

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS E. DOBBS, STATE HEALTH )  
OFFICER OF THE MISSISSIPPI )  
DEPARTMENT OF HEALTH, ET AL., )  
Petitioners, )  
v. ) No. 19-1392  
JACKSON WOMEN'S HEALTH )  
ORGANIZATION, ET AL., )  
Respondents. )  
- - - - -

Pages: 1 through 114  
Place: Washington, D.C.  
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10                                    Respondents.            )  
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13                                    Washington, D.C.  
14                                    Wednesday, December 1, 2021

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16                                    The above-entitled matter came on for  
17                                    oral argument before the Supreme Court of the  
18                                    United States at 10:00 a.m.

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1 APPEARANCES:  
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3 Mississippi; on behalf of the Petitioners.  
4 JULIE RIKELMAN, ESQUIRE, New York, New York; on behalf  
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7 Department of Justice, Washington, D.C.; for the  
8 United States, as amicus curiae, supporting the  
9 Respondents.  
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 19-1392, Dobbs versus Jackson Women's Health Organization.

General Stewart.

ORAL ARGUMENT OF SCOTT G. STEWART

ON BEHALF OF THE PETITIONERS

MR. STEWART: Mr. Chief Justice, and may it please the Court:

Roe versus Wade and Planned Parenthood versus Casey haunt our country. They have no basis in the Constitution. They have no home in our history or traditions. They've damaged the democratic process. They've poisoned the law. They've choked off compromise.

For 50 years, they've kept this Court at the center of a political battle that it can never resolve. And 50 years on, they stand alone. Nowhere else does this Court recognize a right to end a human life.

Consider this case: The Mississippi law here prohibits abortions after 15 weeks. The law includes robust exceptions for a woman's life and health. It leaves months to obtain an

1 abortion. Yet, the courts below struck the law  
2 down. It didn't matter that the law apply --  
3 that the law applies when an unborn child is  
4 undeniably human, when risks to women surge, and  
5 when the common abortion procedure is brutal.  
6 The lower courts held that because the law  
7 prohibits abortions before viability, it is  
8 unconstitutional no matter what.

9 Roe and Casey's core holding,  
10 according to those courts, is that the people  
11 can protect an unborn girl's life when she just  
12 barely can survive outside the womb but not any  
13 earlier when she needs a little more help. That  
14 is the world under Roe and Casey.

15 That is not the world the Constitution  
16 promises. The Constitution places its trust in  
17 the people. On hard issue after hard issue, the  
18 people make this country work. Abortion is a  
19 hard issue. It demands the best from all of us,  
20 not a judgment by just a few of us. When an  
21 issue affects everyone and when the Constitution  
22 does not take sides on it, it belongs to the  
23 people.

24 Roe and Casey have failed, but the  
25 people, if given the chance, will succeed. This

1 Court should overrule Roe and Casey and uphold  
2 the state's law.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: General Stewart, you  
5 focus on the right to abortion, but our  
6 jurisprudence seems to -- seem to focus on, in  
7 Casey, autonomy; in Roe, privacy. Does it make  
8 a difference that we focus on privacy or  
9 autonomy or more specifically on abortion?

10 MR. STEWART: I think whichever one of  
11 those you're focusing on, Your Honor,  
12 particularly if you're focusing on -- on the  
13 right to abortion, each of those starts to  
14 become a step removed for what's provided in the  
15 Constitution. Yes, the Constitution does  
16 provide certain -- protect certain aspects of  
17 privacy, of autonomy, and the like. But, as  
18 this Court said in Glucksberg, going directly  
19 from general concepts of autonomy, of privacy,  
20 of bodily integrity, to -- to a right is not how  
21 we traditionally, this Court traditionally, does  
22 due process analysis.

23 So I think it just confirms, whichever  
24 one of those you look at, Your Honor, a right to  
25 abortion is -- is not grounded in the text, and

1 it's grounded on abstract concepts that this  
2 Court has rejected in -- in other contexts as  
3 supplying a substantive right.

4 JUSTICE THOMAS: You say that this is  
5 the only constitutional right that involves the  
6 taking of a life. What difference does that  
7 make in your analysis?

8 MR. STEWART: Sure, Your Honor. I --  
9 I -- I think it -- it makes a -- a number of  
10 differences. One, I -- I'd mention two in  
11 particular.

12 One is it -- it really does mark out  
13 the unbelievably profound ramifications of this  
14 area, which, in many other areas, assisted  
15 suicide, a whole host of important areas that  
16 are important to dignity, autonomy, freedom, and  
17 important to matters of conscience, it -- it  
18 marks it out as one of the unique areas where  
19 this Court has taken that important issue to the  
20 people, and it's -- it's something that  
21 implicates life, and it just, I think, marks  
22 off, Justice Thomas, how problematic and unusual  
23 and how much of a break the Court's abortion  
24 jurisprudence is from those other cases.

25 JUSTICE THOMAS: If we don't overrule



1 Casey or Roe, do you have a standard that you  
2 propose other than the viability standard?

3 MR. STEWART: It would be, Your Honor,  
4 a clarified version of the undue burden  
5 standard. I -- I -- I would -- I would  
6 emphasize, I -- I think, as Your Honor is  
7 alluding to, that no standard other than the  
8 rational basis review that applies to all laws  
9 will promote an administrable, workable,  
10 practicable, consistent jurisprudence that put  
11 -- puts matters back with the people. I think  
12 anything heightened here is going to be  
13 problematic.

14 But I would say, if the Court were not  
15 inclined to -- to overrule Casey, the -- the  
16 choice would be undue burden standard,  
17 untethered from any bright-line viability rule.

18 JUSTICE THOMAS: Thank you.

19 JUSTICE BREYER: Well, I'd -- I'd like  
20 to go to a different topic, back to Casey.

21 MR. STEWART: Yes, Your Honor.

22 JUSTICE BREYER: I assume you've read  
23 Casey pretty thoroughly.

24 MR. STEWART: Yes, Your Honor.

25 JUSTICE BREYER: And there are two

1 parts. One is they reaffirm Roe. Put that to  
2 the side. The second is an opinion for the  
3 Court, not for three people but for the Court,  
4 and that second part is about what stare decisis  
5 principles should be used to overrule a case  
6 like Roe.

7           And they say Roe is special. What's  
8 special about it? They say it's rare. They  
9 call it a watershed. Why? Because the country  
10 is divided. Because feelings run high. And yet  
11 the country, for better or for worse, decided to  
12 resolve their differences by this Court laying  
13 down a constitutional principle, in this case,  
14 women's choice. All right. That's what makes  
15 it rare.

16           That's not what I'm asking about. I  
17 want your reaction to what they said follows  
18 from that. What the Court said follows from  
19 that is that it should be more unwilling to  
20 overrule a prior case, far more unwilling we  
21 should be, whether that case is right or wrong,  
22 than the ordinary case.

23           And why? Well, they have a lot of  
24 words there, but I'll give you about 10 or 20.  
25 There will be inevitable efforts to overturn it.

1 Of course, there will. Feelings run high. And  
2 it is particularly important to show what we do  
3 in overturning a case is grounded in principle  
4 and not social pressure, not political pressure.

5 Only "the most convincing  
6 justification can show that a later decision  
7 overruling," if that's what we do, "was anything  
8 but a surrender to political pressures or new  
9 members." And that is an unjustified  
10 repudiation of principles on which the Court  
11 stakes its authority.

12 And then there are two sentences I'd  
13 like to read because they say they really mean  
14 this, the -- the Court, not just three: To  
15 overrule under fire in the absence of the most  
16 compelling reason, to reexamine a watershed  
17 decision, would subvert the Court's legitimacy  
18 beyond any serious question.

19 And the last sentence, after they  
20 quote Potter Stewart on the same point, they  
21 say: Overruling unnecessarily and under  
22 pressure would lead to condemnation, the Court's  
23 loss of confidence in the judiciary, the ability  
24 of the Court to exercise the judicial power and  
25 to function as the Supreme Court of a nation

1 dedicated to the rule of law.

2 Now that's the opinion of the Court,  
3 all right? And it's about stare decisis and how  
4 we approach it, and I hope everybody reads this.  
5 It's at 505 U.S. 854 to 869.

6 All right. What do you say to that?

7 MR. STEWART: Sure, Your -- sure  
8 Justice Breyer. I -- I would say a couple  
9 things. I would say we have very closely gone  
10 through the factors that the Casey court itself  
11 went through in stare decisis. More than half  
12 of our brief is devoted to stare decisis. We  
13 now have 30 years in the wake of Casey to see  
14 what Casey has done and what it hasn't done.

15 JUSTICE BREYER: Well, it's caused  
16 some bad things and -- in the eyes of some  
17 people and some good things in the eyes of some  
18 people.

19 MR. STEWART: Your Honor --

20 JUSTICE BREYER: All right. All  
21 right. Go ahead. You --

22 MR. STEWART: I'm -- I'm sorry, Your  
23 Honor. What I'd emphasize, Your Honor, is that  
24 to the extent that -- that the -- I would not  
25 say it was the people that -- that called this

1 Court to end the controversy. The people -- you  
2 know, many, many people vocally really just  
3 wanted to have the matter returned to them so  
4 that they could decide it -- decide it locally,  
5 deal with it the way they thought best and at  
6 least have a fighting chance to have their view  
7 prevail, which was not given to them under Roe  
8 and then, as a result, under Casey.

9 And -- and I'd also emphasize, Your  
10 Honor, that on -- on stare decisis, just as I  
11 said, the last 30 years, workability,  
12 developments in the law, factual developments  
13 that states can't account for. I think the  
14 workability, the undue burden standard alone,  
15 many problems.

