

No. 19-1392

In The
Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H.,
IN HIS OFFICIAL CAPACITY AS STATE
HEALTH OFFICER OF THE MISSISSIPPI
DEPARTMENT OF HEALTH, ET AL., PETITIONERS

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

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

**BRIEF FOR LGBTQ ORGANIZATIONS
AND ADVOCATES AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

SHANNON MINTER
JULIANNA GONEN
NATIONAL CENTER FOR
LESBIAN RIGHTS
1300 Pennsylvania Ave., NW
Washington, DC 20004

CAMILA A. TAPERNOUX
RACHEL S. DOLPHIN
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94105

DEANNE E. MAYNARD
Counsel of Record
BRIAN R. MATSUI
ADAM L. SORENSEN
MORRISON & FOERSTER LLP
2100 L St., NW, Ste. 900
Washington, DC 20037
(202) 887-8740
dmaynard@mofocom

JAMIE A. LEVITT
JAMES E. HOUGH
KATIE L. VIGGIANI
MORRISON & FOERSTER LLP
250 West 55th St.
New York, NY 10019

Counsel for Amici Curiae

SEPTEMBER 2021

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTERESTS OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	16
ARGUMENT	18
I. OVERRULING <i>ROE</i> AND <i>CASEY</i> WOULD CAUSE SERIOUS HARM TO SEXUAL MINORITY WOMEN.....	18
A. Sexual Minority Women Are At Least As Likely As Other Women To Experience Unintended Pregnancies, In Part Due To Elevated Rates Of Sexual Violence.....	19
B. Economic And Social Barriers Often Prevent Sexual Minority Women From Obtaining Contraceptive Care, Which Also Increase Their Risk Of Unintended Pregnancies	23
C. Mississippi’s Law Harms Sexual Minority Women.....	25
II. <i>ROE</i> AND <i>CASEY</i> ARE CONSISTENT WITH IMPORTANT AND LONG-RECOGNIZED CONSTITUTIONAL PRINCIPLES.....	28

TABLE OF CONTENTS—Continued

A. Overturning <i>Roe</i> And <i>Casey</i> Would Undermine The Consistency And Coherence Of Other Individual Rights And Equality Decisions	28
B. Forcing Sexual Minority Women To Undergo Pregnancy And Childbirth Against Their Will Is A Form Of Subordination That Undermines Their Equal Citizenship	30
C. Pre-Viability Bans On Abortion Are Impermissible Sex Discrimination.....	33
CONCLUSION.....	35

TABLE OF AUTHORITIES

CASES

<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	28
<i>Bostock v. Clayton Cnty.</i> , 140 S. Ct. 1731 (2020)	27, 33
<i>Brown v. Bd. of Ed. of Educ.</i> , 347 U.S. 483 (1954)	18, 28
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	28
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	30
<i>Geduldig v. Aiello</i> , 417 U.S. 484 (1974)	34
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	28
<i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007)	31
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	27, 28, 29
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	28
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	28
<i>Nev. Dep't of Human Res. v. Hibbs</i> , 538 U.S. 721 (2003)	33
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015)	27, 28, 29, 30, 31

TABLE OF AUTHORITIES—Continued

<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991)	17, 19
<i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 505 U.S. 833 (1992)	16, 17, 18, 19, 28, 28, 30, 31, 34
<i>Ramos v. Louisiana</i> , 140 S. Ct. 1390 (2020)	18, 28
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	32
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	16, 17, 18, 19, 28, 29, 30, 34
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	32, 33, 34
<i>United States v. Windsor</i> , 570 U.S. 744 (2013)	31
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943)	18, 28

OTHER AUTHORITIES

Madina Agénor et al., <i>Sexual Orientation and Sexual and Reproductive Health among Afri- can American Sexual Minority Women in the U.S. South</i> , 26 WOMEN’S HEALTH ISSUES, no. 6, 2016	24
--	----

TABLE OF AUTHORITIES—Continued

Susan M. Blake et al., <i>Teen Pregnancy Preventing Sexual Risk Behaviors Among Gay, Lesbian, and Bisexual Adolescents: The Benefits of Gay-Sensitive HIV Instruction in Schools</i> , AM. J. PUBLIC HEALTH, June 2001, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446472/pdf/11392938.pdf	21
Bixby Ctr. for Global Reproductive Health, <i>The Turnaway Study</i> (2020), https://www.ansirh.org/sites/default/files/publications//_study_brief_web.pdf	26, 31
Thomas Buchmueller & Christopher S. Carpenter, <i>Disparities in Health Insurance Coverage, Access, and Outcomes for Individuals in Same-Sex Versus Different-Sex Relationships, 2000-2007</i> , AM. J. PUBLIC HEALTH, Mar. 2010.....	23
Centers for Disease Control and Prevention, <i>Key Statistics from the National Survey of Family Growth: Sexual identity, attraction, and activity</i> (2018).....	16
Dep't of Justice, Office for Victims of Crime, <i>Responding to Transgender Victims of Sexual Assault: The Numbers</i> (2014), https://ovc.ojp.gov/sites/g/files/xyckuh226/////sexual-assault.pdf	22
Bethany G. Everett & Stefanie Mollborn, <i>Examining Sexual Orientation Disparities in Unmet Medical Needs Among Men and Women</i> , POPUL. RES. POLICY REV., Aug. 2014	24

TABLE OF AUTHORITIES—Continued

Bethany G. Everett et al., <i>Sexual Orientation Disparities in Mistimed and Unwanted Pregnancy Among Adult Women</i> . PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, Sept. 2017	20
Bethany G. Everett et al., <i>Unintended Pregnancy, Depression, and Hazardous Drinking in a Community-Based Sample of Sexual Minority Women</i> , 25 J. WOMEN'S HEALTH, no. 9, 2016	21
Diana Greene Foster et al., <i>Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the United States</i> , AM. J. PUBLIC HEALTH, Mar. 2018	25
A. Francis et al., <i>Contraceptive Challenges and the Transgender Individual</i> , 4 WOMEN'S MIDLIFE HEALTH, no. 12, 2018, https://womensmidlifehealthjournal.biomedcentral.com/track/pdf/10.1186/s40695-018-0042-1.pdf	25
Caroline Sten Hartnett et al., <i>Congruence Across Sexual Orientation Dimensions and Risk for Unintended Pregnancy Among Adult U.S. Women</i> , 27 WOMEN'S HEALTH ISSUES 145 (2017)	20
Jenny A. Higgins et al., <i>Sexual Minority Women and Contraceptive Use: Complex Pathways between Sexual Orientation and Health Outcomes</i> , AM. J. PUB. HEALTH, Dec. 2019	24
S. E. James et al., <i>Executive Summary of the Report of the 2015 U.S. Transgender Survey</i> (2017)	25

