No. 21-1369

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,

Plaintiffs-Appellees,

v.

ALAN WILSON, in his official capacity as Attorney General of South Carolina, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of South Carolina (Columbia)
No. 3:21-cv-00508-MGL

BRIEF OF AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS (AAPLOG), CHRISTIAN MEDICAL AND DENTAL ASSOCIATION (CMDA), AND CATHOLIC MEDICAL ASSOCIATION (CMA) AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND FOR REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1369 Caption: Planned Parenthood South Atlantic v. Wilson

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Association of Pro-Life Obstetricians and Gynecologists
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: Christopher P. Schandevel Date: July 13, 2021

Counsel for: Amicus

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 21-1369 Caption: Planned Parenthood South Atlantic v. Wilson

Pursuant to FRAP 26.1 and Local Rule 26.1,

Christian Medical and Dental Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

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Signature: Christopher P. Schandevel Date: July 13, 2021

Counsel for: Amicus

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No. 21-1369 Caption: Planned Parenthood South Atlantic v. Wilson

Pursuant to FRAP 26.1 and Local Rule 26.1,

Catholic Medical Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

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Signature: Christopher P. Schandevel Date: July 13, 2021

Counsel for: Amicus

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations, have no parent corporations, and do not issue stock. Amici are not aware of any publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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IDENTITY OF AMICI CURIAE[1]

The American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a nonprofit professional medical organization with over 4,000 obstetrician-gynecologist members and associates. AAPLOG strives to ensure pregnant women receive quality care and are informed of abortion's potential long-term effects on women's health. AAPLOG offers healthcare providers and the public a better understanding of abortion-related health risks, such as depression, substance abuse, suicide, subsequent preterm birth, and *placenta previa*.

Christian Medical and Dental Associations (CMDA), founded in 1931, is an incorporated nonprofit national organization of Christian physicians and allied healthcare professionals with over 19,000 members nationally. Among CMDA's purposes is to provide a public voice on bioethics and healthcare policy (and more specifically to uphold the sanctity of life), to oppose abortion, and to actively develop and employ alternatives to abortion. CMDA believes that abortion is contrary to the revealed, written Word of God and Judeo-Christian medical ethics. As such, CMDA has a strong interest in ensuring that the courts apply the correct legal standard when evaluating constitutional challenges to pro-life laws.

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[1] Under Federal Rule of Appellate Procedure 29(a)(4)(E), amici state that no counsel for any party authored this brief in whole or in part, and no one, other than amici and their counsel, made a monetary contribution to fund the preparation or submission of this brief.

The Catholic Medical Association (CMA) is a national, physician-led community of healthcare professionals that informs, organizes, and inspires its members—over 2,200 physicians and hundreds of allied health members nationwide—in steadfast fidelity to the Catholic Church's teachings. CMA members seek to uphold the principles of the Catholic faith in the science and practice of medicine, affirming that all life is sacred and should be respected from the moment of conception until natural death. Consistent with case law demonstrating States' "legitimate and substantial interest in preserving and promoting fetal life," *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007), the Catholic Medical Association—while supportive of South Carolina's effort to enhance existing protections of fetal life—affirms that without exception all direct abortions performed with the object and intent to terminate a pregnancy are contrary to natural moral law, the wellbeing of women, and the good of society.

ARGUMENT

I. The Supreme Court has never clarified the abortion right's scope. This Court should look to "history and traditions" to do so.

"Nothing in the text or original understanding of the Constitution establishes a right to an abortion." *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 277 (5th Cir. 2019) (Ho, J., concurring in the judgment). Fifty years ago, the Supreme Court nonetheless determined that the penumbral "right of personal privacy includes the abortion decision." *Roe v. Wade*, 410 U.S. 113, 154 (1973). Ever since, the Court has grappled with but never clarified that right's scope. As a result, the current state of abortion law is "confusing and uncertain." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 945 (1992) (Rehnquist, C.J., concurring and dissenting in part).

Although the Court has never clarified the right's scope, it has instructed lower courts where to look when doing so: "history and traditions." *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997) (describing *Casey's* instructions on how to determine when personal decisions like abortion are protected by the Fourteenth Amendment). Only there can this Court determine the abortion right's proper scope.