16 On all the metrics that Casey was  
17 describing or the vast bulk of them, Casey  
18 fails. And I'd also emphasize this as well,  
19 Justice Breyer, that Casey was not -- was -- was  
20 not a -- a great example of simply letting  
21 precedents stand. It -- it recast Roe's  
22 reasoning. It overruled two of the Court's most  
23 important abortion decisions. It jettisoned the  
24 trimester framework of Roe itself and adopted a  
25 new standard unknown to other parts of the law.

1                   Those are not the hallmarks of  
2 precedent, and they failed under this Court's  
3 stare decisis factors.

4                   JUSTICE BREYER: Okay. Can I take it  
5 that your answer is, yes, you accept the way the  
6 special rule, the rule for the rare watershed,  
7 the stare decisis principles for deciding  
8 whether to overturn such a case as Roe, you  
9 accept that and you think it's met?

10                  MR. STEWART: I would --

11                  JUSTICE BREYER: Is that right?

12                  MR. STEWART: -- I would say yes in  
13 part, Your -- Justice Breyer, and here's what  
14 I'd emphasize, is that I -- I do think,  
15 particularly when Casey looked outward and  
16 looked to what it see -- saw as pressure, there  
17 were pressure on all sides. As -- as Your Honor  
18 noted, this is a hot, difficult issue for  
19 everyone. It's -- that's why it belongs to the  
20 people.

21                  And I think the conclusion the Court  
22 drew from that, that it couldn't provide a -- a  
23 good enough example, that it would look on  
24 principle, those conclusions were, with respect,  
25 Justice Breyer, mistaken, and the -- the last 30

1 years has -- has not seen any calming of that.  
2 It's been very different than some of the  
3 others -- the Court's other controversial  
4 decisions that -- that have seen --

5 JUSTICE SOTOMAYOR: Counsel --

6 MR. STEWART: -- much more calm --

7 JUSTICE SOTOMAYOR: -- what hasn't  
8 been at issue in the last 30 years is the line  
9 that Casey drew of viability. There has been  
10 some difference of opinion with respect to undue  
11 burden, but the right of a woman to choose, the  
12 right to control her own body, has been clearly  
13 set for -- since Casey and never challenged.

14 You want us to reject that line of  
15 viability and adopt something different.  
16 Fifteen justices over 50 years have -- or I  
17 should say 30 since Casey have reaffirmed that  
18 basic viability line. Four have said no, two of  
19 them members of this Court. But 15 justices  
20 have said yes, of varying political backgrounds.

21 Now the sponsors of this bill, the  
22 House bill, in Mississippi, said we're doing it  
23 because we have new justices. The newest ban  
24 that Mississippi has put in place, the six-week  
25 ban, the Senate sponsors said we're doing it

1 because we have new justices on the Supreme  
2 Court.

3 Will this institution survive the  
4 stench that this creates in the public  
5 perception that the Constitution and its reading  
6 are just political acts?

7 MR. STEWART: I --

8 JUSTICE SOTOMAYOR: I -- I -- I don't  
9 see how it is possible. It's what Casey talked  
10 about when it talked about watershed decisions.  
11 Some of them, Brown versus Board of Education it  
12 mentioned, and this one have such an entrenched  
13 set of expectations in our society that this is  
14 what the Court decided, this is what we will  
15 follow, that the -- that we won't be able to  
16 survive if people believe that everything,  
17 including New York versus Sullivan -- I could  
18 name any other set of rights, including the  
19 Second Amendment, by the way. There are many  
20 political people who believe the Court erred in  
21 seeing this as a personal right as -- as opposed  
22 to a militia right. If people actually believe  
23 that it's all political, how will we survive?  
24 How will the Court survive?

25 MR. STEWART: Justice Sotomayor, I --



1 I think the concern about appearing political  
2 makes it absolutely imperative that the Court  
3 reach a decision well grounded in the  
4 Constitution, in text, structure, history, and  
5 tradition, and that carefully goes through the  
6 stare decisis factors that we've laid out.

7 JUSTICE SOTOMAYOR: Casey did that.

8 MR. STEWART: No, it didn't, Your  
9 Honor, respectfully.

10 JUSTICE SOTOMAYOR: Casey went through  
11 every one of them. You think it did it wrong.  
12 That's your belief. But Casey did that.

13 MR. STEWART: Well, Your --

14 JUSTICE SOTOMAYOR: And you haven't  
15 added --

16 MR. STEWART: Sorry, Your Honor.

17 JUSTICE SOTOMAYOR: -- much to the  
18 discussion in your papers as to the errors that  
19 Casey made, other than "I disagree with Casey."

20 MR. STEWART: Well, Justice Sotomayor,  
21 maybe I can -- I can highlight two.

22 Casey gave one paragraph to the  
23 workability of Roe. It then adopted the undue  
24 burden standard, which is perhaps the most  
25 unworkable standard in American law. It gave

1 about three paragraphs, if memory serves, to  
2 reliance, which doesn't account for the last 30  
3 years and the changes that have occurred since  
4 Casey. It did -- it -- it gave a brief factual  
5 view to things that have changed since Roe.  
6 Those, of course, are not going to take account  
7 of the last 30 years of advancements in  
8 medicine, science, all of those things.

9 JUSTICE SOTOMAYOR: What are the --

10 JUSTICE ALITO: What is --

11 JUSTICE SOTOMAYOR: -- advancements in  
12 medicine?

13 MR. STEWART: I think it's an  
14 advancement in -- in knowledge and concern about  
15 such things as fetal pain, what we know the  
16 child is doing and looks like and is fully  
17 human from a very early --

18 JUSTICE SOTOMAYOR: You know --

19 MR. STEWART: I'm sorry.

20 JUSTICE SOTOMAYOR: -- in -- in  
21 regular cases, courts decide whether science  
22 fits the Daubert standard. Obviously, the --  
23 under the Daubert standard, the minority of  
24 people, a -- a gross minority of doctors who  
25 believe fetal pain exists before 24, 25 weeks,

1 it's a huge minority and one not well founded in  
2 science at all. So I don't see how that really  
3 adds anything to the discussion.

4 MR. STEWART: Well --

5 JUSTICE SOTOMAYOR: That a small  
6 fringe of doctors believe that pain could be  
7 experienced between -- before a cortex is formed  
8 --

9 MR. STEWART: Well, I --

10 JUSTICE SOTOMAYOR: -- doesn't mean  
11 that there's been that much of a difference  
12 since Casey.

13 MR. STEWART: We -- we pointed out as  
14 an example, Your Honor, of where Roe and Casey  
15 improperly preclude states from taking account  
16 for these things. And they should be able to be  
17 concerned about the -- about a fact of a -- a --  
18 an unborn life being poked and then recoiling in  
19 the way one of us would recoil.

20 JUSTICE SOTOMAYOR: Sir, I -- I don't  
21 --

22 CHIEF JUSTICE ROBERTS: General, does  
23 -- was -- I know what it said about viability in  
24 Roe. But was viability an issue in the case? I  
25 know it wasn't briefed or argued.

1           MR. STEWART: It -- it was -- it was  
2 not issue -- an issue certainly the way it is an  
3 issue here, Your Honor. I think it was -- to  
4 the extent that the Court had to over -- had to  
5 reaffirm Roe, the way to read that as something  
6 other than dicta would be to under --

7           CHIEF JUSTICE ROBERTS: I'm sorry, I  
8 don't know whether I said, was it an issue in  
9 Roe?

10          MR. STEWART: Oh, in Roe?

11          CHIEF JUSTICE ROBERTS: Yeah.

12          MR. STEWART: I'm sorry, Your Honor.  
13 My understanding is no. The law there was --  
14 didn't have a viability tag. That was inserted  
15 by --

16          CHIEF JUSTICE ROBERTS: In fact, if I  
17 remember correctly, and I -- it's an unfortunate  
18 source, but it's there -- in his papers, Justice  
19 Blackmun said that the viability line was --  
20 actually was dicta. And, presumably, he had  
21 some insight on the question.

22          MR. STEWART: I -- I think -- and I'd  
23 -- I'd add, Your Honor, Justice Blackmun in --  
24 in, I think, as well his papers pointed out the  
25 arbitrary nature of it and -- and the

1 line-drawing problems --

2 CHIEF JUSTICE ROBERTS: And then --

3 MR. STEWART: -- in it too.

4 CHIEF JUSTICE ROBERTS: -- and then,  
5 in Casey, Casey said that that was the core  
6 principle or a central principle in Roe,  
7 viability. It said that after tossing out the  
8 trimester formula, which many people thought was  
9 the core -- core principle. But was viability  
10 at issue in Casey?

11 MR. STEWART: I don't think it was  
12 squarely at issue, Your Honor. Again, it's --  
13 it's a little hard not to take the Court at its  
14 word when it emphasized that viability -- the --  
15 that viability is -- is the central part of Roe  
16 -- Roe's holding and saying that it is  
17 reaffirming that, so we kind of take that as it  
18 -- as it stands. But the Court has not -- it  
19 did not face a law like this certainly,  
20 Mr. Chief Justice.

21 JUSTICE SOTOMAYOR: May I finish my  
22 inquiry?

23 MR. STEWART: Of course, Justice  
24 Sotomayor.

25 JUSTICE SOTOMAYOR: Virtually every

1 state defines a brain death as death. Yet, the  
2 literature is filled with episodes of people who  
3 are completely and utterly brain dead responding  
4 to stimuli. There's about 40 percent of dead  
5 people who, if you touch their feet, the foot  
6 will recoil. There are spontaneous acts by dead  
7 brain people. So I don't think that a response  
8 to -- by a fetus necessarily proves that there's  
9 a sensation of pain or that there's  
10 consciousness.

