c-section-mom-gets-probation/>.

Fetuses Becomes Issue in Utah and Elsewhere, N.Y. Times (Mar. 27, 2004), <https://www.nytimes.com/2004/03/27/us/harm-to-fetuses-becomes-issue-in-utah-and-elsewhere.html>.

In addition to misguided prosecutions of miscarriages or stillbirths, *Roe*'s demise will also create risks of criminalizing women who are forced, in the face of abortion bans, to pursue self-managed abortion. For example, after Purvi Patel induced an abortion using medication ordered over the Internet—which violated an Indiana law¹¹ requiring abortion to be performed under specific circumstances—a jury convicted her of child neglect and feticide, and Ms. Patel was sentenced to twenty years in prison.¹² As this case shows, overturning *Roe* will carry a very real risk of criminalization and potentially extreme sentencing consequences for women who choose—often due to a litany of dire circumstances—to seek an abortion.

In addition to Ms. Rowland's and Ms. Patel's cases, there have been numerous similar cases of prosecutorial overreach since *Roe*, in which women were arrested or prosecuted for miscarriage, stillbirth, or attempting

¹¹ On August 10, 2021, a court ruled this law unconstitutional, and permanently enjoined its enforcement. See *Whole Women's Health Alliance v. Rokita*, No. 1:18-cv-01904, 2021 WL 3508211 (S.D. Ind. Aug. 10, 2021), *appeal filed*, Case No. 21-2480, (7th Cir. Aug. 12, 2021).

¹² In this particular case, the appellate court overturned the feticide conviction and the sentence was reduced to 18 months on remand. However, Ms. Patel spent more time behind bars than her reduced sentence actually required by the time she was released. See *Patel v. Indiana*, 60 N.E.3d 1041, 1062 (Ind. Ct. App. 2016); Samantha Cooney, *Woman Convicted of Feticide Will be Released From Prison*, TIME (Sept 1, 2016), <https://time.com/4476036/purvi-patel-feticide-release/>.

to end their own pregnancy. See Paltrow & Flavin, *supra*, at 321 (finding sixty-eight cases involving women who experienced miscarriage, stillbirth, or infant death).

If overzealous prosecutors are already charging women with murder for suffering stillbirths and miscarriages, in a world without *Roe's* protections it is likely that far more women seeking abortions will fall prey to such egregious misuse of law. Such over-criminalization of personal healthcare decisions will inure to the detriment of communities across the country.

II. The Risk Of Unjust Prosecution And Arbitrary Application Of The Law Will Undermine Trust In The Justice System And Thereby Endanger Communities

A. Trust Between The Community And Criminal Justice Officials Is Integral To Public Safety

The trust of the community is integral to the ability of law enforcement and prosecutorial offices to protect the public. When individuals have confidence in legal authorities and view the police, the courts, and the law as legitimate, they are more likely to report crimes, cooperate as witnesses, and accept police and judicial system authority. See Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 *Psych., Pub. Pol'y & L.* 78, 78–79 (2014); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 *Ohio St. J. Crim. L.* 231, 263 (2008). Indeed, even “a single instance of positive contact with a uniformed police officer can substantially improve public attitudes toward police,

including legitimacy and willingness to cooperate.” Kyle Peyton et al., *A Field Experiment on Community Policing and Police Legitimacy*, 116 Proc. Nat’l. Acad. Sci. 19894, 19894 (2019).¹³ Unfair, discriminatory, and arbitrary law enforcement and prosecutorial practices erode this essential confidence. See Andrew Goldsmith, *Police Reform and the Problem of Trust*, 9 Theoretical Criminology 443, 456 (2005); Thomas C. O’Brien & Tom R. Tyler, *Rebuilding Trust between Police & Communities Through Procedural Justice & Reconciliation*, 5 Behav. Sci. & Pol’y, 35 (2019). Without trust, the effectiveness of prosecutors and law enforcement suffers.