A. History has never recognized abortion as an absolute right.

The abortion right's historical imprimatur has a precarious foundation. In *Roe*, the Supreme Court stated that its decision came after it had "inquired into, and . . . place[d] some emphasis upon, medical and medical-legal history." 410 U.S. at 117. Nearly half of the opinion, in fact, paid lip service to history. The Court particularly relied on one historian, Cyril Means, referencing his works six times. *Id.* at 132 n.21, 133 n.22, 135 n.26, 139 n.33, 148 n.42, 151 n.47.

But Means "wrote as an advocate to make a case for legal change, not as a historian investigating the past." Joseph W. Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY 1004 (2006). Means served as legal counsel to the National Association for the Repeal of Abortion Laws. In that capacity, he came to understand that "only if in 1791 elective abortion was a common-law liberty, can it be a . . . right today." Cyril C. Means Jr., *The Phoenix of Abortional Freedom: Is a Penumbral Right or Ninth-Amendment Right About to Rise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L. FORUM 335, 336 (1971). No such history existed, so he *created* one, one that purported to "reveal the story, untold now for nearly a century, of the long period during which English and American women enjoyed a common-law liberty to terminate at will an unwanted pregnancy." *Id.*

To underscore that point, Means's historical account asserted that the "demonstrable legislative purpose behind" any historical pro-life statutes "was the protection of pregnant women from the danger to their lives posed by surgical or optional abortion." *Id.* If laws were enacted to protect women, Means concluded, then these restrictions did not displace the abortion right but merely supplemented it, ensuring that abortion could be exercised safely for the mother (though obviously not the child).

Based on Means's account, the Supreme Court concluded that "a woman enjoyed a substantially broader right to terminate a pregnancy" at the Founding than she did "in most States" in 1972. *Roe*, 410 U.S. at 140–41. It was "doubtful," the Court wrote, "that abortion was ever firmly established as a common-law crime." *Id.* at 136. And when the States criminalized abortion, they did so to protect the health of mothers, not unborn life. Again, relying on Means's history, the Court held that States could not curtail the ability to end a pregnancy based on an interest in protecting unborn life. *Id.* at 162.

But that history was wrong. Means presented a "distorted doctrinal history of abortion precedents and statutes [that] ignored the larger social and technological context in which those decisions were grounded." Br. for the Am. Acad. of Med. Ethics as Amicus Curiae at 4, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91–744, 91–902). As a result, the Court in *Roe* treated "history as a grab

bag of principles, to be adopted where they support[ed] the Court's theory, and ignored where they [did] not." *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1060 (1992) (Blackmun, J., dissenting).

Contrary to Means's "findings," the common law never recognized abortion as a protected liberty interest. Justin Buckley Dyer, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING 108 (2013). The common law has instead always protected life, "[w]ith consistency, beautiful and undeviating . . . from its commencement to its close." 2 James Wilson, THE WORKS OF JAMES WILSON 596–97 (R.G. McCloskey ed., 1968).

In fact, there is an "unbroken legal tradition, extending over at least eight centuries of Anglo-American social life, *condemning* abortion[.]" Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 1055 (emphasis added); John Keown, *Back to the Future of Abortion Law:* Roe's *Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3, 5 (2006) ("As early as the mid-thirteenth century the common law punished abortion after fetal formation as homicide."); James S. Witherspoon, *Reexamining* Roe: *Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 31 (1985) ("In the earliest periods of the common law, abortion causing the death of a living fetus was considered homicide.").

As early as the 13th century, the English jurist Henry de Bracton wrote that "if one strikes a pregnant woman or gives her a potion in order to procure an abortion, if the foetus is already formed or animated," "he commits homicide." 2 Henry de Bracton, THE LAWS AND CUSTOMS OF ENGLAND 341 (George Woodbine ed., Samuel Thorne trans. 1977 & 1982). Similarly, the *Fleta* treatise reported that a man committed homicide if he "pressed upon a pregnant woman or has given her poison or has struck her in order to procure an abortion . . . if the foetus is already formed and animated." 1 Fleta, ch. 33 (ca. 1290), *reprinted in* 53 SELDEN SOC'Y 60–61 (H.G. Richardson & G.O. Sayles eds. 1953).

Unsurprisingly, common-law cases "treated abortion as a crime . . . because it involved the killing of an unborn child." Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 135–52 (collecting early cases). And that remained true when the newly independent States simplified and systematized their legal codes: the States codified many of the common law's criminal prohibitions—including those against abortion. By 1860, jurist Francis Wharton said that there was "no doubt that at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder." 2 Francis Wharton, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 1220 (5th rev. ed. 1868).