11 So I go back to my question of, what  
12 has changed in science to show that the  
13 viability line is not a real line, that a fetus  
14 cannot survive? And I think that's what both  
15 courts below said, that you had no expert say  
16 that there is any viability before 23 to 24  
17 weeks.

18 MR. STEWART: And what I'd say -- say  
19 is this, Justice Sotomayor, is that the  
20 fundamental problem with viability, it's not  
21 really something that rests on -- on science so  
22 much. It's that viability is not tethered to  
23 anything in the Constitution, in history, or  
24 tradition. It's a quintessentially legislative  
25 line.

1           A legislature could think that  
2           viability makes sense as -- as a place to draw  
3           the line, but it's quite reasonable for a  
4           legislature to draw the line elsewhere.

5           JUSTICE SOTOMAYOR: Counsel, there's  
6           so much that's not in the Constitution,  
7           including the fact that we have the last word.  
8           Marbury versus Madison. There is not anything  
9           in the Constitution that says that the Court,  
10          the Supreme Court, is the last word on what the  
11          Constitution means. It was totally novel at  
12          that time. And yet, what the Court did was  
13          reason from the structure of the Constitution  
14          that that's what was intended.

15          And, here, in Casey and in Roe, the  
16          Court said there is inherent in our structure  
17          that there are certain personal decisions that  
18          belong to individuals and the states can't  
19          intrude on them. We've recognized them in terms  
20          of the religion parents will teach their  
21          children. We've recognized it in -- in their  
22          ability to educate at home if they choose. They  
23          just have to educate them. We have recognized  
24          that sense of privacy in people's choices about  
25          whether to use contraception or not. We've

1 recognized it in their right to choose who  
2 they're going to marry.

3 I fear none of those things are  
4 written in the Constitution. They have all,  
5 like Marbury versus Madison, been discerned from  
6 the structure of the Constitution.

7 Why do we now say that somehow Roe  
8 versus Casey is -- Roe and Casey are so unusual  
9 that they must be overturned?

10 MR. STEWART: Well, Your -- Justice  
11 Sotomayor, I would -- I would emphasize two  
12 things. When you're going beyond the  
13 Constitution, this Court has looked closely  
14 to --

15 JUSTICE SOTOMAYOR: No, what I'm  
16 saying is they didn't go beyond the  
17 Constitution.

18 MR. STEWART: Your Honor, they did not  
19 deduce those from the structure of the  
20 Constitution. They -- they pointed to the  
21 Fourteenth Amendment and -- and reasoned that  
22 privacy in Roe, autonomy and similar values in  
23 Casey led to a right to abortion.

24 That's not how this Court  
25 traditionally does things, including in the vast



1 run of cases that Your Honor ran through. The  
2 Court looks to history and tradition. And,  
3 here, those decisively reject the proposition  
4 that states cannot legislate comprehensively on  
5 abortion before, after viability, and all  
6 throughout. So it's -- it's history and  
7 tradition, Your Honor.

8 And I would also add, Your -- Your  
9 Honor, that those -- those decisions, a great  
10 many of them, draw -- you know, not just draw  
11 from text -- text, history, and tradition, but  
12 they draw often clear lines, very workable, have  
13 not led to the many negative stare decisis  
14 factors that we identify here.

15 JUSTICE KAGAN: General --

16 JUSTICE BARRETT: General, would -- go  
17 ahead. Go ahead.

18 JUSTICE KAGAN: Go ahead, Justice  
19 Barrett.

20 JUSTICE BARRETT: Would a decision in  
21 your favor call any of the questions -- any of  
22 the cases, sorry, that Justice Sotomayor is  
23 identifying into question?

24 MR. STEWART: No, Your Honor, I -- I  
25 think for a couple reasons.

1           First of all, I think the vast run of  
2 those cases -- and some mentioned from time to  
3 time are Griswold, Lawrence, Obergefell -- these  
4 are -- these are cases that draw clear rules:  
5 you can't ban contraception, you can't ban  
6 intimate romantic relationships between  
7 consenting adults, can't ban marriage of people  
8 of the same sex, clear rules that have  
9 engendered strong reliance interests and that  
10 have not produced negative consequences or all  
11 the many other negative stare decisis  
12 considerations we pointed out, Your Honor.

13           Also, I -- I'd add none of them  
14 involve the purposeful termination of a human  
15 life. So those two -- those two features, stare  
16 decisis and termination of a human life, Your  
17 Honor, puts all of those safely out of reach if  
18 the Court overrules here.

19           JUSTICE BREYER: Okay. So we -- I'm  
20 sorry to interrupt again, but we really might be  
21 making progress. I mean, in the part that --  
22 that I read, you know, of Casey --

23           MR. STEWART: Yes, Your Honor.

24           JUSTICE BREYER: -- I think they think  
25 go back 150 years, maybe now we can go back 200.

1 They think there have only been two cases which  
2 were what they call the watershed and where the  
3 special tough overruling rules apply.

4 You want this to be the third, or do  
5 you think there were more? And, if so, what  
6 were they?

7 MR. STEWART: Well, Your Honor, I --  
8 I -- I think there's quite a bit of difference.  
9 I -- I think the question is never is it bad to  
10 overrule, period. You know, surely, stare --

11 JUSTICE BREYER: This is why I'm  
12 asking you to think -- think in their terms.  
13 There were two they mentioned, you see.

14 MR. STEWART: But --

15 JUSTICE BREYER: And they don't want  
16 Casey -- they don't want Roe to be the third.

17 MR. STEWART: And --

18 JUSTICE BREYER: Now, in your opinion,  
19 you just answered Justice Barrett, hey, all  
20 these are not rising to that level. Okay.

21 MR. STEWART: Right, Your Honor.

22 JUSTICE BREYER: Are there any that do  
23 rise to the level in your opinion?

24 MR. STEWART: I think -- and I -- and  
25 I'm not sure that I necessarily agree with the

1 watershed characterization, Your Honor. What  
2 I'd say, though, I -- I can't think of another  
3 that kind of hits the radar. But -- but I'd  
4 emphasize that a problem here is we're -- we're  
5 dealing with a right that doesn't have a basis  
6 in constitutional text and, again, very much in  
7 conflict with those -- with those values,  
8 Justice Breyer.

9 JUSTICE SOTOMAYOR: I'm not sure how  
10 your answer makes any sense. All of those other  
11 cases -- Griswold, Lawrence, Obergefell -- they  
12 all rely on substantive due process. You're  
13 saying there's no substantive due process in the  
14 Constitution, so they're just as wrong according  
15 to your theory.

16 MR. STEWART: No, Your Honor, we're  
17 quite comfortable with Washington versus  
18 Glucksberg and how it analyzes substantive due  
19 process and it looks to text, history. It looks  
20 to history and tradition to discipline the  
21 inquiry --

22 JUSTICE SOTOMAYOR: Well, I mean --

23 MR. STEWART: -- to make sure --

24 JUSTICE SOTOMAYOR: -- in Obergefell,  
25 there was no history of -- of -- of same-sex

1 marriage.

2 MR. STEWART: And I think the Court --  
3 the -- the Court pointed out, look, when we --  
4 when we were facing Loving versus Virginia --

5 JUSTICE SOTOMAYOR: I -- I'm not  
6 trying to argue that we should overturn those  
7 cases. I just think you're dissimilating when  
8 you say that any ruling here wouldn't have an  
9 effect on those.

10 MR. STEWART: Respectfully, I -- I --  
11 that's -- that's -- I respectfully --

12 JUSTICE SOTOMAYOR: Do you think no --  
13 that no state is going to think otherwise, that  
14 no people in the population aren't going to  
15 channel -- challenge those cases in court?

16 MR. STEWART: I mean, Your -- Your  
17 Honor, we'll always have a diversity of views,  
18 but I think -- I think --

19 JUSTICE SOTOMAYOR: That's the point.

20 MR. STEWART: -- I think -- I think  
21 that's one --

22 JUSTICE SOTOMAYOR: That -- isn't that  
23 the -- isn't --

24 MR. STEWART: -- of the benefits of  
25 our society.

1 JUSTICE SOTOMAYOR: -- isn't that the  
2 point?

3 MR. STEWART: That there -- that  
4 there's a diversity of views and people  
5 can vigorously debate and make --

6 JUSTICE SOTOMAYOR: Exactly.

7 MR. STEWART: -- decisions for  
8 themselves?

9 JUSTICE SOTOMAYOR: And that's what  
10 we're still doing --

11 MR. STEWART: I think that's a good  
12 thing, Your Honor.

13 JUSTICE SOTOMAYOR: -- and that's what  
14 we're doing under undue burden, but we haven't  
15 been doing it on the viability line.

16 MR. STEWART: And -- and neither one  
17 has worked well. The viability line discounts  
18 and disregards state interests, and the undue  
19 burden standard has all -- all of the  
20 problems that we've emphasized.

21 JUSTICE SOTOMAYOR: How is your  
22 interest anything but a religious view? The  
23 issue of when life begins has been hotly debated  
24 by philosophers since the beginning of time.  
25 It's still debated in religions.

1                   So, when you say this is the only  
2 right that takes away from the state the ability  
3 to protect a life, that's a religious view,  
4 isn't it --

5                   MR. STEWART: Respectfully --

6                   JUSTICE SOTOMAYOR: -- because it  
7 assumes that a fetus's life at -- when? You're  
8 not drawing -- you're -- when do you suggest we  
9 begin that life?

10                  MR. STEWART: Your Honor, I -- aside  
11 from --

12                  JUSTICE SOTOMAYOR: Putting it aside  
13 from religion.

14                  MR. STEWART: I -- I'll -- I'll try to  
15 -- I think there might be more than one  
16 question. I'll do my very best, Justice  
17 Sotomayor.