TABLE OF AUTHORITIES—Continued

Michelle M. Johns et al., Centers for Disease Control and Prevention, <i>Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017</i> , Morbidity and Mortality Weekly Report, Jan. 25, 2019, https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf	22
Janelle Jones, U.S. Dep’t of Labor Blog, <i>5 Facts About the State of the Gender Pay Gap</i> (Mar. 19, 2021), https://blog.dol.gov/2021/03/19/5-facts-about-the-state-of-the-gender-pay-gap	31, 32
Rachel K. Jones et al., <i>Sexual Orientation and Exposure to Violence Among U.S. Patients Undergoing Abortion</i> , OBSTET. & GYNECOL., Sept. 2018	22, 26
Shabab Ahmed Mirza & Caitlin Rooney, Ctr. for Am. Progress, <i>Discrimination Prevents LGBTQ People from Accessing Health Care</i> (Jan. 18, 2018), https://www.americanprogress.org/issues/lgbt/news/01/18/445130/discrimination-prevents-lgbtq-people-health-care	24
Heidi Moseson et al., <i>Abortion Experiences of Transgender, Nonbinary, and Gender-Expansive People in the United States</i> , 224 AM. J. OBSTETRICS & GYNECOLOGY 376 (2021)	20
Gabriel R. Murchison et al., <i>School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth</i> , PEDIATRICS, June 2019	23

TABLE OF AUTHORITIES—Continued

Lauren J. Ralph et al., <i>Self-reported Physical Health of Women Who Did and Did Not Terminate Pregnancy After Seeking Abortion Services: A Cohort Study</i> , 20 ANNALS OF INTERNAL MED., no. 171, Aug. 20, 2019, https://www.acp-journals.org/doi/10.7326/m18-1666	26
Sarah CM Roberts et al., <i>Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion</i> , 12 BMC MED., no. 144, Sept. 29, 2014, https://bmcmmedicine.biomedcentral.com/track/pdf/10.1186/s12916-014-0144-z.pdf	26
Reva B. Siegel, <i>The Pregnant Citizen, from Suffrage to the Present</i> , 108 GEO. L.J. 167 (2020)	34
Cynthia Stoffel et al., <i>Family Planning for Sexual Minority Women</i> , SEMIN. REPROD. MED., Sept. 2017	21
Barbara G. Valanis et al., <i>Sexual Orientation and Health: Comparisons in the Women's Health Initiative Sample</i> , ARCHIVES OF FAMILY MED., Sept.–Oct. 2000	20

INTERESTS OF AMICI CURIAE¹

Amici are organizations and advocates dedicated to protecting the rights and liberties of minorities, including lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. They have substantial expertise in the lived realities of LGBTQ people, including their need for reproductive health care, and their ongoing quest for full equal citizenship. Many have litigated the foundational cases recognizing the constitutional rights of this community. The amici joining this brief are:

Bay Area Lawyers for Individual Freedom

Bay Area Lawyers for Individual Freedom (BALIF) is the nation's oldest and largest association of lesbian, gay, bisexual, and transgender (LGBTQI) persons in the field of law. Founded in 1980, BALIF represents its members' interests in the wider San Francisco Bay Area; takes action on questions of law and justice that affect the LGBTQI community; strengthens professional and social ties among LGBTQI members of the legal profession; builds coalitions with other legal organizations to combat all forms of discrimination; funds scholarships for LGBTQI law students and fellowships for public interest lawyers working on LGBTQI issues; and provides a forum for

¹ No counsel for a party authored this brief in whole or in part, and no person other than amici or its counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of amicus briefs.

the exchange of ideas and information of concern to members of the LGBTQI legal community. BALIF also submits amicus briefs in cases affecting the LGBTQI community, sponsors resolutions to the Conference of Delegates of California Bar Associations, provides LGBTQI-focused continuing legal education opportunities, and endorses candidates for judicial offices and legal elected positions.

Council for Global Equality

The Council for Global Equality brings together international human rights activists, foreign policy experts, LGBT and intersex leaders, philanthropists and corporate officials to encourage a clearer and stronger American voice on human rights concerns impacting LGBT communities around the world. The Council for Global Equality is a dedicated coalition effort. Its institutional members include many of the most prominent organizations working to promote human rights and LGBT equality in the United States and overseas. This unique collaboration joins the respective expertise and positioning of LGBT and non-LGBT organizations; domestically-focused and internationally-focused organizations; as well as advocacy groups, think tanks, multinational corporations, and research organizations.

Equality California

Equality California is a 501(c)(4) nonprofit organization that works to achieve full, lived LGBTQ+ equality by electing pro-equality leaders, passing pro-equality legislation and fighting for LGBTQ+ civil

rights and social justice in the courtroom. With over 900,000 members, Equality California is the nation's largest statewide LGBTQ+ civil rights organization. Equality California brings the voices of LGBTQ+ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ+ people. It advances civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those it serves.

Equality Federation

Equality Federation is an advocacy accelerator rooted in social justice, building power in its network of state-based lesbian, gay, bisexual, transgender, and queer (LGBTQ) advocacy organizations. In 1997, these organizations came together to harness their collective knowledge and power. Since then, Equality Federation (Institute) has become the leading movement builder, national network, and strategic partner to its 40+ member organizations. Collectively, its member network mobilizes more than 2 million supporters across the country to advance equality and justice. Equality Federation works collaboratively on critical issues—from advancing workplace fairness and family recognition to defeating anti-transgender bathroom bans and HIV criminalization laws—that affect how LGBTQ people experience the world from cradle to grave. Together with its partners, Equality Federation works on cross-cutting issues such as racial equity, reproductive justice, and immigration.