B. Laws Criminalizing Abortion Threaten To Erode Trust And Confidence In The Justice System And Endanger Communities

Laws criminalizing those who seek or facilitate abortions endanger the health of women and their families. Restrictive abortion laws disparately burden poor women and women of color who will not have the means to seek care in a more favorable state or otherwise find ways to obtain a safe and medically supervised abortion. Criminal abortion laws also upset expectations of settled law aimed at protecting all members of the community, creating the risk that communities will believe law enforcement and the justice system are not to be trusted.¹⁴

¹³ <https://www.pnas.org/content/116/40/19894>.

¹⁴ Similarly, overruling *Roe* would open the door to laws authorizing civil enforcement of abortion restrictions and further undermine community trust in the justice system. These effects have already been seen in Texas. Texas Senate Bill 8 (the “Texas Law”), which deputizes private citizens to enforce steep civil

Such laws will inevitably further undermine public trust in law enforcement while entangling these authorities in a deeply personal, political, and divisive issue. As a result, if *Roe* is overturned, the safety and well-being of entire communities will suffer.

1. Laws That Make Abortion A Criminal Offense Endanger The Health of Women And Families

To maintain public trust, officials in the criminal justice system must be dedicated to protecting the safety and well-being of all individuals in the community and seeking equal justice for all. See ABA, *Criminal Justice Standards for the Prosecution Function* §3-1.2(b) (4th ed. 2017). Inviting prosecutors into the doctor's office, and into the middle of very personal family healthcare decisions, undermines these principles.

Overturning or limiting *Roe* will be ineffective and dangerous. Eliminating *Roe* will not end abortion but may instead simply relegate it to less safe and unsupervised settings. Indeed, criminalizing abortions has

penalties against physicians and anybody else who knowingly helps a pregnant person obtain an abortion after six weeks gestation, has already spurred chaos, fear and distrust in the short time it has been in effect as of September 1, 2021. The Texas Law creates a specter that intimate details of a woman's life—including her menstrual cycle, sexual activity, and drug-store purchases that could indicate a pregnancy—might be monitored by neighbors or others in an attempt to recover a civil penalty from the woman's healthcare provider or any family and friends who might take her to the doctor. The justice system would be called on to adjudicate claims arising from such actions, assess penalties, and enforce judgments. Such an ever-present threat of personal monitoring and intrusion is not only Orwellian and un-American, but undermines any trust that young women have that laws and the justice system are in place to protect them.

been shown to have no significant impact on the total number of abortions obtained; regardless of criminalization, women will still terminate unwanted and concerning pregnancies.¹⁵ But overturning or severely limiting *Roe*, and thereby allowing states to ban or further restrict access to abortion, will increase the likelihood that women will obtain unsafe abortions or attempt to end their own pregnancies without clinical support.¹⁶

¹⁵ See e.g., Jonathan Bearak et al. *Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimate From a Comprehensive Model for 1990–2019*, 8 *Lancet Glob. Health* e1152, e1152, e1159 (July 22, 2020) (finding “no evidence that abortion rates were lower in settings where abortion was restricted” because “individuals seek abortion even in [such] settings”); *Unsafe Abortion: Global and Regional Estimate of the Incidence of Unsafe Abortion and Associated Mortality in 2008*, World Health Org. (6th ed. 2011) (finding “women all over the world are highly likely to have an induced abortion when faced with an unplanned pregnancy – irrespective of legal conditions”). Comparable laws in countries criminalizing abortion do very little to reduce the number of abortions because women experiencing unwanted pregnancies will seek abortions in spite of criminal penalties. See Jose Miguel Vivanco, *Criminalization of Abortion Has Failed. It’s Time to End It.*, Human Rights Watch (Jan. 11, 2021), <https://www.hrw.org/news/2021/01/11/criminalization-abortion-has-failed-its-time-end-it>.