18                  I -- I think this Court in Gonzales  
19 pretty clearly recognized that before viability,  
20 we are talking, with unborn life, with a human  
21 organism. And I think the philosophical  
22 questions Your Honor mentioned, all those  
23 reasons, that they're hard, they've been  
24 debated, they're -- they're -- they're  
25 important, those are all reasons to return this

1 to the people because the people should get to  
2 debate these hard issues, and this Court does  
3 not in that kind of a circumstance --

4 JUSTICE SOTOMAYOR: So when does the  
5 life of a woman and putting her at risk enter  
6 the calculus? Meaning, right now, forcing women  
7 who are poor -- and that's 75 percent of the  
8 population and much higher percentage of those  
9 women in Mississippi who elect abortions before  
10 viability -- they are put at a tremendously  
11 greater risk of medical complications and ending  
12 their life, 14 times greater to give birth to a  
13 child full term than it is to have an abortion  
14 before viability.

15 And now the state is saying to these  
16 women, we can choose not only to physically  
17 complicate your existence, put you at medical  
18 risk, make you poorer by the choice because we  
19 believe what? That --

20 MR. STEWART: Sure, Your Honor. I --  
21 I think, to -- to answer, I think, the -- the  
22 question I think you -- you led with and -- and  
23 then I think expanded on but is still on the  
24 same issue is as to when does a woman's interest  
25 enter, as far as we're concerned, it's there the



1 entire time. Our point is that all of the  
2 interests are there the entire time, and Roe and  
3 Casey improperly prevent states from taking  
4 account and weighing those interests however  
5 they think best.

6 We're not saying --

7 JUSTICE KAGAN: General --

8 JUSTICE ALITO: General, are there --  
9 are there secular philosophers and bioethicists  
10 who take the position that the rights of  
11 personhood begin at conception or at some point  
12 other than viability?

13 MR. STEWART: I -- I believe so. I  
14 mean, I think there's a wide array, I mean,  
15 of -- of -- of people of kind of all different  
16 views and -- and of no faith views who -- who  
17 would reasonably have that view, Your Honor.

18 It's -- it's -- it's not tied to a  
19 religious view, and I don't think -- were it  
20 otherwise, this Court's jurisprudence would --  
21 on this issue would run right into some of its  
22 religious exercise jurisprudence.

23 JUSTICE KAGAN: General, Justice  
24 Breyer started with stare decisis, an important  
25 principle in any case, and, here, for the

1 reasons that Casey mentioned, especially so, to  
2 prevent people from thinking that this Court is  
3 a political institution that will go back and  
4 forth depending on what part of the public yells  
5 loudest and -- and -- and preventing people from  
6 thinking that the Court will go back and forth  
7 depending on changes to the Court's membership.

8           And what strikes me about this case --  
9 and -- and -- and you come here very honestly  
10 saying, you know, we want you to discard the  
11 entire setup and then, even if you don't do  
12 that, we want you to discard the viability line,  
13 which you've acknowledged again today Casey says  
14 is the -- the heart, the central principle of  
15 Roe.

16           And so, usually, there has to be a  
17 justification, a strong justification in a case  
18 like this beyond the fact that you think the  
19 case is wrong. And I guess what strikes me when  
20 I look at this case is that, you know, not much  
21 has changed since Roe and Casey, that people  
22 think it's right or wrong based on the things  
23 that they have always thought it was right and  
24 wrong for.

25           So the -- the -- the -- the -- the

1 rationale behind those cases has something to do  
2 with the autonomy and the freedom and the  
3 dignity of women to pursue their lives as they  
4 wish, to protect their bodily integrity, to make  
5 the decisions that are most fundamental to the  
6 course of their lives.

7           And -- and always, in those cases,  
8 there was an understanding that there were  
9 important interests on the other side in  
10 protecting life or protecting the potential for  
11 life, whether people saw it one way or the other  
12 way, and that there was a difficult question  
13 here and a balance to be made.

14           And, I mean, it strikes me that  
15 people -- some people think those decisions made  
16 the right balance and some people thought they  
17 made the wrong balance, but, in the end, we are  
18 in the same exact place as we were then, except  
19 that we're not because there's been 50 years of  
20 water under the bridge, 50 years of decisions  
21 saying that this is part of our law, that this  
22 is part of the fabric of women's existence in  
23 this country, and that that places us in an  
24 entirely different situation than if you had  
25 come in 50 years ago and made the same

1 arguments.

2 So I guess I just wanted to hear you  
3 react to that.

4 MR. STEWART: Of course, Justice  
5 Kagan. Thank you. I -- I would emphasize a  
6 couple things, Your Honor. The fact that so  
7 much time has passed, let's say nothing had  
8 changed, that's not a point in Roe and Casey's  
9 favor. They have no basis in the Constitution.  
10 They -- they adopt a right that purposefully  
11 leads to the termination of now millions of  
12 human lives. The -- if nothing had changed,  
13 they'd be just as bad as they were 30 years ago,  
14 50 years ago. And now we just have decades of  
15 damage, and we have a situation where nearly 30  
16 years after Casey, the Court unfortunately  
17 divides over what Casey, the lead case on -- on  
18 -- in the abortion area, even means.

19 The lower courts are left not knowing  
20 what to do, as I think -- and I think kind of a  
21 fundamental problem here is, I think, as Justice  
22 Gorsuch mentioned, emphasized in his -- his  
23 opinion in -- in June Medical, that the problem  
24 for lower court judges is the Constitution  
25 doesn't give them an answer to this. There's no

1 neutral rule of law, so judges unfortunately  
2 have to look within themselves, and that's just  
3 never going to solve this issue.

4 But, if the matter is returned to the  
5 people, the people can deal with it, they can  
6 work, they can compromise and reach different  
7 solutions. But, if we don't do that, we're just  
8 going to have all this sort of damage, and at  
9 some point, it's appropriate for the Court to  
10 say enough, as it has in some of its -- the  
11 great overrulings in -- in Brown and in other  
12 cases, where it said this is just enough.

13 Justice Harlan had it right in dissent  
14 in Plessy when he recognized that -- that --  
15 that, you know, all are -- all are equal. And,  
16 here -- similarly, here, the state should be  
17 able to recognize, hey, there are real values on  
18 both sides here. We -- we -- we think that this  
19 one slightly outweighs, we think that this one  
20 slightly outweighs, or we think that there's  
21 some balance to be drawn here.

22 But, if the Court doesn't do that,  
23 Justice Kagan, it's just going to be continued  
24 damage, and the Court will continue to plunge in  
25 this political issue.

1                   I apologize, Mr. Chief Justice. I've  
2 gone over.

3                   CHIEF JUSTICE ROBERTS: No, no, that's  
4 all right. I have just a few little -- well,  
5 not little, I hope -- questions, and the first  
6 gets back to the issue of viability.

7                   You know, in your petition for cert,  
8 your first question and the only one on which we  
9 granted review was whether all pre-viability  
10 prohibitions on elective abortions are  
11 unconstitutional. And then I think it's fair to  
12 say that when you got to the brief on the  
13 merits, you kind of shifted gears and talked a  
14 lot more about whether or not Roe and Casey  
15 should be overruled. And I wanted to give you a  
16 chance to explain that.

17                  MR. STEWART: Sure, Your Honor. So a  
18 couple points. You know, at the petition stage,  
19 we were, of course, identifying -- we identified  
20 for the Court three questions. We emphasized,  
21 as you do at the cert stage, hey, this is  
22 important; only this Court can resolve it. We  
23 emphasized, I believe it was five times, that  
24 the Court was at the least going need -- going  
25 to need to reconsider, revisit, or re-evaluate

1 its precedents. And we asked the Court to at  
2 least get rid of a viability line or any  
3 suggestion of a viability line.

4 So we added, however -- and we had to  
5 take account of the reality that this argument  
6 has not fared well in the lower courts. It --  
7 it -- it's lost in every court of appeals. So,  
8 you know, we -- we raised the issue in addition,  
9 but, once the Court granted only the first  
10 question, we presented every argument as we, you  
11 know, signaled we -- we would present the -- the  
12 -- the full-blown constitutional merits argument  
13 with that fundamental question.

14 So I -- I'd emphasize that, Your  
15 Honor. It was kind of the shift you go from  
16 cert state to merits stage. The Court granted  
17 one question. That question fairly includes  
18 what is the correct standard.

19 CHIEF JUSTICE ROBERTS: Well, it  
20 fairly includes the broader arguments you  
21 raised. I'm not suggesting that. But, on the  
22 other hand, it presumably included the viability  
23 question as well, because that's what you talked  
24 about in that one sentence.

25 MR. STEWART: And -- and -- and we --

1 we've addressed that as well, Your Honor. What  
2 I -- what I'd emphasize here is that the merits  
3 arguments of, you know, the validity of Roe and  
4 Casey as an original matter, is there a  
5 viability rule based on the Constitution, those  
6 are not that complicated or -- or -- or lengthy.

7 The harder questions are, you know,  
8 should the Court overrule and -- and take that  
9 momentous step? And that's why we devote a lot  
10 of space to that very important issue. We  
11 respect stare decisis and have walked through  
12 all those points. But, again, focusing on the  
13 question presented and arguing -- presenting our  
14 best arguments for that, that's -- that's what  
15 we've done, Mr. Chief Justice.

16 CHIEF JUSTICE ROBERTS: On stare  
17 decisis, I think the first issue you look at is  
18 whether or not the decision at issue was wrongly  
19 decided. I've actually never quite understood  
20 how you evaluate that. Is it wrongly decided  
21 based on legal principles and doctrine when it  
22 was decided or -- or in retrospect?