Equality North Carolina

Equality North Carolina (ENC) is the oldest statewide organization in the country dedicated to securing rights and protections for the LGBTQ community. ENC's long-term goal is to enact statewide nondiscrimination on the basis of sexual orientation, gender identity & expression in housing, employment, public accommodations, credit, insurance, and education without exemptions that treat LGBTQ people differently from other protected groups. ENC provides training and education to individuals, institutions, businesses and the government on how to provide diverse, inclusive, and equitable environments. Additionally, it works to mobilize communities and partners to advocate and take action against discriminatory practices.

Family Equality

Family Equality's mission is to advance legal and lived equality for LGBTQ families, and for those who wish to form them, through building community, changing hearts and minds, and driving policy change. It connects LGBTQ+ families, prospective parents, and youth with community across the country. It provides important education about LGBTQ+ paths to parenthood for community members and professionals. It helps LGBTQ+ families and its allies advocate for legal and lived equality through state and national campaigns. It organizes LGBTQ+ families, providing opportunities to speak out and take action. Family Equality envisions a future where all LGBTQ families,

regardless of creation or composition, live in communities that recognize, respect, protect, and value them.

GLBTQ Legal Advocates and Defenders

Through strategic litigation, public policy advocacy, and education GLBTQ Legal Advocates & Defenders (GLAD) has worked for almost four decades in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. Using impact litigation, legislative lawyering, and public education, GLAD will achieve legal progress on the broad range of challenges facing the entire LGBTQ community, including: ending discrimination at work, at home, and in public spaces; blocking the counter-movement, including improper religiously-based discrimination; expanding protections for all families, no matter how they are formed; fighting HIV discrimination and stigma; increasing legal rights and protections for transgender people; promoting the safety and well-being of all LGBTQ youth; and ensuring that LGBTQ older adults are treated with fairness and dignity.

Human Rights Campaign

Representing more than three million members and supporters, the Human Rights Campaign (HRC) strives to end discrimination against LGBTQ+ people and realize a world that achieves fundamental fairness and equality for all. HRC envisions a world where lesbian, gay, bisexual, transgender and queer people plus community members who use different language to describe identity are ensured equality and embraced as

full members of society at home, at work, and in every community.

LPAC Action Network

LPAC Action Network is the only national organization whose mission is to build the political power of lesbian, gay, bisexual, transgender, and queer women. LPAC endorses and invests in LGBTQ women candidates, conducts research into issues that impact LGBTQ women, and leads social welfare advocacy campaigns to benefit the community and promote the values of women's rights, LGBTQ rights, and social justice. Founded as a Federal PAC in 2012, LPAC has expanded to support LGBTQ women candidates at the local, state, and federal levels, and launched non-profit and social advocacy arms to diversity representation at all levels of government. With the ongoing assault on women's rights in the states, LPAC believes it is more important than ever to support elected officials and candidates who put women's protections front and center.

Mazzoni Center

Founded in 1979, Mazzoni Center is a non-profit multi-service, community-based health care and social service provider in Philadelphia, Pennsylvania. Mazzoni Center's mission is to provide quality comprehensive health and wellness services in an LGBTQ-focused environment, while preserving the dignity and improving the quality of life of the individuals it serves. With the onset of HIV/AIDS in 1981, the agency responded by incorporating HIV care and prevention

services and continues to design and implement numerous programs and services to combat HIV/AIDS. In 2003, the organization opened its primary care medical practice, which has since become a cornerstone of its services. Through continued growth, Mazzoni Center currently offers a full continuum of services to Philadelphia's LGBTQ communities, serving more than 33,000 individuals annually through primary medical care (including family planning and abortion services), mental health counseling, substance abuse treatment services, legal services, HIV prevention and care, youth support in schools, professional development, and LGBTQ competency training.

Minority Veterans of America

Minority Veterans of America (MVA) is a non-partisan, 501(c)(3) non-profit organization that was designed to create belonging and advance equity and justice for underrepresented veterans, including women, veterans of color, LGBTQ-identifying veterans, and (non)religious minorities. MVA's advocative efforts are driven by the certainty that effectively supporting the nation's minority veterans begins with the recognition that at the heart of the problem lies social and structural inequities. MVA advocates for community and systemic change to equitably serve all veterans. Often, minority veterans have lower socioeconomic status and opportunity when compared to their non-minority counterparts. Healthcare access disparities exist for veterans based on their sex, gender, and race. MVA aims to rectify such disparities by working to guarantee access to IVF and surrogacy programs,

abortion and contraception, and gender confirmation surgery through VA for veterans.

Movement Advancement Project

Founded in 2006, the Movement Advancement Project (MAP) is an independent, nonprofit think tank that provides rigorous research, insight and communications that help speed equality and opportunity for all. MAP's mission is to provide independent and rigorous research, insight and communications that help speed equality and opportunity for all. MAP works to ensure that all people have a fair chance to pursue health and happiness, earn a living, take care of the ones they love, be safe in their communities, and participate in civic life.

National Center for Lesbian Rights

The National Center for Lesbian Rights (NCLR) is a national legal nonprofit organization founded in 1977 and committed to advancing the rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families through litigation, public policy advocacy, and public education. NCLR represented six plaintiffs in the 2015 cases before this Court that resulted in the recognition of marriage equality for same-sex couples. NCLR is dedicated to working toward full gender equality and ensuring the rights of all people to reproductive and bodily autonomy, as well as access to essential reproductive health care services.