¹⁶ David A. Grimes et al., *Unsafe Abortion: The Preventable Pandemic*, 368 *Lancet* 1908, 1909 (2006) (“Abortion-related mortality often happens after a clandestine or illegal procedure, and powerful disincentives discourage reporting.”); Sandro Galea, *What Will Happen to Women’s Health If Abortion Is Banned?*, Boston Univ. Sch. of Pub. Health (May 31, 2019) (“Countries where restrictive laws are currently making the practice less safe do indeed face thousands of deaths related to unsafe abortion. Each year, globally, at least eight percent of global maternal deaths are estimated to have been caused by complications from an unsafe abortion, with as many as 22,800 women dying annually.”); *Unsafe Abortion: A Forgotten Emergency*, Doctors

Additionally, the express criminalization of abortion providers and the threat of criminalization of women seeking abortions may also deter women from seeking medical care and sharing important medical information with their doctors, even in the face of significant health crises. See Heathe Luz McNaughton et al., *Patient Privacy and Conflicting Legal and Ethical Obligations in El Salvador: Reporting of Unlawful Abortions*, 96 Health Pol’y & Ethics 1927, 1927, 1931 (2006) (finding that the reporting of suspected abortion patients to authorities by medical personnel deterred women from consulting physicians and may have contributed to abortion-related morbidity and mortality). For example, if abortion is banned, those who obtain a criminalized abortion or attempt to end a pregnancy without clinical support are likely to be deterred from seeking care if they experience a complication, and from openly sharing their medical history with their healthcare provider.

Moreover, criminalization forces healthcare providers to navigate laws that threaten their liberty and undercut their ethical commitments to the confidentiality and wellbeing of their patients.¹⁷ This operates to the detriment of the individuals in their care. For

Without Borders (Mar. 7 2019) (“The evidence is clear that the number of abortions changes little when there are legal restrictions. Instead, where abortion is most restricted, it is more likely to be unsafe. Where abortion is legal and safe services are available, deaths and disability from abortion are greatly reduced.”).

¹⁷ See also UN Human Rights Committee (HRC), CCPR General Comment 28: Article 3, The Equality of Rights Between Men and Women, U.N. Doc. CCPR/C/21/Rev.1/Add.10, at ¶ 20 (2000) (“States may fail to respect women’s privacy . . . where [they] impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion.”).

example, in Ethiopia, laws allowing abortion in limited circumstances such as rape and incest obligated healthcare workers to assess the credibility of their patients and weigh the best interests of the women against their own fear of prosecution. See Emily McLean et al., *When the Law Makes Doors Slightly Open: Ethical Dilemmas among Abortion Service Providers in Addis Ababa, Ethiopia*, 20 BMC Med. Ethics, no. 50, at 4–6 (2019). And in El Salvador, which also criminalizes abortion, doctors routinely breach patient confidentiality despite widespread recognition that the practice dissuades women from seeking emergency care. See McNaughton, *supra*. If *Roe* is overturned, women in the United States would face similarly fraught relationships with their physicians.

There is every reason to believe that the medical risks of criminalizing abortion will come to fruition if *Roe* is overturned. Existing data show that states with more restrictive abortion laws have worse health outcomes for women and children. *Evaluating Priorities: Measuring Women’s and Children’s Health and Well-Being Against Abortion restriction in the States*, Ibis Reproductive Health (2017).¹⁸ “Infants born in states with three or more restrictive laws were significantly more likely to die before their first birthday than those born in states with no restrictions.” Roman Pabayo et al., *Laws Restricting Access to Abortion Services and Infant Mortality Risk in the United States*, 17 Int’l J. Env’t Res. & Pub. Health, no. 11, 2020, at 10 (2020).¹⁹ Additionally, women who seek but are denied abortions

¹⁸ <https://www.ibisreproductivehealth.org/publications/evaluating-priorities-measuring-womens-and-childrens-health-and-well-being-against>.

¹⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7312072/pdf/ijerph-17-03773.pdf>.

also face disparate long-term health outcomes as compared to women who receive abortions, reporting poorer physical health up to five years after carrying their pregnancy to term.²⁰

International data also show the close relationship between abortion bans and harm to women's health. Indeed, "the 82 countries with the most restrictive abortion legislation are also those with the highest incidence of unsafe abortions and abortion mortality ratios."²¹ Amnesty International has likewise found that "when governments restrict access to abortions, people are compelled to resort to clandestine, unsafe abortions, particularly those who cannot afford to travel or seek private care."²²

Worse still, the damaging repercussions of restricted abortion access would extend to families and children. Most women who receive abortions are already mothers and one third have two or more prior children. Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher

²⁰ Lauren J. Ralph et al. *Self-reported Physical Health of Women Who Did and Did not Terminate Pregnancy after Seeking Abortion Services*, 171 *Annals Internal Med.* 238 (2019), available at https://www.redaas.org.ar/archivos-recursos/470-Ralph%202019_Self-reported%20physical%20health%20of%20women%20who%20did%20and%20did%20not%20terminate%20pregnancy.pdf, at 5–6.