23 Because Roe -- I mean, there are a lot  
24 of cases around the time of Roe, not of that  
25 magnitude but the same type of analysis, that --



1 that went through exactly the sorts of things we  
2 today would say were erroneous, but do we look  
3 at it from today's -- if we look at it from  
4 today -- today's perspective, it's going to be a  
5 long list of cases that we're going to say were  
6 wrongly decided.

7 MR. STEWART: Well, I'd say -- I'd  
8 say, Mr. Chief Justice, that you -- you look --  
9 you can look both was it wrong at the time, has  
10 it been unmasked as wrong by -- by new  
11 understandings, new knowledge, any developments.

12 But I -- I don't think -- as I -- I  
13 think the colloquy -- my colloquy with Justice  
14 Barrett indicated, the Court won't have -- have  
15 to be looking at -- at -- at much other -- many  
16 other areas because this is an area that has a  
17 uniquely problematic set of stare decisis  
18 considerations. A lot of other controversial  
19 areas or once controversial areas are -- are  
20 quite settled, clear rules, and don't have those  
21 considerations against them.

22 So, really, by -- by overruling Roe  
23 and Casey, the Court won't have to go down that  
24 road, and a lot of those decisions are quite  
25 readily groundable in history, tradition, and

1 the Court's traditional factors, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas?

4 JUSTICE THOMAS: No questions.

5 CHIEF JUSTICE ROBERTS: Justice

6 Breyer?

7 Justice Alito?

8 Justice Sotomayor?

9 Justice Kagan?

10 JUSTICE KAGAN: General, I -- I just  
11 wanted to get your quick sense of how your  
12 intermediate positions would work, you know, if  
13 basically the viability line was discarded and  
14 undue burden became the standard overall, a  
15 standard that, according to you, is an unclear  
16 one, what that would leave the Court with going  
17 forward.

18 You know, I'm just sort of thinking  
19 about the great variety of different -- of  
20 regulations that states could pass, so whether  
21 one is 15 weeks and one is 12 weeks and one is 9  
22 weeks or variation across a wide variety of  
23 other dimensions. What would that look like  
24 coming to the Court? How would we -- how -- how  
25 do you think we should -- we would be able to

1 deal with that or -- or how would you counsel us  
2 to deal with that if the Court were to go down  
3 that road?

4 MR. STEWART: Well, I think I -- that  
5 this is -- not to push back against the end --  
6 and I will -- will answer your question, Justice  
7 Kagan, but part of why we've counseled to  
8 overrule full scale is that that's the only way  
9 to get rid of a number of the problems that I  
10 think Your Honor's alluding to.

11 And that's that when you have the  
12 undue burden standard, it's -- it's a very hard  
13 standard to apply. It's not objective. The  
14 Court looks to the record in each case and  
15 what's going on. I mean, the Court in Casey  
16 itself said, under this record, this is not an  
17 undue burden. You -- you couldn't say  
18 necessarily for certain that a certain number of  
19 weeks one place would be an undue burden but  
20 would be okay another place.

21 But, again, that is the world we have  
22 under Casey. So, if the Court upholds this law  
23 under the undue burden standard, it would be  
24 carrying forward with those features, which I --  
25 and I hope I've answered your question, but I

1 think that's one of the very strong reasons to  
2 just go all the way and overrule Roe and Casey,  
3 Your Honor. I -- anyway.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch?

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: I want to be clear  
8 about what you're arguing and not arguing.

9 MR. STEWART: Yes, Your Honor.

10 JUSTICE KAVANAUGH: And to be clear,  
11 you're not arguing that the Court somehow has  
12 the authority to itself prohibit abortion or  
13 that this Court has the authority to order the  
14 states to prohibit abortion as I understand it,  
15 correct?

16 MR. STEWART: Correct, Your Honor.

17 JUSTICE KAVANAUGH: And as I  
18 understand it, you're arguing that the  
19 Constitution's silent and, therefore, neutral on  
20 the question of abortion? In other words, that  
21 the Constitution's neither pro-life nor  
22 pro-choice on the question of abortion but  
23 leaves the issue for the people of the states or  
24 perhaps Congress to resolve in the democratic  
25 process? Is that accurate?

1 MR. STEWART: Right. We're -- we're  
2 saying it's left to the people, Your Honor.

3 JUSTICE KAVANAUGH: And so, for the --  
4 if you were to prevail, the states, a majority  
5 of states or states still could or -- and  
6 presumably would continue to freely allow  
7 abortion, many states; some states would be able  
8 to do that even if you prevail under your view,  
9 is that correct?

10 MR. STEWART: That's consistent with  
11 our view, Your Honor. It's -- it's one that  
12 allows all interests to have full voice and --  
13 and many of the abortions we see in certain  
14 states that I don't think anybody would think  
15 would be moving to change their laws in a more  
16 restrictive direction.

17 JUSTICE KAVANAUGH: Thank you.

18 MR. STEWART: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Barrett?

21 JUSTICE BARRETT: General, I have a  
22 question that is a little bit of a follow-up to  
23 one that Justice Breyer was asking you. That's  
24 about stare decisis. And I think a lot of the  
25 colloquy you've had with all of us has been

1 about the benefits of stare decisis, which I  
2 don't think anyone disputes, and, of course, no  
3 one can dispute because it's part of our stare  
4 decisis doctrine that it's not an inexorable  
5 command and that there are some circumstances in  
6 which overruling is possible. You know, we have  
7 Plessy, Brown. We have Bowers versus Hardwick,  
8 to Lawrence.

9 But, in thinking about stare decisis,  
10 which is obviously the core of this case, how  
11 should we be thinking about it -- I mean,  
12 Justice Breyer pointed out that in Casey and in  
13 some respects, well, it was a different  
14 conception of stare decisis insofar as it very  
15 explicitly took into account public reaction.  
16 Is that a factor that you accept, or are you  
17 arguing that we should minimize that factor?

18 And is there a different set of rules  
19 -- it is true that Casey identified Brown and  
20 West Coast Hotel as watershed decisions. But is  
21 there a distinct set of stare decisis  
22 considerations applicable to what the Court  
23 might decide is a watershed distinction?

24 MR. STEWART: I don't think there  
25 should be a distinct set of -- of -- of

1 considerations there, Your Honor. I think what  
2 I -- what I emphasize, and just to make sure, on  
3 -- on the kind of legitimacy, the Court looking  
4 outward, I -- I think Casey was unusual in that  
5 regard. I think it was a mistake. And I think  
6 it's something that is kind of in conflict with  
7 this Court's structure and approach as an  
8 independent branch looking to the Constitution  
9 rather than looking without.

10           And I -- I think that's one reason why  
11 traditionally the Court is -- is -- is -- in  
12 some of its greatest overrulings, it's -- it's  
13 not looking without. It's saying this was  
14 wrong. It was wrong the day it was decided. We  
15 know it's wrong today. And it's led to all  
16 these terrible consequences. We should get --  
17 we should get rid of it.

18           I -- so I -- I think that that was an  
19 unfortunate break, and I think the Court -- even  
20 if the Court were to -- were to still look at  
21 legitimacy, though, Justice Barrett, I think the  
22 Court could very, very powerfully say, look,  
23 our -- our legitimacy really derives from our  
24 willingness to stand strong and stand firm in  
25 the face of whatever is going on and stand for

1 constitutional principle and follow our  
2 traditional stare decisis factors to overrule  
3 when it's appropriate.

4 Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 MR. STEWART: Thank you, Mr. Chief  
8 Justice.

9 CHIEF JUSTICE ROBERTS: Ms. Rikelman.

10 ORAL ARGUMENT OF JULIE RIKELMAN  
11 ON BEHALF OF THE RESPONDENTS

12 MS. RIKELMAN: Mr. Chief Justice, and  
13 may it please the Court:

14 Mississippi's ban on abortion two  
15 months before viability is flatly  
16 unconstitutional under decades of precedent.  
17 Mississippi asks the Court to dismantle this  
18 precedent and allow states to force women to  
19 remain pregnant and give birth against their  
20 will.

21 The Court should refuse to do so for  
22 at least three reasons.

23 First, stare decisis presents an  
24 especially high bar here. In Casey, this Court  
25 carefully examined and rejected every possible



1 reason for overruling Roe, holding that a  
2 woman's right to end a pregnancy before  
3 viability was a rule of law and a component of  
4 liberty it could not renounce. The question  
5 then is not whether Roe should be overturned but  
6 whether Casey was egregiously wrong to adhere to  
7 Roe's central holding.

8           Second, Casey and Roe were correct.  
9 For a state to take control of a woman's body  
10 and demand that she go through pregnancy and  
11 childbirth with all the physical risks and  
12 life-altering consequences that brings is a  
13 fundamental deprivation of her liberty.  
14 Preserving a woman's right to make this decision  
15 until viability preserve -- protects her liberty  
16 while logically balancing the other interests at  
17 stake.

18           Third, eliminating or reducing the  
19 right to abortion will propel women backwards.  
20 Two generations have now relied on this right,  
21 and one out of every four women makes the  
22 decision to end a pregnancy.

23           Mississippi's ban would particularly  
24 hurt women with a major health or life change  
25 during the course of a pregnancy, poor women,

1 who are twice as likely to be delayed in  
2 accessing care, and young people or those in  
3 contraception, who take longer to recognize a  
4 pregnancy.

5 To avoid profound damage to women's  
6 liberty, equality, and the rule of law, the  
7 Court should affirm.

8 JUSTICE THOMAS: Counsel, I just have  
9 one question. I assume you -- from your brief,  
10 you're relying on an autonomy theory?