Some of these early statutes made abortion "an indictable offence" only if "the mother be quick with child." *E.g.*, *State v. Cooper*, 22 N.J.L. 52, 53 (N.J. 1849). Based on that language, the Court in *Roe* thought that "the law continued for some time to treat less punitively an abortion procured in early pregnancy" (i.e., before "quickening"). 410 U.S. at 141. If the law punished abortion only after quickening, the Court thought, then there must have been a broad right to terminate a pregnancy before quickening.

But it is quite a leap to say that if conduct is unindictable, it has constitutional protection. The "limiting of criminality to post-quickening abortions could very well have been a response to the evidentiary problems of proving both the pregnancy and that the fetus had been alive before the abortion before quickening." Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 274; Witherspoon, *Reexamining* Roe, 17 ST. MARY'S L.J. at 31 (abortion convictions were hard to obtain because it was "difficult to prove that (1) the woman on whom the abortion was attempted was actually pregnant; (2) the fetus was alive at the time of the attempt; and (3) the attempt caused the death of the fetus"). Given these evidentiary issues, the common law settled on quickening as "a flexible standard of proof"—but "not a substantive judgment on the value of unborn human life." Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 825 (1973).

Contemporaneous cases made this clear. The New York Court of Appeals held that, although "life exists from the first moment of conception" and "certain civil rights attach to the child from the first," "the law has fixed upon this period of gestation as the time when the child is endowed with life." *Evans v. People*, 49 N.Y. 86, 89–90 (N.Y. 1872). That "fixed" period was *not* because the law recognized abortion as a right; it was because "the foetal movements are the first clearly marked and well defined *evidences* of life." *Id.* (emphasis added).

Even then, not every jurisdiction read the common law to criminalize abortion only after quickening. The Pennsylvania Supreme Court held that it was a "flagrant crime, at common law, to attempt to procure the miscarriage or abortion of the woman . . . at *all* periods after conception." *Mills v. Commonwealth*, 13 Pa. (1 Harris) 631, 633 (Pa. 1850) (emphasis added). Similarly, Wharton wrote:

> It has been said that it is not an indictable offence to administer a drug to a woman, and thereby to procure an abortion, unless the mother is *quick* with child, though such a distinction, it is submitted, is neither in accordance with the result of medical experience, nor with the principles of the common law.

2 Francis Wharton, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 1220 (5th rev. ed. 1868).

Even those jurisdictions that thought the common law punished abortions only after quickening felt that "the law *should* punish abortions . . . willfully produced, at *any* time during the period of gestation."

Mitchell v. Commonwealth, 78 Ky. 204, 209 (Ky. 1879) (emphasis added). They described abortions as "offensive to good morals and injurious to society"—hardly language used to describe a right. *Commonwealth v. Parker*, 50 Mass. 263, 268 (Mass. 1845).

In no other context would one make the logical leap that conduct unindictable must be conduct constitutionally protected. Consider the common-law definition of burglary: the breaking and entering of a dwelling house at night with intent to commit a felony inside. That the common law defined burglary to prohibit conduct "at night" did not mean that people had a *right* to burgle during daylight. The law drew the "night" line for a particular purpose: "night time invasions of the home were seen as particularly threatening." Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 IND. L. REV. 629, 643 (2012). So too with abortion. That the law drew a line at quickening did not indicate a *right* to abort an unborn child before quickening. The law simply drew a line to facilitate prosecution of conduct that society found unacceptable.

And when that line no longer made sense, the law abandoned it. After the American Medical Association reported that a "foetus in utero is alive from the very moment of conception," Dyer, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING at 111, physician Horatio Storer wrote that "if the foetus be already, and from the very

outset, a human being alive . . . the offence becomes, in every stage of pregnancy, MURDER," Horatio Robinson Storer & Franklin Fiske Heard, CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW 9–10 (1868).

In accord with this new understanding, many States abandoned the quickening distinction. "By 1868, when the Fourteenth Amendment was ratified, thirty of the thirty-seven states had abortion statutes on the books. Just three of these states prohibited abortion only after quickening. Twenty states punished all abortion equally regardless the stage of pregnancy." Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 315–16; *accord June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2151 & n.7 (2020) (Thomas, J., dissenting) (collecting statutes); *Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring and dissenting in part). In fact, just four months after Ohio ratified the Fourteenth Amendment, the State prohibited abortion from *any* point of embryonic or fetal development. Dyer, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING at 105–06. "It would no doubt shock the public at that time to learn that one of the new constitutional Amendments contained hidden within the interstices of its text a right to abortion"—the very conduct that many States were prohibiting. *June Med. Servs.*, 140 S. Ct. at 2151 (Thomas, J., dissenting).