National Center for Transgender Equality

The National Center for Transgender Equality (NCTE) was founded in 2003 to advance justice, opportunity, and well-being for transgender people through education and advocacy. NCTE works with policymakers and communities around the country to develop fair and effective public policy on issues that affect transgender people’s daily lives, including health care. Today, NCTE partners with local and issue-expert organizations to act beyond matters that *only* affect LGBTQ+ people (like conversion therapy), to include issues that *also* affect them (like reproductive rights)—often disproportionately. LGBTQ+ people and their allies have always known injustice, but not simply because of the sexual orientation or gender. They are also women, people of color, workers, immigrants, people living with HIV/AIDS, religious minorities, and more. LGBTQ+ people and their allies stand at a unique intersection of multiple identities giving them a unique perspective, and with it, a unique responsibility to act for Justice.

National Equality Action Team

The National Equality Action Team (NEAT) builds collaborative actions and partnerships so anyone, anywhere, can fight for lesbian, gay, bisexual, transgender, and queer (LGBTQ+) justice everywhere. We believe in education and advocacy that is grassroots, intersectional, locally driven, and accessible. NEAT is built on the 20 years of experience of Marriage Equality New York and Marriage Equality USA in grassroots,

collective action and education that empowered LGBTQ+ people and their allies to win marriage equality in the United States.

The National LGBTQ+ Bar Association

Founded over thirty years ago by a small group of family law practitioners at the height of the HIV/AIDS crisis, the National LGBTQ+ Bar Association (“the LGBTQ+ Bar”) is a national association of lawyers, judges and other legal professionals, law students, activists, and affiliated lesbian, gay, bisexual, and transgender legal organizations that promotes justice in and through the legal profession for the LGBTQ+ community in all its diversity. As an official affiliate of the American Bar Association, the LGBTQ+ Bar has worked to prohibit discrimination against jurors on the bases of sexual orientation or gender identity or expression, and curtail the availability and effectiveness of the “LGBTQ+ panic” defense. The LGBTQ+ Bar has also submitted comments and signed on to many amicus briefs in cases concerning LGBTQ+ issues or issues of discrimination.

Sexuality Information and Education Council of the United States

The Sexual Information and Education Council of the United States (SIECUS) is a national, nonprofit organization dedicated to affirming that sexuality is a natural and healthy part of life. SIECUS develops, collects, and disseminates information, promotes comprehensive education about sexuality, and advocates for the right of individuals to make responsible sexual

choices. SIECUS asserts that sexuality is a fundamental part of being human, one worthy of dignity and respect. SIECUS advocates for the rights of all people to accurate information, comprehensive sexuality education, and the full spectrum of sexual and reproductive health services. SIECUS works to create a world that ensures social justice inclusive of sexual and reproductive rights. SIECUS envisions an equitable nation where all people receive comprehensive sexuality education and quality sexual and reproductive health services affirming their identities, thereby ensuring their lifelong health and well-being.

Transgender Law Center

Transgender Law Center (TLC) is the largest national trans-led organization advocating for a world in which all people are free to define themselves and their futures. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming people alive, thriving, and fighting for liberation. Founded in 2002, TLC has grown into the largest trans-specific, trans-led organization in the United States. Its advocacy and precedent-setting litigation victories—in areas including employment, prison conditions, education, immigration, and healthcare—protect and advance the rights of transgender and gender nonconforming people across the country. Through TLC’s organizing and movement-building programs, TLC assists, informs, and empowers thousands of individual community members a year and

builds towards a long-term, national, trans-led movement for liberation.

Transgender Legal Defense and Education Fund, Inc.

Transgender Legal Defense and Education Fund (TLDEF) is a non-profit organization that advocates on behalf of transgender and non-binary people across the United States. TLDEF is committed to ensuring that law and policy permit full, lived equality for the transgender and non-binary community. TLDEF seeks to coordinate with other civil rights organizations to address key issues affecting transgender people in the areas of employment, healthcare, education and public accommodations and provides public education on transgender rights.

U.S. People Living With HIV Caucus

The U.S. PLHIV Caucus (also known as “the HIV Caucus” or “Caucus”) is comprised of organizations, coalitions, networks or client groups of people living with HIV, (“institutions”) and independent advocates living with HIV. The HIV Caucus collectively speaks with a unified voice for people living with HIV in the United States. At present the HIV Caucus is an unincorporated association of interested parties and does not have a corporate non-profit status.

The Whitman-Walker Institute

The Whitman-Walker Institute provides research, education and public policy advocacy in partnership with Whitman-Walker Health, a Federally Qualified

Health Center in Washington, D.C. Whitman-Walker Health offers primary care, LGBTQ specialty care, and HIV specialty care, to individuals and families in the District of Columbia, Northern Virginia, Suburban Maryland, and other parts of the Mid-Atlantic Region. The Whitman-Walker Institute has been on the frontlines of groundbreaking research and policy work. Whitman-Walker's policy team works with health care providers, researchers, and with local and national advocacy groups on a range of issues important to LGBTQ health, the continuing fight against HIV, and healthcare reform. Whitman-Walker aims to undo structural barriers to good health and wellbeing through new policy ideas, public and policymaker education, strategic partnerships, and litigation. Whitman-Walker Health and Institute have also been at the forefront of the legal fight against LGBTQ discrimination by health care providers and insurance plans—from bringing numerous individual discrimination cases; to providing important input into the Obama Administration's nondiscrimination rule under the Affordable Care Act; to fighting recent attempts to cut back on the Obama Administration's rule; to participating in litigation that has vacated an HHS rule authorizing conscience-based discrimination by health care providers, staff and insurance plans.

Evan Wolfson
Founder, Freedom to Marry

Evan Wolfson founded and led Freedom to Marry, the campaign that won marriage equality in the United States, and is widely considered the architect

of the movement that led to nationwide victory in 2015. In 1983, Wolfson wrote his Harvard Law School thesis on gay people and the freedom to marry. During the 1990s he served as co-counsel in the historic Hawaii marriage case that launched the ongoing global movement for the freedom to marry, and has participated in numerous gay rights and HIV/AIDS cases. Wolfson earned a B.A. in history from Yale College in 1978; served as a Peace Corps volunteer in a village in Togo, West Africa; and wrote the book, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry*, published by Simon & Schuster in July 2004. Citing his national leadership on marriage and his appearance before this Court in *Boy Scouts of America v. James Dale*, the National Law Journal in 2000 named Wolfson one of “the 100 most influential lawyers in America.” Newsweek/The Daily Beast dubbed Wolfson “the godfather of gay marriage” and Time Magazine named him one of “the 100 most influential people in the world.” In 2012, Wolfson received the Barnard Medal of Distinction alongside President Barack Obama.