11 MS. RIKELMAN: Both bodily integrity  
12 and the ability to make decisions related to  
13 family, marriage, and childbearing, Your Honor.

14 JUSTICE THOMAS: Shortly, some years  
15 after we decided Casey, we had a case out of  
16 South Carolina, I believe, and it involved a  
17 woman who had been convicted of criminal child  
18 neglect because she ingested cocaine during  
19 pregnancy, and her case was post-viability, so  
20 it doesn't fit in the facts of this case.

21 If she had ingested cocaine  
22 pre-viability and had the same negative  
23 consequences to her child, do you think the  
24 state had an interest in enforcing that law  
25 against her?

1 MS. RIKELMAN: The state may have,  
2 Your Honor. The state can certainly regulate to  
3 serve its interests in fetal life and in women's  
4 health. Those particular laws tend to undermine  
5 both of those interests because they deter women  
6 from seeking prenatal care, which is  
7 counterproductive to both their health.

8 JUSTICE THOMAS: But pre-viability as  
9 well as post-viability?

10 MS. RIKELMAN: No, Your Honor. The --  
11 the Court has been clear that after  
12 viability states can prohibit abortion, except  
13 to save a woman's life.

14 JUSTICE THOMAS: No, I mean the -- in  
15 my example of criminal child neglect. I  
16 understand you -- your argument is about  
17 abortion. I am trying to look at the issue of  
18 bodily autonomy and whether or not she has a  
19 right also to bodily autonomy in the case of  
20 ingesting an illegal substance and causing harm  
21 to a pre-viability fetus.

22 MS. RIKELMAN: Your Honor, of course,  
23 those issues aren't posed in this case, and,  
24 again, I would say that the states can certainly  
25 regulate throughout pregnancy, both before and

1 after viability, to preserve fetal life and to  
2 preserve the woman's health.

3 The Court has said, however, there  
4 is -- there are other constitutional issues at  
5 stake, for instance, in the Ferguson case, that  
6 states still can't violate women's Fourth  
7 Amendment rights. But, again, that's not what  
8 this case is about.

9 This case is about a ban on abortion  
10 that the state concedes is weeks before  
11 viability, and the Court has been clear for 50  
12 years that the one thing that states cannot do  
13 is to take the decision completely away from the  
14 woman until viability, that, until that point,  
15 it is her decision to make given the unique  
16 physical demands of pregnancy and the,  
17 life-altering consequences of pregnancy and  
18 having a child.

19 JUSTICE THOMAS: Thank you.

20 CHIEF JUSTICE ROBERTS: You -- the  
21 point you made about the impact on -- on women  
22 and their place in society, those -- those were  
23 certainly made in Roe as well. What we have  
24 before us, though, is a 15-week standard.

25 Are -- are you suggesting that the

1 difference between 15 weeks and viability are  
2 going to have the same sort of impacts as you  
3 were talking about -- or as we were talking  
4 about in Roe?

5 MS. RIKELMAN: Yes, Your Honor, I  
6 believe they would because people who need  
7 abortion after 15 weeks are often in the most  
8 challenging circumstances. As I mentioned,  
9 they're people who have made -- perhaps had a  
10 major health or life change, a family illness, a  
11 job loss, a separation, young people or people  
12 who are on contraception or pregnant for the  
13 first time and who are delayed in recognizing  
14 the signs of pregnancy, or poor women, who often  
15 have much more trouble navigating access to  
16 care, and if they're denied the ability to make  
17 this decision because there's a ban after 15  
18 weeks, they will suffer all of the consequences  
19 that the Court has talked about in the past.

20 And, in fact, the data has been very  
21 clear over the last 50 years that abortion has  
22 been critical to women's equal participation in  
23 society. It's been critical to their health, to  
24 their lives, their ability to pursue --

25 CHIEF JUSTICE ROBERTS: I'm sorry,

1 what -- what kind of data is that?

2 MS. RIKELMAN: I would refer the Court  
3 to the brief of the economists in this case,  
4 Your Honor, and it compiles data showing studies  
5 based actually on causal inference, showing that  
6 it's the legalization of abortion and not other  
7 changes that have had these benefits for women  
8 in society, and, again, those benefits are clear  
9 for education, for the ability to pursue a  
10 profession, for the ability to have --

11 CHIEF JUSTICE ROBERTS: Well, putting  
12 that data aside, if you think that the issue is  
13 one of choice, that women should have a choice  
14 to terminate their pregnancy, that supposes that  
15 there is a point at which they've had the fair  
16 choice, opportunity to choice, and why would 15  
17 weeks be an inappropriate line?

18 Because viability, it seems to me,  
19 doesn't have anything to do with choice. But,  
20 if it really is an issue about choice, why is 15  
21 weeks not enough time?

22 MS. RIKELMAN: For -- for a few  
23 reasons, Your Honor.

24 First, the state has conceded that  
25 some women will not be able to obtain an

1 abortion before 15 weeks and this law will bar  
2 them from doing so. And a reasonable  
3 possibility standard would be completely  
4 unworkable for the courts. It would be both  
5 less principled and less workable than  
6 viability, and some of the reasons for that are,  
7 without viability, there will be no stopping  
8 point.

9 States will rush to ban abortion at  
10 virtually any point in pregnancy. Mississippi  
11 itself has a six-week ban that it's defending  
12 with very similar arguments as it's using to  
13 defend the 15-week ban. And there are states  
14 that have bans --

15 CHIEF JUSTICE ROBERTS: Well, I know,  
16 but I'd like to focus on the 15-week ban because  
17 that's not a dramatic departure from viability.  
18 It is the standard that the vast majority of  
19 other countries have.

20 When you get to the viability  
21 standard, we share that standard with the  
22 People's Republic of China and North Korea. And  
23 I don't think you have to be in favor of looking  
24 to international law to set our constitutional  
25 standards to be concerned if those are your --

1 share that particular time period.

2 MS. RIKELMAN: I think there's two  
3 questions there, Your Honor, if I may.

4 First, that is not correct about  
5 international law. In fact, the majority of  
6 countries that permit legal access to abortion  
7 allow access right up until viability, even if  
8 they have nominal lines earlier.

9 So, for example, Canada, Great  
10 Britain, and most of Europe allows access to  
11 abortion right up until viability, and it also  
12 doesn't have the same barriers in place.

13 CHIEF JUSTICE ROBERTS: What do you  
14 mean, even if they have nominal lines earlier?

15 MS. RIKELMAN: Some countries, Your  
16 Honor, have a nominal line of 12 weeks or 18  
17 weeks, but they permit legal access to abortion  
18 after that point for broad social reasons,  
19 health reasons, socioeconomic reasons, so their  
20 regimes really aren't comparable, and they also  
21 don't have the same type -- types of barriers  
22 that we have here. So, if the Court were to  
23 move the line substantial -- substantially  
24 backwards -- and 15 weeks is 9 weeks before  
25 viability, Your Honor, it's quite a bit



1 backwards -- it may need to reconsider the rules  
2 around regulations because, if it's cutting the  
3 time period to obtain an abortion roughly in  
4 half, then those barriers are going to be much  
5 more important.

6 CHIEF JUSTICE ROBERTS: Thank you.

7 JUSTICE BARRETT: Ms. Rikelman, I have  
8 a question about the safe haven laws. So  
9 Petitioner points out that in all 50 states, you  
10 can terminate parental rights by relinquishing a  
11 child after abortion, and I think the shortest  
12 period might have been 48 hours if I'm  
13 remembering the data correctly.

14 So it seems to me, seen in that light,  
15 both Roe and Casey emphasize the burdens of  
16 parenting, and insofar as you and many of your  
17 amici focus on the ways in which forced  
18 parenting, forced motherhood, would hinder  
19 women's access to the workplace and to equal  
20 opportunities, it's also focused on the  
21 consequences of parenting and the obligations of  
22 motherhood that flow from pregnancy.

23 Why don't the safe haven laws take  
24 care of that problem? It seems to me that it  
25 focuses the burden much more narrowly. There

1 is, without question, an infringement on bodily  
2 autonomy, you know, which we have in other  
3 contexts, like vaccines. However, it doesn't  
4 seem to me to follow that pregnancy and then  
5 parenthood are all part of the same burden.

6 And so it seems to me that the choice  
7 more focused would be between, say, the ability  
8 to get an abortion at 23 weeks or the state  
9 requiring the woman to go 15, 16 weeks more and  
10 then terminate parental rights at the  
11 conclusion. Why -- why didn't you address the  
12 safe haven laws and why don't they matter?

13 MS. RIKELMAN: I think they don't  
14 matter for a couple of reasons, Your Honor.

15 First, even if some of those laws are  
16 new since Casey, the idea that a woman could  
17 place a child up for adoption has, of course,  
18 been true since Roe, so it's a consideration  
19 that the Court already had before it when it  
20 decided those cases and adhered to the viability  
21 line.

22 But, in addition, we don't just focus  
23 on the burdens of parenting, and neither did Roe  
24 and Casey. Instead, pregnancy itself is unique.  
25 It imposes unique physical demands and risks on

1 women and, in fact, has impact on all of their  
2 lives, on their ability to care for other  
3 children, other family members, on their ability  
4 to work. And, in particular, in Mississippi,  
5 those risks are alarmingly high. It's 75 times  
6 more dangerous to give birth in Mississippi than  
7 it -- than it is to have a pre-viability  
8 abortion, and those risks are disproportionately  
9 threatening the lives of women of color.