B. States have a historical interest in protecting the lives of the unborn, even before viability.

Means not only distorted history; he also diminished the States' interest in protecting unborn life. Means concluded that historical pro-life statutes protected only women. But history highlights the States' "legitimate and substantial interest in preserving and promoting fetal life." *Gonzales*, 550 U.S. at 145. From the beginning, common law courts "spoke unequivocally in terms of the killing of a child, and not just in terms of a crime against the mother." Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 135.

What was true of the common law was equally true of the States. Many mid-19th century legislatures prohibited abortion "to protect *both* [mother and child] from injury." *Dougherty v. People*, 1 Colo. 514, 523 (Colo. 1872) (emphasis added); *accord State v. Moore*, 25 Iowa 128, 136 (Iowa 1868) ("[A]bortion is an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child.").

As early as 1828, "New York enacted legislation that . . . barr[ed] destruction of an unquickend fetus as well as a quick fetus." *Roe*, 410 U.S. at 138. In New Jersey, after its Supreme Court held that abortion was a crime only after quickening, *Cooper*, 22 N.J.L. at 53, the legislature moved quickly to punish abortions before quickening with the "equally obvious purpose" to protect unborn life, *Gleitman v. Cosgrove*, 227 A.2d 689, 696 (N.J. 1967) (Francis, J., concurring). Similarly, after

Massachusetts and Iowa courts failed to convict an abortionist because of the quickening distinction, both abandoned that line and criminalized every abortion to strengthen protections for the unborn. Dyer, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING at 115–16.

Although *Roe* diminished this historical interest, "[t]he evolution in the Supreme Court's jurisprudence reflects its increasing recognition of states' profound interest in protecting unborn children." *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 771 (8th Cir. 2015). The Court has recognized that States have a "legitimate interest[]" in "promot[ing] respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158.

This Court should reaffirm that historical interest. "[W]ithout any basis in constitutional text or original meaning," federal courts should not "restrict the ability of states to regulate in the area of abortion" to protect unborn life. *Jackson*, 945 F.3d at 286 (Ho, J., concurring in the judgment). They should instead follow the "traditional rule that state and federal legislatures have wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment) (cleaned up). That's doubly true given the abortion right's shaky historical foundation. *See Garza v. Idaho*, 139 S. Ct. 738, 756 (2019) (Thomas, J., dissenting) (courts should "tread carefully before extending" precedents with "little available evidence" to suggest they are "correct as an original matter").

II. The Supreme Court's abortion jurisprudence has never treated the abortion right as absolute, even before viability.

Though the Supreme Court has never clarified the abortion right's scope, it did set out the framework for courts to use when evaluating pro-life statutes. Under that framework, courts are to uphold pro-life statutes unless they have "the purpose or effect of placing a substantial obstacle in the path of a women seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. Nowhere has the Court established a rule that forces lower courts to strike down pro-life statutes that regulate abortions before viability.

A. The Supreme Court has evaluated abortion regulations—even those that affect previability abortions—under the undue-burden standard.

Here, the district court did not consider whether South Carolina's law "plac[ed] a substantial obstacle in the path of a women seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. The only factual and legal issue that the district court considered, in fact, was whether South Carolina's law prevented certain abortions before viability. That was error. The Supreme Court's jurisprudence has been "much more nuanced." *Cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

To consider viability as determinative assumes that the abortion right is absolute before viability. But "[t]he right to an abortion before viability is *not* absolute." *Preterm-Cleveland v. McCloud*, 994 F.3d 512,

520 (6th Cir. 2021) (en banc). From the outset, *Roe* clarified that an abortion could not be obtained any "way," at any "time," or for any "reason." 410 U.S. at 153. *Casey* reaffirmed that States can regulate abortion at all stages—including previability—subject to one limitation: regulations could not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion." 505 U.S. at 877.