²¹ See Janie Benson et al., *Reductions in Abortion-Related Mortality Following Policy Reform: Evidence from Romania, South Africa and Bangladesh*, 8 *Reprod. Health* no. 39, at 1 (2011), <https://reproductive-healthjournal.biomedcentral.com/articles/10.1186/1742-4755-8-39>.

²² *Key Facts on Abortion*. Amnesty Int'l (2021), <https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts/> (last visited Sept. 2, 2021).

Inst. (2016).²³ Women who are denied abortions are more likely to have difficulty bonding with their infants. Diana Greene Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 *JAMA Pediatrics* 1053, 1056–57 (2018). Both their newborn and existing children are more likely to be raised in poverty and less likely to meet developmental milestones. See *id.*; Diana Greene Foster et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 *J. Pediatrics* 183, 185, 187 (2019). Five years after giving birth, women who were denied abortions were more likely to be raising children alone without family members or partners. Diana Green Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 *Am. J. Pub. Health* 407, 410–11 (2018).

Furthermore, women seeking abortions are more likely to be victims of domestic violence. See Dominique Bourassa & Jocelyn Bérubé, *The Prevalence of Intimate Partner Violence Among Women and Teenagers Seeking Abortion Compared With Those Continuing Pregnancy*, 29 *J. Obstetrics & Gynaecology Can.* 415 (2007) (finding the risk of being a victim of physical or sexual intimate partner violence in the past year was almost four times higher for women seeking elective abortions than for women choosing to continue their pregnancies). Restricting access to clinical abortions would also restrict access to the tools physicians use to help identify and proactively address such violence.

²³ <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>.

And women who are turned away by healthcare providers are more likely to remain with abusive partners—placing them and their children at increased risk of physical violence—compared to women who received an abortion in a medical setting.²⁴

Prosecutors, law enforcement, and other leaders in the criminal justice system must shield communities from these outcomes, not perpetuate them. In fact, it is the sworn duty of these officials to keep their communities safe. *See* ABA, *Criminal Justice Standards for the Prosecution Function* § 3-1.2 (4th ed. 2017). This Court too should consider that overturning *Roe* will undoubtedly cause terrible harm to women and children, harm that can be avoided by simply continuing to enforce a straightforward precedent upon which scores of women have come to rely over the past half century.

2. The Criminalization Of Abortion Will Disproportionately Harm Women Of Color And Low-Income Women

The detrimental health effects of abortion restrictions and bans, as well as the dangers of prosecution, will fall disproportionately upon women of color and

²⁴ Sarah C. M. Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy after Receiving or Being Denied an Abortion*, *BMC Med.* (2014), <https://www.researchgate.net/publication/266263871> ([t]erminating an unwanted pregnancy may allow women to avoid physical violence from the [man involved in the pregnancy (MIP)], while having a baby from an unwanted pregnancy appears to result in sustained physical violence over time;” “women denied abortions were slower to end their romantic relationships with the MIPs than women having abortions,” and “were more likely to have sustained contact with the MIP over time.”).

low-income women. These laws would further jeopardize the safety of marginalized communities already at a higher risk of experiencing violence and incarceration, and where bonds of trust with law enforcement and the justice system are most frayed.²⁵

Policing abortion inherently targets low-income women and women of color. Three out of four abortion patients are poor or low-income and sixty-one percent are women of color. See Jerman, *supra*. Women of color are also more likely to reside in states with the most restrictive abortion laws and will thus face a greater likelihood of prosecution in the event that abortion is criminalized or further restricted. See Jamila Taylor, *Women of Color Will Lose the Most if*