10 JUSTICE BARRETT: So are you saying --  
11 I mean, actually, as I read Roe and Casey, they  
12 don't talk very much about adoption. It's a  
13 passing reference that that means out of the  
14 obligations of parenthood. But, as I hear this  
15 answer then, are you saying that the right as  
16 you conceive of it is grounded primarily in the  
17 bearing of the child, in the carrying of a  
18 pregnancy, and not so much looking forward into  
19 the consequences on professional opportunities  
20 and work life and economic burdens?

21 MS. RIKELMAN: No, Your Honor, I  
22 believe it's both, and -- and that is exactly  
23 how Casey talked about it. It talked about the  
24 two strands of cases that supported the right.  
25 One was the strand of cases supporting bodily

1 integrity, and it cited to cases like Curzan and  
2 Riggins versus Nevada. And the second was the  
3 strand of cases supporting decisional autonomy  
4 and specifically decisions related to  
5 childbearing, marriage, and procreation,  
6 decisions like Griswold, Loving.

7 And so it's really both strands that  
8 we're relying on here.

9 JUSTICE GORSUCH: May I ask you a  
10 question about stare decisis, counsel? Your --  
11 your colleagues on the other side have  
12 emphasized that Casey rejected Roe's trimester  
13 framework and replaced it with an undue burden  
14 standard. They argue that the undue burden  
15 standard was not well known to the law before  
16 that, and then they argue that the undue burden  
17 standard has evolved over time too in ways the  
18 Court has found difficult to agree upon.

19 In Hellerstedt, for example, they --  
20 they point out in their briefs that the Court  
21 seemed to suggest that a court should consider  
22 both the benefits and the burdens associated  
23 with the proposed restriction. In June Medical  
24 more recently, the Court splintered on -- on --  
25 on that same question, whether benefits could be

1 considered or only burdens.

2 And so the argument goes that this has  
3 proved to be, putting aside all the other  
4 obviously difficult questions in the case, that  
5 -- that the standard itself has proved difficult  
6 to administer and that that is relevant to the  
7 stare decisis analysis, and I just wanted to  
8 give you an opportunity to respond.

9 MS. RIKELMAN: Yes, Your Honor.

10 The first point I'd like to make is  
11 the undue burden test is not at issue in this  
12 case. That is the test that applies to  
13 regulations, not prohibitions. And the state  
14 has conceded that this is a prohibition. In  
15 fact, that's the title of this law, is an Act to  
16 prohibit abortion after 15 weeks.

17 And the only thing that's at issue in  
18 this case is the viability line, and the  
19 viability line has been enduringly workable.  
20 The lower federal courts have applied it  
21 consistently and uniformly for 50 years. And  
22 the Fifth Circuit here below had no difficulty  
23 striking down this law unanimously, 3-0. So  
24 it's been an exceedingly workable standard.

25 And if I may return to your question,

1 Mr. Chief Justice, a reasonable possibility  
2 standard would not be workable. It would  
3 ultimately boil down to an argument that states  
4 can prohibit a category of women from exercising  
5 a constitutional right merely because of the  
6 number of people in the category. And that's  
7 just not how constitutional rights work. A  
8 state would never say that it could ban  
9 religious services on a Wednesday evening, for  
10 example, simply because most people could attend  
11 religious services on another night of the week.

12 JUSTICE GORSUCH: So -- so I actually  
13 just wanted to -- that's helpful, I think. I  
14 just want to make sure I understand what you're  
15 telling me, counsel, that -- that if the Court  
16 were to, in this case, step past viability and  
17 apply undue burden, the undue burden test, to  
18 regulations prior to viability, you would agree  
19 with the other side, I think, that that's not a  
20 workable standard. Is -- is that -- is that a  
21 fair understanding of what you're -- you're  
22 telling the Court?

23 MS. RIKELMAN: No, Your Honor. I -- I  
24 believe --

25 JUSTICE GORSUCH: Do you think that

1 would be workable?

2 MS. RIKELMAN: -- I believe -- if I  
3 may clarify, I believe the undue burden test has  
4 been workable for regulations that it is --

5 JUSTICE GORSUCH: I -- I -- I  
6 understand that. I'm -- if it were to apply --  
7 if the Court were to -- and I thought this was  
8 what you were saying in response to the Chief  
9 Justice, but maybe I'm mistaken, and please  
10 correct me if I am -- but what -- what is your  
11 argument against applying the undue burden  
12 standard prior to viability?

13 MS. RIKELMAN: If the undue burden  
14 standard, as this Court laid out in Casey, which  
15 includes the viability line, is applied --

16 JUSTICE GORSUCH: No, no, I'm asking  
17 -- I know -- we're fighting the hypothetical  
18 here, counsel, all right? Accept the  
19 hypothetical. If, hypothetically, the Court  
20 were to extend the undue burden standard to  
21 regulations prior to viability, would that be  
22 workable or would that not be workable in your  
23 view?

24 MS. RIKELMAN: Without viability, it  
25 would not be workable, Your Honor, because it

1 would ultimately, again, always come down to a  
2 claim that states can bar a certain category of  
3 people from exercising this right simply because  
4 of the number of people in the category, and  
5 that's not a workable standard and it's not a  
6 constitutional standard.

7 JUSTICE GORSUCH: I appreciate that  
8 clarification. Thank you.

9 JUSTICE ALITO: Just to follow up on  
10 that, I read your briefs -- your brief to say  
11 that the only real options we have are to  
12 reaffirm Roe and Casey as they stand or to  
13 overrule them in their entirety. You say that  
14 "there are no half-measures here." Is that a  
15 correct understanding of your brief?

16 MS. RIKELMAN: Your Honor, it --  
17 certainly, the arguments that the state has  
18 presented is what we're responding to there,  
19 which is that all of the state's arguments,  
20 including their alternatives, which are undue  
21 burden without viability, would be the  
22 equivalent of overruling Casey and Roe because  
23 the viability line is the central holding of  
24 those cases. Casey mentioned it no fewer than  
25 19 times. And the Court in June Medical just a



1 year ago affirmed that the viability line is the  
2 central holding of both Casey and Roe.

3 JUSTICE ALITO: Well, you -- you do  
4 emphasize that the Court drew the line at  
5 viability in Roe and reaffirmed that in Casey,  
6 and that is certainly something that we have to  
7 take very seriously into consideration.

8 But suppose we were considering that  
9 question now for the first time. I'm sure you  
10 know the arguments about the viability line as  
11 well as I do, probably better than I do. What  
12 would you say in defense of that line? What  
13 would you say to the argument that has been made  
14 many times by people who are pro-choice and  
15 pro-life that the line really doesn't make any  
16 sense, that it is, as Justice Blackmun himself  
17 described it, arbitrary?

18 The -- the woman's -- if a woman wants  
19 to be free of the burdens of pregnancy, that  
20 interest does not disappear the moment the  
21 viability line is crossed. Isn't that right?

22 MS. RIKELMAN: No, Your Honor, and if  
23 I may make a few points to answer your question.

24 First, I think the state views  
25 viability as arbitrary because it completely

1 discounts the woman's interests. But  
2 viability --

3 JUSTICE ALITO: No, no. But does a  
4 woman have -- does -- upon reaching the point of  
5 viability, does not the woman have the same  
6 interests that she had before viability in being  
7 free of this pregnancy that she no longer wants  
8 to continue?

9 MS. RIKELMAN: Viability is a  
10 principled line, Your Honor, because, in  
11 ordering the interests --

12 JUSTICE ALITO: Well, I'm trying to  
13 see whether it is a principled line.

14 MS. RIKELMAN: Yeah. The --

15 JUSTICE ALITO: Will you agree with me  
16 at least on that point, that a woman still has  
17 the same interest in terminating her pregnancy  
18 after the viability line has been crossed?

19 MS. RIKELMAN: Yes, Your Honor, but  
20 the Court balanced the interests --

21 JUSTICE ALITO: Okay. And then --

22 MS. RIKELMAN: -- and in ordering the  
23 interests at stake --

24 JUSTICE ALITO: -- look at the  
25 interests on -- on the other side. The -- the

1 fetus has an interest in having a life, and that  
2 doesn't change, does it, from the point before  
3 viability to the point after viability?

4 MS. RIKELMAN: In -- in some people's  
5 view, it doesn't, Your Honor, but what the Court  
6 said is that those philosophical differences  
7 couldn't be resolved --

8 JUSTICE ALITO: Well, what is the --

9 MS. RIKELMAN: -- in the way --

10 JUSTICE ALITO: That -- that's what  
11 I'm getting at. What is the philosophical  
12 argument, the secular philosophical argument for  
13 saying this is the appropriate line?

14 There are those who say that the  
15 rights of personhood should be considered to  
16 have taken hold at a point when the fetus  
17 acquires certain independent characteristics.  
18 But viability is dependent on medical technology  
19 and medical practice. It has changed. It may  
20 continue to change.

21 MS. RIKELMAN: No, Your Honor, it is  
22 principled because, in ordering the interests at  
23 stake, the Court had to set a line between  
24 conception and birth, and it logically looked at  
25 the fetus's ability to survive separately as a

1 legal line because it's objectively verifiable  
2 and doesn't require the Court to resolve the  
3 philosophical issues at stake.

4 CHIEF JUSTICE ROBERTS: I just want to  
5 focus on stare decisis for a little bit. I  
6 found my colleague, Justice Breyer's, comments  
7 quite compelling. I'm not quite sure how  
8 they're -- they play out in -- in Casey.

9 It is certainly true that we cannot  
10 base our decisions on whether they're popular or  
11 not with the people. Casey seemed to say we  
12 shouldn't base our decisions not only on that  
13 but whether they're going to -- whether they're  
14 going to seem popular, and it seemed to me to  
15 have a paradoxical conclusion that the more  
16 unpopular the decisions are, the firmer the  
17 Court should be in not departing from prior  
18 precedent, sort of a super stare decisis, but  
19 it's super stare decisis for what are regarded  
20 as -- by many, as the most erroneous decisions.