That limitation did not make regulations on previability abortion *per se* unconstitutional. *Casey*, in fact, "*rejected* . . . the interpretation of *Roe* that considered all previability regulations of abortion unwarranted." *Gonzales*, 550 U.S. at 146 (emphasis added). Instead, *Casey* established that all regulations on previability abortions must satisfy the "undue-burden" test.

In *Casey* itself, the Court assessed whether each law challenged there imposed an undue burden—even though some of those laws could have prevented certain previability abortions. For example, one challenged statute required a 24-hour waiting period before obtaining an abortion. 505 U.S. at 885. That waiting period could cause further delay, as it might require "two visits to the doctor." *Id.* at 886. Even though that delay might prevent some previability abortions, the Court did not strike it down as *per se* unconstitutional. Instead, the Court analyzed the law under the "undue-burden" test and concluded that the law—though it would prevent some previability abortions—was not an undue burden. *Id.*

Again in *Gonzales*, the Supreme Court reaffirmed that states can regulate abortions before viability. 550 U.S. at 158. There the Court upheld a ban on partial-birth abortion that applied "both previability and postviability." *Id.* at 156. To reach this conclusion, the Court used the undue-burden standard. The dissent complained that the majority "blur[red] the line . . . between previability and postviability abortions," but that only confirms the Court has never held that pro-life laws affecting previability abortions are *per se* invalid. *Id.* at 171 (Ginsburg, J., dissenting); Khiara M. Bridges, *Capturing the Judiciary:* Carhart *and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915, 941 (2010) (noting that *Gonzales* "can be read to eliminate the significance of viability as a marker"); Randy Beck, Gonzales, Casey, *and the Viability Rule*, 103 NW. U. L. REV. 249, 253, 276 n.152 (2009) (arguing *Gonzales* "undermines *Casey*'s attempted defense of the viability rule").

More recently, a plurality of the Court concluded that a Louisiana law would prevent "thousands of Louisiana" citizens from obtaining a "safe, legal abortion" before viability. *June Med. Servs.*, 140 S. Ct. at 2130 (plurality opinion). But no one—not the plurality, not the Chief Justice in his concurring opinion, not any of the dissenting justices—subjected the law to a *per se* constitutional rule. Instead, a majority evaluated it under *Casey*'s undue-burden standard. *Id.* at 2138 (Roberts, C.J., concurring in the judgment); *see also id.* at 2182 (Kavanaugh, J., dissenting).

Next term, the Court will address whether "all previability prohibitions on elective abortions are unconstitutional." *Dobbs v. Jackson Women's Health*, No. 19-1392, 2021 WL 1951792, at *1 (S. Ct. May 17, 2021) (mem.) (granting review of the first question presented in Pet. for Cert. at i, *Dobbs v. Jackson Women's Health*, No. 19-1392 (2020)). The Court may undo *Roe* and *Casey*, since neither has a basis in constitutional text. At minimum, however, the Court will undoubtedly reaffirm that "rigid" lines that would "forbid any regulation of abortion" "before viability" are "incompatible with the recognition that there is a substantial state interest in potential life *throughout* pregnancy." *Casey*, 505 U.S. at 873, 876 (emphasis added). After all, to treat previability abortion as untouchable would elevate a penumbral right above enumerated rights. "[E]ven the fundamental rights of the Bill of Rights are not absolute." *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949).

Yet the district court's *per-se*-unconstitutional test would make abortion "more ironclad even than the rights enumerated in the Bill of Rights." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 310 (7th Cir. 2018) (Manion, J., concurring and dissenting in part). To treat "abortion as a super-right, more sacrosanct even than the enumerated rights," is an "absurd result." *Id.* at 311 (Manion, J., concurring and dissenting in part). Nothing in the Supreme Court's abortion jurisprudence requires this absurdity.

B. *Casey* did not prohibit all regulations on previability abortions.

Not only did the district court treat previability abortion as absolute, but it did so based on a single sentence from *Casey*. There the Court held that a "State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. at 879. But in so holding, the Court did not create a firewall around previability abortions. Indeed, "[t]o implement its holding, *Casey rejected* . . . the interpretation of *Roe* that considered all previability regulations of abortion unwarranted." *Gonzales*, 550 U.S. at 146 (emphasis added). Rather than declare pro-life laws that affect previability abortions off-limits, *Casey* made clear that such laws are constitutionally permissible so long as they do not "place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* (quoting *Casey*, 505 U.S. at 878).