The Woodhull Freedom Foundation

Established in 2003, Woodhull Freedom Foundation (Woodhull) is a 501(c)(3) non-profit organization devoted to education and public advocacy centered on protecting the fundamental human right to sexual freedom. Woodhull works in partnership with activists and advocacy organizations, forming collaborative partnerships across the United States to fight the political, social, and economic forces working to repress

sexual freedom. Woodhull believes that broad recognition of the human right to sexual freedom will lead to a healthier, more humane society and support the creation of a more just, compassionate, and sustainable world. Woodhull assiduously cultivates allies and builds coalitions linking a broad range of communities to more effectively promote public policies that protect and affirm the fundamental human right to sexual freedom.

INTRODUCTION AND SUMMARY OF ARGUMENT

People rely on this Court’s decisions. They rely on the stability of the law, as this Court rarely re-trenches on past precedent regarding fundamental rights and equality. Respondents ably demonstrate that bedrock principles of stare decisis strongly counsel against overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992). Amici support that position and wish to emphasize the vital importance of those decisions to sexual minority women—women who have same-sex partners or identify as lesbian, gay, bisexual, queer, or otherwise non-heterosexual.² According to the CDC, one in twelve women in the United States between the ages of 18 and 44 is a sexual minority. Centers for Disease Control and Prevention, *Key Statistics from the National Survey of Family Growth: Sexual identity, attraction, and activity* (2018).

Stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to

² This brief uses the term “sexual minority women” to refer to women who identify as something other than heterosexual. Many women who become pregnant are heterosexual, but that is not true for all. Some are bisexual. Some are lesbians who become pregnant either through sexual violence or by engaging in reproductive sex. In addition, some individuals who become pregnant do not identify as women, but as transgender or nonbinary (i.e., people identified as female at birth but who now identify as male or who do not identify as either male or female).

the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). This Court does not overrule its constitutional precedents lightly. And when asked to do so, it carefully considers the real-world consequences its decision would have on those who have come to rely on the challenged ruling, especially those who are most likely to experience significant harms from a change in the law.

Overruling *Roe* and *Casey* would have catastrophic effects on sexual minority women. Lesbian, bisexual, and other non-heterosexual women are at least as likely as other women to experience unintended pregnancies and to require abortion care. Sexual minority women are more likely to experience unintended pregnancies as a result of sexual violence. They are more likely to lack insurance. And they face widespread discrimination in the health care system, including in the provision of contraceptive care.

All of these factors combine to make sexual minority women among the most vulnerable who rely on abortion rights. Being denied an abortion has serious, lasting consequences for all women, and has profound and often distinct adverse effects on sexual minority women. It exposes an already at-risk population to greater rates of poverty, domestic violence, and negative health outcomes.

Immediate, practical consequences are not the only effects relevant to *stare decisis*. This Court also considers broader jurisprudential consequences of overruling precedent, including such a decision’s

consistency with other areas of the law. Those considerations, too, counsel against jettisoning *Roe* and *Casey*. This Court rarely—if ever—overrules precedent to take away a previously recognized constitutional right. Doing so now cannot be reconciled with this Court’s decisions affirming the fundamental equality of women and of LGBTQ people or with its decisions banning discrimination based on sex. In addition to unduly burdening a fundamental right, Mississippi’s law violates the fundamental guarantee of equal protection, creating a sex-based classification that inflicts serious harms on women, including those represented by amici in this case.

Mississippi asks this Court to return the country to a time when the law subordinated women by denying them equal liberty because of their sex. The Court should reject this devastating wrong turn and decline to roll back the clock.

ARGUMENT

I. OVERRULING *ROE* AND *CASEY* WOULD CAUSE SERIOUS HARM TO SEXUAL MINORITY WOMEN

Among the Court’s most important tasks in deciding whether to overturn settled precedent is examining its impact on actual people. The Court must carefully “scrutinize the precedent’s real-world effects on the citizenry.” *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (Kavanaugh, J., concurring in part) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954); *W. Va. State*

Bd. of Educ. v. Barnette, 319 U.S. 624, 630-42 (1943); *Payne*, 501 U.S. at 825-27).

The ability to decide whether and when to have children is a fundamental aspect of being treated as an equal, respected, and participating member of our democracy. Women must be free to exercise this fundamental freedom on equal terms, as this Court's precedents have long recognized. Overturning *Roe* and *Casey* would have a deeply disruptive effect on the lives and expectations of millions of women, including those who are members of the LGBTQ community. Sexual minority women have the same interest as other women in reproductive autonomy. They are at least as likely to experience unintended pregnancies, in part due to sexual violence and to economic and other barriers to reproductive care. Sexual minority women often face both sexism and homophobia, and many confront racism and poverty as well, which makes their quest for equal citizenship an uphill battle. By stripping sexual minority women of an essential aspect of equal freedom, overturning *Roe* and *Casey* would inflict significant harm on this community.

A. Sexual Minority Women Are At Least As Likely As Other Women To Experience Unintended Pregnancies, In Part Due To Elevated Rates Of Sexual Violence

Pregnancy is a common experience among women of all sexual identities—not just those who are heterosexual. More than 80% of bisexual women have

experienced at least one pregnancy, and more than a third of lesbians have done so. Barbara G. Valanis et al., *Sexual Orientation and Health: Comparisons in the Women's Health Initiative Sample*, ARCHIVES OF FAMILY MED., Sept.–Oct. 2000, at 843, 843 (abstract). In addition, “a substantial proportion of [transgender and gender-expansive] individuals who were assigned female sex at birth may need pregnancy and/or abortion care during their lives.” See Heidi Moseson et al., *Abortion Experiences of Transgender, Nonbinary, and Gender-Expansive People in the United States*, 224 AM. J. OBSTETRICS & GYNECOLOGY 376, 376 (2021).