²⁵ See, e.g., Gregory M. Zimmerman & Steven F. Messner, *Individual, Family Background, and Contextual Explanations of Racial and Ethnic Disparities in Youths' Exposure to Violence*, 103 Am. J. Pub. Health 435, 438–39 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673502/> (finding the likelihood of being exposed to violence was 74% and 112% higher for Hispanic and Black youth, respectively, than for Whites); Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justiceracial-and-ethnic-disparity-in-state-prisons> (finding that Black and Hispanic individuals were incarcerated at rates 5.1 and 1.4 times higher, respectively, than their White counterparts); Bailey Gray et al., *Return to Nowhere: The Revolving Door Between Incarceration and Homelessness*, Tex. Crim. Just. Coal., 6 (2019) (finding adults in poverty are three times more likely to be arrested than adults above the poverty line); U.S. Dep't of Hous. & Urban Dev., *Neighborhoods and Violent Crime*, (2016) <https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html> (finding that neighborhoods with higher poverty rates tend to have higher rates of violent crime).

Roe v. Wade *Is Overturned*, Ctr. for Am. Progress, (Aug. 23, 2018).²⁶

Moreover, unlike wealthier women, travel to less restrictive states is not necessarily possible for low-income women, who are also disproportionately women of color. These women in particular are less able to afford the expenses associated with such travel including lost wages, and costs for childcare, transportation, and accommodations that are required for them to travel out of state to seek an abortion. This burden is more than a mere inconvenience and, for some, will serve to bar access to a clinical or medically supervised abortion.²⁷ The inability to access an abortion due to restrictions would entrench the economic disparities that the vast majority of women seeking abortions already face, quadrupling the odds that their household income will remain below the poverty line.²⁸ See Diana Greene Foster, *Op-Ed: Restricting Access to*

²⁶ <https://www.americanprogress.org/issues/women/news/2018/08/23/455025/women-color-will-lose-roe-v-wade-overturned/>.

²⁷ For example, for women covered by Medicaid—the primary health insurance option for low-income Americans—abortion costs must be paid out-of-pocket; under the Hyde Amendment, federal funding cannot be used for abortion coverage. Guttmacher Inst., *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, (July 14, 2016), <https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters>.

²⁸ One study found that over half of women who received an abortion paid the equivalent of more than one-third of their monthly personal income in out-of-pocket costs alone. Guttmacher Inst., *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*. Those who received later abortions paid closer to two-thirds of their monthly pay. *Ibid.* Limiting supply through restrictive access would only further increase the cost and disproportionate burden of obtaining an abortion.

Abortion Makes Poor Women Poorer, L.A. Times (Jan. 22, 2018).²⁹

3. Overturning *Roe*, A Precedent That Has Been Settled For Nearly 50 Years, Will Erode Trust In Our Legal Systems

The Court's precedent has held for nearly 50 years that women have the right to make decisions about their own medical care, including whether to seek an abortion.³⁰ *Stare decisis* not only provides citizens with predictability in the law, it also "contributes to the actual and perceived integrity" of the legal system. *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991). Overturning *Roe* will undermine the legal system's integrity and create significant uncertainty. The Mississippi law at issue would not only eradicate a "woman's right to terminate her pregnancy before viability"—a constitutional right that this Court has recognized for decades—but would open the door to criminalization of abortion and upset settled expectations of "entire generation[s]" of society that "ha[ve] come of age 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, 871; 505 U.S. at 924 (Blackmun, J. concurring in part and dissenting in part).

²⁹ <https://www.latimes.com/opinion/op-ed/la-oe-foster-abortion-socioeconomic-impact-20180122-story.html>.

³⁰ See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Bryant v. Woodall*, 1 F.4th 280 (4th Cir. 2021); *Whole Woman's Health v. Paxton*, 978 F.3d 896 (5th Cir. 2020).