The district court was thus wrong to "squeeze all [it could] out of every last word" in *Casey*, as if a single sentence from one case answers every question about previability abortions. *See In re Plavix Marketing, Sales Practices & Prods. Liab. Litig. (No. II)*, 974 F.3d 228, 235 (3d Cir. 2020). *Casey* is a judicial opinion, and judicial opinions "resolve only the situations presented for decision." *Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc).

Casey must be read "in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004). And "[w]hatever else might be said about *Casey*, it did not decide whether the Constitution" prohibits any pro-life law that touches on previability abortions. *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring). Lower courts should not "impute to the Justices decisions they have not made about problems they have not faced." *Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting from the denial of rehearing en banc).

Indeed, the Supreme Court's abortion jurisprudence has demonstrated an "increasing recognition of states' profound interest in protecting unborn children." *MKB Mgmt. Corp.*, 795 F.3d at 771. Since *Casey*, the Court has upheld pro-life laws that touch on previability abortions. For instance, in *Gonzales* the Court upheld a ban that applied "both previability and postviability because, by common understanding and scientific terminology," "a fetus is a living organism while within the womb, whether or not it is viable outside the womb." 550 U.S. at 147. In doing so the Court professed consistency with *Casey*. *Id.* at 146. A single sentence from *Casey* thus does not create the strict-liability regime the district court imagined.

C. States have various interests in regulating abortion before viability.

Without showing an undue burden, the abortion providers here can succeed only if they show that South Carolina's pro-life law is not "reasonably related to a legitimate state interest." *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) (cleaned up). Yet South Carolina has legitimate reasons to enact pro-life laws.

To start, States have a historical interest in protecting unborn life. The Supreme Court has continually recognized that a State, "from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus." *Gonzales*, 550 U.S. at 158. That interest is "legitimate," "substantial," and "central." *Id.* at 145. And it does not "come into existence only at the point of viability." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519 (1989). It therefore makes little sense to impose a "rigid line allowing state regulation after viability but prohibiting it before viability." *Id.*

States also have an interest "in protecting the integrity and ethics of the medical profession." *Gonzales*, 550 U.S. at 157 (cleaned up). "A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others." *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000) (Kennedy, J., dissenting).

In doing so, the State may shield doctors from the corrosive effect of "violence against innocent human life." *Casey*, 505 U.S. at 582. It can also insulate doctors from "position[s] of conflicted medical, legal, and ethical duties." *Preterm-Cleveland*, 994 F.3d at 532.

The district court's *per-se*-unconstitutional test would never allow the States to vindicate these interests. In fact, if States could never regulate previability abortion, then they would be powerless to prevent abortion from becoming a pernicious "tool of eugenic manipulation." *Box*, 139 S. Ct. at 1784 (Thomas, J., concurring). That, too, is an "absurd result." *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 311 (Manion, J., concurring and dissenting in part).

III. The district court should not have granted a preliminary injunction for a pre-enforcement facial challenge based on such a sparse record.

Before South Carolina's governor even signed the Act into law, abortion providers sued to "frustrate[] the intent of the elected representatives of the people." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006). With no evidence about how the law would operate, abortion providers challenged it as facially unconstitutional. Facial challenges "are disfavored" precisely because, as here, they "raise the risk of premature interpretation of statutes on the basis of factually barebones records" and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution."

Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165, 173 (4th Cir. 2009) (en banc) (cleaned up).

A facial challenge here requires abortion providers to show that South Carolina's law is invalid in *every* "set of circumstances." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 164 (4th Cir. 2000). That is a heavy burden to shoulder, made harder "in the context of a pre-enforcement facial challenge." *June Med. Servs., LLC v. Gee*, 139 S. Ct. 663, 664 (2019) (Kavanaugh, J., dissenting from the grant of stay). Normally, to determine whether a pro-life law imposes an undue burden, courts weigh the "evidence and argument presented in judicial proceedings." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). In the pre-enforcement context, however, they must instead weigh "competing predictions." *Gee*, 139 S. Ct. at 664 (Kavanaugh, J., dissenting from the grant of stay). And predictions, rather than evidence, tend to "run contrary to the fundamental principle of judicial restraint" because they invite courts to "anticipate a question of constitutional law in advance of the necessity of deciding it" and to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (cleaned up).