Similarly, due in part to higher rates of sexual victimization, sexual minority women are at least as likely as heterosexual women to experience unintended pregnancies. Caroline Sten Hartnett et al., *Congruence Across Sexual Orientation Dimensions and Risk for Unintended Pregnancy Among Adult U.S. Women*, 27 WOMEN'S HEALTH ISSUES 145, 145 (2017) (finding that unintended pregnancies are at least as common for sexual minority women as for heterosexual women); Bethany G. Everett et al., *Sexual Orientation Disparities in Mistimed and Unwanted Pregnancy Among Adult Women*, PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, Sept. 2017, at 157, 161-62 (finding that adult and adolescent sexual minority women are at greater risk of unintended pregnancy than are their heterosexual counterparts).

Multiple studies have found that adolescents who are lesbian or bisexual are at an especially high risk of unintended pregnancy due to social pressures to

hide their sexual orientation and convince others they are heterosexual. See Susan M. Blake et al., *Teen Pregnancy Preventing Sexual Risk Behaviors Among Gay, Lesbian, and Bisexual Adolescents: The Benefits of Gay-Sensitive HIV Instruction in Schools*, AM. J. PUBLIC HEALTH, June 2001, at 940, 944.³ As one summary noted: “A growing body of research has documented increased risk of teen pregnancy among sexual minority adolescent girls compared with their heterosexual peers.” Cynthia Stoffel et al., *Family Planning for Sexual Minority Women*, SEMIN. REPROD. MED., Sept. 2017, at 460, 461-62 (noting recent data showing that “young [sexual minority women] who were classified as either women who have sex with women or women who have sex with both women and men * * * were significantly more likely to have been pregnant in the past 12 months than their peers who were women who have sex with men only”). These higher rates of unintended pregnancies persist into adulthood. Bethany G. Everett et al., *Unintended Pregnancy, Depression, and Hazardous Drinking in a Community-Based Sample of Sexual Minority Women*, 25 J. WOMEN’S HEALTH, no. 9, 2016, at 904, 904.

Sexual minority women are more likely than other women to experience unwanted pregnancies caused by sexual violence. Among abortion patients, sexual minority women are significantly more likely than their heterosexual counterparts to experience physical or sexual violence, “sometimes by a factor of

³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446472/pdf/11392938.pdf>.

15 or more.” Rachel K. Jones et al., *Sexual Orientation and Exposure to Violence Among U.S. Patients Undergoing Abortion*, OBSTET. & GYNECOL., Sept. 2018 at 605, 609. In one study of abortion patients, lesbians were nine times more likely than those identifying as heterosexual to disclose that they had been subjected to violence by the man involved in the pregnancy, and bisexual women were more than twice as likely to so report. *Id.* at 608. Both groups also were more likely to report sexual abuse by the man who impregnated them. *Ibid.* And all sexual minority groups in the study were more likely to report that the pregnancy resulting in the abortion was the product of forced sex. *Ibid.*

Transgender and nonbinary individuals also experience very high rates of sexual violence and assault, with the attendant risk of unwanted pregnancies. According to the U.S. Department of Justice, some research indicates that more than 65% of transgender people experience sexual assault. Dep’t of Justice, Office for Victims of Crime, *Responding to Transgender Victims of Sexual Assault: The Numbers* (2014).⁴ A 2017 study by the Centers for Disease Control found that 23.8% of transgender high school students had been forced to have sexual intercourse (compared with 4.2% of cisgender boys and 10.5% of cisgender girls), and 22.9% of transgender students had experienced sexual dating violence (compared with 3.5% of cisgender boys and 12% of cisgender girls). Michelle M.

⁴ <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/forge/printerFriendlyPDF/sexual-assault.pdf>.

Johns et al., Centers for Disease Control and Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, Morbidity and Mortality Weekly Report, Jan. 25, 2019, at 67, 68-69.⁵ Another study published in *Pediatrics* concluded that “[t]ransgender and nonbinary middle and high school youth * * * experienced sexual assault at troubling rates well above those for nontransgender adolescents.” Gabriel R. Murchison et al., *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, *PEDIATRICS*, June 2019, at 1, 7.

B. Economic And Social Barriers Often Prevent Sexual Minority Women From Obtaining Contraceptive Care, Which Also Increase Their Risk Of Unintended Pregnancies

Sexual minority women face economic and social barriers to contraception, which also increase their risk of unintended pregnancies.

Sexual minority women are more likely to lack insurance and financial means than their heterosexual counterparts and thus less likely to seek care. Thomas Buchmueller & Christopher S. Carpenter, *Disparities in Health Insurance Coverage, Access, and Outcomes for Individuals in Same-Sex Versus Different-Sex*

⁵ <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf>.

Relationships, 2000-2007, AM. J. PUBLIC HEALTH, Mar. 2010, at 489, 492-93. For example, one study of Black sexual minority women in the southern United States found that 59.4% of study participants had no primary care provider. Madina Agénor et al., *Sexual Orientation and Sexual and Reproductive Health among African American Sexual Minority Women in the U.S. South*, 26 WOMEN'S HEALTH ISSUES, no. 6, 2016, at 612, 615. As a result, sexual minority women are less likely to use birth control and make regular gynecological visits. Bethany G. Everett & Stefanie Mollborn, *Examining Sexual Orientation Disparities in Unmet Medical Needs Among Men and Women*, POPUL. RES. POLICY REV., Aug. 2014, at 553, 556-57.

When they do seek health care, sexual minority women are vulnerable to mistreatment. In one survey of respondents from all 50 states, nearly ten percent of LGBQ people who had visited a doctor in the last year said that a doctor or other health care provider refused to see them because of their actual or perceived sexual orientation. Shabab Ahmed Mirza & Caitlin Rooney, Ctr. for Am. Progress, *Discrimination Prevents LGBTQ People from Accessing Health Care* (Jan. 18, 2018).⁶ In particular, sexual minority women are significantly less likely to receive contraceptive counseling or care, which puts them at an elevated risk of unintended pregnancy. Jenny A. Higgins et al., *Sexual Minority Women and Contraceptive Use: Complex Pathways*

⁶ <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care>.

between Sexual Orientation and Health Outcomes, AM. J. PUB. HEALTH, Dec. 2019, at 1680, 1680 (2019); Stoffel, *supra*, at 460 (summarizing studies).