Departing from legal precedent or even significantly weakening it will invite further chaos and uncertainty, including misapplication and disparate application of trigger bans and other abortion restrictions across jurisdictions. Research shows that individuals associate inconsistent enforcement of laws with weakness of institutional character and lack of integrity; together, these beliefs erode community trust in institutions. See Goldsmith, *supra*. Moreover, low income and communities of color may already have diminished trust in law enforcement. The disproportionate enforcement of anti-abortion laws against these communities would only exacerbate an already strained relationship of trust. See Nancy La Vigne et al., *How Do People in High-Crime, Low-Income Communities View the Police?*, Urb. Inst. (2017); Robin Smyton, *How Racial Segregation and Policing Intersect in America*, Tufts Now (June 17, 2020).³¹

Overturing or significantly weakening *Roe* and its progeny would also cause new and untenable legal questions to arise. For example, how will abortion bans treat victims of sex crimes? Even states whose bans make exceptions for sex crime victims will need to grapple with this issue. For victims of child molestation, rape, incest, human trafficking, or domestic violence—many of whom experience long-term trauma—the process of reporting can be re-traumatizing.³² And

³¹ https://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf; <https://now.tufts.edu/articles/how-racial-segregation-and-policing-intersect-america>.

³² Robert T. Muller, *Rape Victims' Reactions Misunderstood by Law Enforcement*, Psych. Today (Jan. 11, 2019), <https://www.psychologytoday.com/us/blog/talking-about-trauma/201801/rape-victims-reactions-misunderstood-law-enforcement>; Starre Vartan, *The Lifelong Consequences of Rape*, Pac. Standard, (June 14,

laws with sex crime exceptions may fail to account for victims who may not report an incident of sexual assault within the laws' specified time, or at all. Thus, these victims will be forced to live with the choice of reporting and disclosing the details of their sexual assault—and subjecting themselves to law enforcement inquiry and potential criminalization—or risk being connected to their abuser for life because their abuser impregnated them against their will.

Even where statutes are enacted that “clearly” criminalize abortion providers, questions will remain about who is implicated: doctors, nurses, medical assistants, receptionists at the practice, or all of the above? In addition, criminalizing abortion providers has the potential of turning the advice and care of healthcare professionals and prenatal healthcare appointments into an area of sensitive and unwarranted inquiry for law enforcement. This is even the case for inchoate offenses that would not require completion of the underlying offense of abortion. It will be unclear what information a patient can share with her doctor without subjecting the doctor, and the patient herself, to law enforcement inquiry.

Thus, the harms caused by laws criminalizing abortion are far-reaching. They undercut the welfare of women and families, exacerbate the inequalities in communities, and trade established precedent for uncertainty. Worse, they shake public confidence in judges, prosecutors, and law enforcement to remedy these wrongs.

2017), <https://psmag.com/social-justice/lifelong-consequences-rape-96056>.

III. Criminalization Will Divert Limited Resources Away From Protecting Communities

With an inherently limited pool of resources at their disposal, prosecutors must carry out their obligations to “put the rights and interests of society in a paramount position” in addressing crimes,³³ and to “increase public safety . . . by pursuing appropriate criminal charges of appropriate severity.”³⁴ In other words, prosecutors should focus on crimes that cause the greatest harm to communities—crimes which reduce safety or threaten the livelihood of members of society.

Given that abortion bans and the potential for criminalization of these decisions harms everyone involved, prosecution of abortion is not a wise or effective use of public safety resources.³⁵ Instead, these resources are better utilized to prevent and address serious crimes that impact society rather than enforcing laws that divide communities, create untenable choices for women and healthcare providers, and erode trust in the justice system.

The potential criminalization and prosecution of abortions will also undermine the legitimacy and

³³ Nat’l Dist. Attys. Ass’n, Nat’l Prosecution Standards § 1-1.2 (3d. ed. 2009).

³⁴ ABA, Criminal Justice Standards for the Prosecution Function § 3-1.2 (4th ed. 2017).