Abortion providers asked the district court to "strike down a statute in its entirety based on nothing more than . . . speculative applications, none of which have been presented in this case with the concreteness necessary to support a facial or for that matter as-applied attack." *Herring*, 570 F.3d at 181 (Wilkinson, J., concurring). The district court erred in doing so.

On top of their heavy burden in bringing a pre-enforcement facial challenge, abortion providers shouldered another by seeking a preliminary injunction. "A preliminary injunction is hard to get, all the more so when the target is a democratically enacted state law." *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, __ F.4th __, 2021 WL 2345256, at *6 (8th Cir. 2021) (Stras, J., concurring and dissenting in part). A preliminary injunction is, after all, an "extraordinary remedy," one that requires the party seeking it to show that he is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20, 24 (2008). At a minimum, then, abortion providers needed to show that South Carolina's law would *likely* prevent *every woman* who could otherwise get a lawful abortion from obtaining one.

But with no record of how South Carolina's law operates, providers could only provide "limited factual information"—which meant the district court could only "make haphazard guesses about who will win the case." *Leaders of a Beautiful Struggle v. Baltimore Police*

Dep't, __ F.4th __, 2021 WL 2584408, at *20 (4th Cir. 2021) (Wilkinson, J., dissenting). And "[c]ourts are not supposed to grant injunctions based on guesses." *Parson*, 2021 WL 2345256, at *8 (Stras, J., concurring and dissenting in part). Courts especially should not guess in cases involving "complex, subtle, and professional decisions" best left to actors that courts usually "give great deference to." *Winter*, 555 U.S. at 24. And the "traditional rule" is "that state and federal legislatures have wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment) (cleaned up) (quoting *Gonzales*, 550 U.S. at 124, 163).

The district court should have given South Carolina a chance to "develop[] the record in a meaningful way so as to present a real opportunity for the court to examine viability." *Edwards v. Beck*, 786 F.3d 1113, 1119 (8th Cir. 2015) (per curiam). Viability, after all, has "steadily move[d] back towards conception" as "medical and scientific technology have greatly expanded our knowledge of prenatal life." *Id.* at 1118–19 (quoting *Hamilton v. Scott*, 97 So.3d 728, 742 (Ala. 2012) (Parker, J., concurring specially)). So a "viability determination necessarily calls for a case-by-case determination." *Id.*; *accord Casey*, 505 U.S. at 864 ("In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations."). Yet here, the district court concluded—based on a single declaration—that viability

was "medically impossible at six weeks of pregnancy," and that South Carolina's law was unconstitutional because it "may" prevent some abortions at "six weeks of pregnancy, or even sooner." App.290–91. *Possibly* burdening *some* previability abortions falls far short of *likely* burdening *every* previability abortion. To evaluate whether South Carolina's law will *always* unduly burden previability abortions, the district court should have established a more expansive record on what, "in the light of present medical knowledge," constitutes viability.[2] *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 61 (1976).

The district court had a "responsibility to develop an evidentiary record that would elucidate how [South Carolina's law] actually worked." *Leaders of a Beautiful Struggle*, __ F.4th __, 2021 WL 2584408, at *18 (Wilkinson, J., dissenting). By declaring South Carolina's pro-life law *per se* invalid, the district court did not meet that responsibility. This Court should therefore reverse the district court's grant of a preliminary injunction.

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[2] The U.S. Food and Drug Administration notes, for instance, that home pregnancy tests can detect pregnancy within "12–15 days after ovulation," which is around four weeks' gestation—much earlier than a fetal heartbeat, which is detectable at around six weeks' gestation. U.S. FDA, *Pregnancy: What is hCG?*, https://perma.cc/FB7C-ABLU. South Carolina's law thus does not prevent all previability abortions. Whatever burdens the law imposes are outweighed by the State's "legitimate and substantial interest in preserving and promoting fetal life." *Gonzales*, 550 U.S. at 145.

CONCLUSION

Neither history nor current Supreme Court precedent supports the district court's treatment of abortion as absolute before viability. And the court's adherence to this flawed premise prevented it from fulfilling its responsibility to develop a factual record where it could evaluate whether abortion providers had showed that South Carolina's pro-life law imposes an undue burden in *every* set of circumstances. This Court should therefore reverse the district court's grant of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with the page limitation of Fed. R. App. P. 29(a)(5) and Circuit R. 29 because it consists of 5,896 words and does not exceed 6,500 words.

This amicus brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

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Dated: July 13, 2021

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2021, the foregoing amicus brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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