These barriers to contraceptive care are even more formidable for transgender and nonbinary individuals, with one-third reporting being refused treatment, verbally harassed, or physically or sexually assaulted by a medical provider, or having to teach the provider about transgender people in order to get appropriate care. S. E. James et al., *Executive Summary of the Report of the 2015 U.S. Transgender Survey* 8 (2017).⁷ As a practical matter, transgender and nonbinary people who need contraception face “barriers to care, social stigma and limited data regarding transgender health.” A. Francis et al., *Contraceptive Challenges and the Transgender Individual*, 4 WOMEN’S MIDLIFE HEALTH, no. 12, 2018, at 1, 4.⁸

C. Mississippi’s Law Harms Sexual Minority Women

Being denied an abortion can cause lasting harms. Even years later, women who are denied an abortion are more likely to face economic hardship. Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the United States*, AM. J. PUBLIC HEALTH, Mar. 2018, at 407, 407. In one study, women

⁷ <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

⁸ <https://womensmidlifehealthjournal.biomedcentral.com/track/pdf/10.1186/s40695-018-0042-1.pdf>.

denied an abortion were nearly four times more likely to have household income below the federal poverty level and three times more likely to be unemployed than those who obtained abortions. Bixby Ctr. for Global Reproductive Health, *The Turnaway Study* (2020).⁹ These hardships are particularly salient for sexual minority women, who are already more likely to live in poverty or lack financial resources. *See supra* Part I.B.

Being denied access to abortion also exacerbates the harms caused by domestic violence and sexual abuse. Women who are unable to terminate unwanted pregnancies are more likely to stay with violent partners, exposing them and their children to greater risk of domestic abuse. Sarah CM Roberts et al., *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion*, 12 BMC MED., no. 144, Sept. 29, 2014, at 1, 3-5.¹⁰ The “unique vulnerability of sexual minorities” puts them at high risk of experiencing these harms. Jones et al., *Sexual Orientation and Exposure to Violence*, *supra*, at 610.

Overall, health outcomes are also worse among women denied abortion services compared to those who received them. Lauren J. Ralph et al., *Self-reported Physical Health of Women Who Did and Did Not Terminate Pregnancy After Seeking Abortion*

⁹ https://www.ansirh.org/sites/default/files/publications/files/turnaway_study_brief_web.pdf.

¹⁰ <https://bmcmedicine.biomedcentral.com/track/pdf/10.1186/s12916-014-0144-z.pdf>.

Services: A Cohort Study, 20 ANNALS OF INTERNAL MED., no. 171, Aug. 20, 2019, at 238, 244-45.¹¹ Because many sexual minority women already experience health disparities (*supra* Part I.B), the added negative impact on overall health is especially significant.

In addition to these material and often life-altering harms, being denied the right to determine whether and when to have children deprives sexual minority women of their hard-won and not yet fully secured status as equal persons under the law. Like other women, sexual minority women have fought long and hard for the right to vote, to work in any occupation, to serve in our nation's military, and to exercise the same basic freedoms exercised by men. Similarly, it is only recently that LGBTQ people have secured recognition of their right to freedom of intimate association, to marry, and to work free from discrimination. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). No less than for other women, reproductive autonomy is an essential aspect of equality for sexual minority women.

¹¹ <https://www.acpjournals.org/doi/10.7326/m18-1666>.

II. *ROE* AND *CASEY* ARE CONSISTENT WITH IMPORTANT AND LONG-RECOGNIZED CONSTITUTIONAL PRINCIPLES

A. Overturning *Roe* And *Casey* Would Undermine The Consistency And Coherence Of Other Individual Rights And Equality Decisions

In addition to examining the practical effects of overruling precedent, *stare decisis* requires an examination of the “effects on the law and the legal system,” including the challenged decision’s “consistency and coherence with other decisions.” *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

Overruling *Roe* and *Casey* would represent a stark departure from the goal of maintaining coherence and consistency in this Court’s decisions. For starters, even when the Court has reconsidered its constitutional rulings, it rarely—if ever—overrules precedent to take away previously recognized individual rights. To the contrary, the Court’s most notable decisions overturning precedent have recognized the entitlement of previously excluded groups to constitutional liberties that belong equally to all persons. *See, e.g., Obergefell*, 576 U.S. 644; *Lawrence*, 539 U.S. 558; *Batson v. Kentucky*, 476 U.S. 79 (1986); *Craig v. Boren*, 429 U.S. 190 (1976); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Brown*, 347 U.S. 483; *Barnette*, 319 U.S. 624. Overturning *Roe* and *Casey* would create inconsistency and incoherence with respect to that

precedent. It would mark a sea change in this Court’s constitutional jurisprudence.

Overruling the landmark precedents of *Roe* and *Casey* would particularly conflict with this Court’s long-running recognition of basic equality principles. Abortion rights—like LGBTQ rights—are grounded in strong constitutional principles of equality. As Mississippi acknowledges (Pet. Br. 13), *Obergefell* did not purport to create a new right to “gay marriage” or “same-sex marriage.” Rather, the Court recognized that states cannot deny same-sex couples the same freedom to marry that different-sex couples enjoy. As this Court held, that disparate treatment “abridge[d] central precepts of equality.” *Obergefell*, 576 U.S. at 675.