³⁵ See Joint Statement From Elected Prosecutors, Fair and Just Prosecution (Oct. 2020) (“The wise exercise of discretion suggests focusing prosecutorial resources on the child molester or rapist, and not on prosecuting the victim herself, or the healthcare professionals who provide that victim with needed care and treatment.”), <https://fairandjustprosecution.org/wp-content/uploads/2020/10/Joint-Statement-from-Elected-Prosecutors-on-Abortion-Laws-10-14-20.pdf>.

efficacy of the justice system. Taxpayers whose incomes are used to fund these endeavors may lose faith that their dollars are being appropriately spent. Courts will be harmed with further case congestion and strain on judicial resources.³⁶ Yet, numerous states have indicated the intent to criminalize abortion if *Roe* is overturned.³⁷ Criminalization will pull critical resources from prosecuting serious crimes for the benefit of communities, and direct them toward an endeavor with no empirically verified benefit to society.³⁸

³⁶ Mississippi is particularly susceptible to this harm. For example, the National Center for State Courts standard indicates that 75% of cases should conclude within 90 days, 90% within 180 days, and 98% within one year. But the Mississippi Hinds County Circuit Court resolves only 9% of felonies in 90 days, 14% in 180 days, and 55% within 365 days. The Mississippi Supreme Court has suggested that felony prosecutions be concluded within 270 days of arraignment; yet, the average time in Hinds County in 2014 between indictment and disposition for closed was 775 days. See Case-Processing Times, at 7 BOTEK Analysis Corp. (Nov. 2015), <https://jacksonfreepress.media.clients.ellingtoncms.com/news/documents/2019/09/09/Case-Management-Report-FINAL-DESIGNED.pdf>.

³⁷ Emma Batha, *U.S. States Making 2021 Moves on Abortion Rights and Access*, Thomas Reuters Found. News (Sept. 1, 2021), <https://news.trust.org/item/20201231112641-qfynt/>; see also Michelle Lou, *Alabama Doctors Who Perform Abortions Could Face Up to 99 Years in Prison – The Same as Rapists and Murderers*, CNN (May 15, 2019), <https://www.cnn.com/2019/05/15/us/alabama-abortion-law-felony-trnd/index.html>.

³⁸ Some prosecutors may attempt to preserve their resources by declining charges in certain cases or diverting others to alternative programs. But even this exercise of discretion will not cure the drain on resources. Screening and processing cases for alternative dispositions is itself a process that consumes considerable time and resources. Further, in the absence of *Roe*, states could pass laws that require prosecutors to file lawsuits in order to vindicate individuals' rights. The Texas Law has already

Rather than end the “national fever on abortion”³⁹ overturning *Roe* would only intensify the heated political debate and shift the battle to the State and local arena. Indeed, overturning *Roe*, and the subsequent debates around implementation and potential criminalization of abortion, could consume the focus of elected prosecutors and law enforcement leaders in ways that would crowd out other pressing public safety issues.

CONCLUSION

Upending *Roe* will entangle our criminal justice system in a chaotic regime that will contravene the role and duty of prosecutors and law enforcement leaders to protect the safety and well-being of our communities. Criminalizing abortion—which will happen in many states if *Roe* is gutted—will severely harm vulnerable women, their families, and the healthcare providers who serve them. And such an about-face in the law resulting from the failure to adhere to *stare decisis* will seriously threaten the public’s faith in the impartiality and legitimacy of the criminal legal system.

This Court should decline to embroil our law enforcement institutions in a personal and divisive issue that will detract from the ability of law enforcement and criminal justice leaders to work with and seek the cooperation of the community in our joint effort to promote public safety. It will force leaders such as *amici* to navigate uncharted waters that could divert limited resources to investigating, prosecuting

invited a U.S. Department of Justice complaint. See Complaint, *United States v. State of Texas*, No. 1:21-cv-796 (W.D. Tex. 2021).

³⁹ Pet. Br. at 24.

and criminalizing healthcare decisions that are best left in the medical— not the criminal justice—arena.

Roe has been the law of the land for nearly 50 years. Keeping it in place will protect the health and safety of women and children, and help safeguard the integrity of our nation’s law enforcement and criminal legal institutions.

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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September 20, 2021

APPENDIX

**APPENDIX: LIST OF *AMICI*—CURRENT AND
FORMER PROSECUTORS AND LAW
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AND STATE COURT JUDGES,
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District Attorney, Santa Clara County, California

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