Similarly, *Lawrence* advanced “[e]quality of treatment” by recognizing that the guarantees of due process and equal protection “are linked in important respects,” and that a decision based on “the due process right to demand respect for conduct protected by the substantive guarantee of liberty” necessarily incorporates a requirement that such guarantees must be protected equally for all. 539 U.S. at 575. As Justice O’Connor noted, the Texas law struck down in that case “treat[ed] the same conduct differently based solely on the participants.” *Id.* at 581 (O’Connor, J., concurring in judgment). The law “ma[de] homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction.” *Ibid.*

Like denying marriage to same-sex couples or criminalizing same-sex relationships, pre-viability abortion restrictions deny women equal treatment under the law. The Court has held that *all* individuals—regardless of marital status—have a right to decide whether and when to have children. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). And the Court has never held that *any* individual may be categorically compelled to undermine or sacrifice their own health or life to serve a state interest. But to deny women the ability to determine whether to continue or end a pregnancy does just that. *Casey*, 505 U.S. at 857 (noting that this Court’s “cases since *Roe* accord with *Roe*’s view that a State’s interest in the protection of life falls short of justifying any plenary override of individual liberty claims”). It elevates a purported state interest in compelling procreation above a woman’s interest in determining the course of her own life—a freedom that is essential to women’s equal membership in our society.

B. Forcing Sexual Minority Women To Undergo Pregnancy And Childbirth Against Their Will Is A Form Of Subordination That Undermines Their Equal Citizenship

“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.” *Casey*, 505 U.S. at 856. And “legal challenges to undue restrictions on abortion procedures * * * center on a woman’s autonomy to determine her life’s course,

and thus to enjoy equal citizenship stature.” *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). Mississippi seeks to take from women that very control over their reproductive lives.

Parenthood is a significant responsibility, perhaps the most significant societal role many Americans take on in their lifetimes. Like marriage, it is one of “society’s most basic compact[s].” *Obergefell*, 576 U.S. at 679. These “[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person.” *United States v. Windsor*, 570 U.S. 744, 772 (2013). But such responsibilities must be assumed freely. Using the power of the state to “conscript[] women’s bodies into its service” treats women as subordinates, not as equal persons who must be free to make life-altering decisions without unjustified governmental interference. *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part).

The stakes are high. As explained above, women denied an abortion are far more likely to earn less, become unemployed, and fall into poverty compared to those who received abortion care. *See supra* p. 11; Foster et al., *supra*, at 407-13; Bixby Center, *The Turnaway Study*. Those outcomes exacerbate existing disparities based on sex. Just last year, women’s annual earnings in the United States were 82.3% of men’s. Janelle Jones, U.S. Dep’t of Labor Blog, *5 Facts About the State of the Gender Pay Gap* (Mar. 19,

2021).¹² Layoffs and childcare shortages caused by the pandemic “have forced many women out of the workforce entirely,” regressing women’s labor force participation rate back to what it was in April 1987. *Ibid.* Mississippi’s characterization of the United States as a place where childbearing and parenting no longer pose any barriers to women’s full equality (Pet. Br. 5) bears little resemblance to reality. That is especially true for sexual minority women, who are more likely to lack financial means than their heterosexual counterparts. *See supra* Part I.B.

More broadly, permitting states to abridge women’s freedom to decide whether to have a child would deal a staggering blow to their status as equal citizens. “Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *United States v. Virginia*, 518 U.S. 515, 532 (1996) (referring to *Reed v. Reed*, 404 U.S. 71 (1971)). Like the policies struck down in those decisions, Mississippi’s law forces women into a predetermined role, simply because they are women.

¹² <https://blog.dol.gov/2021/03/19/5-facts-about-the-state-of-the-gender-pay-gap>.

C. Pre-Viability Bans On Abortion Are Impermissible Sex Discrimination

Laws that classify based on sex violate Equal Protection unless supported by “an exceedingly persuasive justification.” *Virginia*, 518 U.S. at 531. As explained in greater detail by other amici, pre-visibility bans on abortion fail that test. *See* Amici Br. of Equal Protection Constitutional Law Scholars.

Like anti-LGBTQ discrimination, abortion bans discriminate based on sex. In *Bostock*, this Court held that discrimination because of a person’s sexual orientation or transgender status necessarily discriminates based on sex. 140 S. Ct. at 1737. Because being gay or transgender is a sex-based trait, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* at 1741.

By the same logic, laws that restrict abortion also facially discriminate based on sex. Like being LGBTQ, pregnancy is a sex-based characteristic; it is “inextricably bound up with” an individual’s sex. *Id.* at 1742; *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 733 n.6 (2003) (stating that a “pregnancy disability leave” that is not based on gender-neutral medical criteria is

a “gender-discriminatory policy”).¹³ Accordingly, laws that force a pregnant woman to bear a child necessarily discriminate based on sex, as would a law that barred a reproductive medical procedure available only to men. For example, if Mississippi barred men from obtaining vasectomies, such a law would discriminate based on sex and would be upheld only if the state could show “an exceedingly persuasive justification.” *Virginia*, 518 U.S. at 531.

This Court has already held that the state has no interest strong enough to justify restricting a woman’s ability to obtain a pre-viability abortion. *Casey*, 505 U.S. at 860 (affirming “*Roe*’s central holding, that viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions). This Court should affirm that precedent here and ensure that all women, including those who are sexual minorities, continue to enjoy equal protection of the laws.

¹³ *But compare Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (stating that not “every legislative classification concerning pregnancy is a sex-based classification like those” rising to the level of “invidious discrimination” in prior cases), *with* Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 170-71 (2020) (noting that later “equal protection cases holding that laws regulating pregnancy are part of the equal protection heightened-scrutiny framework” call *Geduldig* into question).

CONCLUSION

The judgment of the court of appeals should be affirmed.

SHANNON MINTER
JULIANNA GONEN
NATIONAL CENTER FOR
LESBIAN RIGHTS
1300 Pennsylvania Ave., NW
Washington, DC 20004

CAMILA A. TAPERNOUX
RACHEL S. DOLPHIN
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94105

Respectfully submitted,

DEANNE E. MAYNARD
Counsel of Record
BRIAN R. MATSUI
ADAM L. SORENSEN
MORRISON & FOERSTER LLP
2100 L St., NW, Ste. 900
Washington, DC 20037
(202) 887-8740
dmaynard@mofocom

JAMIE A. LEVITT
JAMES E. HOUGH
KATIE L. VIGGIANI
MORRISON & FOERSTER LLP
250 West 55th St.
New York, NY 10019

Counsel for Amici Curiae

SEPTEMBER 2021