21 Do you think there is that category?  
22 Is there -- or is it just normal stare decisis?

23 MS. RIKELMAN: I think it is precedent  
24 on precedent, Your Honor, because Casey did the  
25 stare decisis analysis for Roe, so the question

1 before this Court is whether that stare decisis  
2 analysis was egregiously wrong.

3 And if I may answer your earlier  
4 question about whether viability was squarely at  
5 issue in Casey, it clearly was, Your Honor. At  
6 pages 869 to 871, the Court squarely discussed  
7 viability because the government had made the  
8 argument that viability was arbitrary --

9 CHIEF JUSTICE ROBERTS: Well, no, I  
10 appreciate that Casey addressed it, but that's  
11 different than saying it was at issue. It said  
12 it was the central principle of Roe because it  
13 was pretty much all that was left after they  
14 were done dealing with the rest of it.

15 And the regulations in Casey had --  
16 had no applicability or not depending upon where  
17 viability was. They applied throughout the  
18 whole range, period. So, if they didn't say  
19 anything about viability, it's like what Justice  
20 Blackmun said in -- when discussing among his  
21 colleagues, which is a good reason not to have  
22 papers out that -- that early, is that they  
23 don't have to address the line-drawing at all in  
24 Roe, and they didn't have to address the  
25 line-drawing at all in Casey.

1 MS. RIKELMAN: I disagree with that,  
2 Your Honor, because the undue burden test  
3 incorporates the viability line. That was what  
4 the Court was assessing the regulations against,  
5 whether they imposed a substantial obstacle in  
6 the path of a woman before viability.

7 And if a prohibition like this law  
8 isn't a substantial obstacle, then nothing would  
9 be. So the issue was squarely before the Court,  
10 and, in fact, the Court said at page 879 that in  
11 adopting the undue burden test, it was not  
12 disturbing the viability line.

13 JUSTICE BREYER: It's a very  
14 interesting question that I think Justice  
15 Barrett raised too. It's usually just  
16 philosophical, but I think it has bite here.

17 When I read Casey, it's not just one  
18 on one, you know, two is greater than one.  
19 Casey plus Roe is greater than -- it -- it's --  
20 they're making a point that -- that -- that  
21 we're an institution perhaps more than a court  
22 of appeals or a district court. It's Hamilton's  
23 point, no purse, no sword, and yet we have to  
24 have public support, and that comes primarily,  
25 says Casey -- I wonder if it was O'Connor who

1 wrote that? I don't know.

2           But it comes primarily from people  
3 believing that we do our job. We use reason.  
4 We don't look to just what's popular. And  
5 that's where you're seeing the paradox. But the  
6 problem with the super case of which we've heard  
7 three mentioned, the problem with a super case  
8 like this, the rare case, the watershed case,  
9 where people are really opposed on both sides  
10 and they really fight each other, is they're  
11 going to be ready to say, no, you're just  
12 political, you're just politicians.

13           And that's what kills us as an  
14 American institution. That's what they're  
15 saying. So we're looking at it for that. But  
16 we are looking to, and that they say is a reason  
17 why -- a reason why, when you get a case like  
18 that, you better be damn sure that the normal  
19 stare considerations, stare decisis overrulings  
20 are really there in spades, double, triple,  
21 quadruple, and then they go through and show  
22 they're not. Okay?

23           What's the paradox? Now maybe you  
24 think I just made an argument that there isn't  
25 one, but, really, in my head, I'm thinking I'm

1 not sure. There may be one. And I don't know  
2 if you've ever thought about this. I don't know  
3 if you've ever -- if -- when -- when -- when  
4 that occurred to you, I don't want to overrule  
5 the stare -- I wouldn't want the Court to  
6 overrule the stare decisis section of Casey, you  
7 see. And that -- that's -- that's what I think  
8 is being brought up, and maybe I haven't made it  
9 clearer, but I've tried to.

10 MS. RIKELMAN: Yes, Your Honor. I  
11 think the point that the Court was making was  
12 that the fact that some states may continue to  
13 enact laws in the teeth of the Court's precedent  
14 has never been enough of a reason to overrule.  
15 And that's true for a number of decisions that  
16 the Court has issued. The fact that some people  
17 continue to disagree with them is not a basis to  
18 discard that precedent.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Thomas, anything further?

21 JUSTICE THOMAS: Back to my original  
22 question. If I were -- I know your interest  
23 here is in abortion, I understand that, but, if  
24 I were to ask you what constitutional right  
25 protects the right to abortion, is it privacy?



1 Is it autonomy? What would it be?

2 MS. RIKELMAN: It's liberty, Your  
3 Honor. It's the textual protection in the  
4 Fourteenth Amendment that a state can't deprive  
5 a person of liberty without due process of law,  
6 and the Court has interpreted liberty to include  
7 the right to make family decisions and the right  
8 to physical autonomy, including the right to end  
9 a pre-viability pregnancy.

10 JUSTICE THOMAS: So it's all of the  
11 above?

12 MS. RIKELMAN: Well, the Court --  
13 that's how the Court has interpreted the liberty  
14 clause for over a hundred years in cases going  
15 back to Meyer, Griswold, Carey, Loving,  
16 Lawrence.

17 JUSTICE THOMAS: Yeah, but I -- I  
18 mean, all of those sort of just come out of  
19 Lochner, the -- so it's that we've -- we've  
20 dropped part of it. So I understand what you're  
21 saying, but what I'm trying to focus on is, if  
22 we -- is to lower the level of generality or at  
23 least be a little bit more specific.

24 In the old days, we used to say it was  
25 a right to privacy that the Court found in the

1 due process, substantive due process clause,  
2 okay? So -- or in substantive due process, and  
3 I'm trying to get you to tell me, what are we  
4 relying on now? Is it privacy? Is it autonomy?  
5 What is it?

6 MS. RIKELMAN: I think it continues to  
7 be liberty, and the right exists whatever level  
8 of generality the Court applies. There was a  
9 tradition under the common law for centuries of  
10 women being able to end their pregnancies.

11 But, in addition, when it comes to  
12 decisions related to family, marriage, and  
13 childbearing, the Court has done the analysis at  
14 a higher level of generality, and that makes  
15 sense because, otherwise, the Constitution would  
16 reinforce the historical discrimination against  
17 women.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Breyer?

21 Justice Alito?

22 JUSTICE ALITO: Well, you just  
23 mentioned the common law, so let me ask you a  
24 couple questions about history.

25 Did any state constitutional provision

1 recognize that abortion was a right, liberty, or  
2 immunity in 1868, when the Fourteenth Amendment  
3 was adopted?

4 MS. RIKELMAN: No, Your Honor, but it  
5 had been allowed under the common law for many  
6 years.

7 JUSTICE ALITO: Does any judicial  
8 decision at that time or shortly or immediately  
9 after 1868 recognize that abortion was a right,  
10 liberty, or immunity?

11 MS. RIKELMAN: There were state high  
12 court decisions shortly before then, Your Honor,  
13 talking about the ability of women to end a  
14 pregnancy before quickening.

15 JUSTICE ALITO: What's your best case?

16 MS. RIKELMAN: For the right to end a  
17 pregnancy, Your Honor?

18 JUSTICE ALITO: Uh-huh.

19 MS. RIKELMAN: Allowing a state to  
20 take control of a woman's body and force her to  
21 undergo the physical demands, risks, and  
22 life-altering consequences of pregnancy is a  
23 fundamental deprivation of her liberty. And,  
24 once the Court recognizes that that liberty  
25 interest deserves heightened protection, it does

1 need to draw a workable line, and viability is a  
2 line that logically balances the interests at  
3 stake.

4 JUSTICE ALITO: The brief for the  
5 American Historical Association says that  
6 abortion was not legal before quickening in 26  
7 out of 37 states at the time when the Fourteenth  
8 Amendment was adopted. Is that correct?

9 MS. RIKELMAN: That is correct because  
10 some of the states had started to discard the  
11 common law at that point because of a  
12 discriminatory view that a woman's proper role  
13 was as a wife and mother, a view that the  
14 Constitution now rejects, and that's why it's  
15 appropriate to do the historical analysis at a  
16 higher level of generality.

17 JUSTICE ALITO: In the face of that,  
18 can it said that the right to -- to abortion is  
19 deeply rooted in the history and traditions of  
20 the American people?

21 MS. RIKELMAN: Yes, it can, Your  
22 Honor. Again, at the founding, women were able  
23 to end their pregnancy under the common law.  
24 And, in fact, this Court in Glucksberg  
25 specifically decide -- discussed Casey as a

1 decision based on history and tradition and, at  
2 Note 19, specifically called out and relied on  
3 Roe's conclusion that at the time of the  
4 founding and well into the 1800s, women had the  
5 ability to end a pregnancy.

6 JUSTICE ALITO: What was the -- the  
7 principal source that the Court relied on in Roe  
8 for its historical analysis? Who was the author  
9 of that -- of that article?

10 MS. RIKELMAN: I apologize, Your  
11 Honor, I don't remember the author. I know that  
12 the Court spent many pages of the opinion doing  
13 a historical analysis. There's also a brief on  
14 behalf of several key American historian  
15 associations that go through that history in  
16 detail because there's even more information now  
17 that supports Roe's legal conclusions.

18 JUSTICE ALITO: All right. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

21 Justice Kagan?

22 Justice Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: I think the other  
25 side would say that the core problem here is

1 that the Court has been forced by the position  
2 you're taking and by the -- the cases to pick  
3 sides on the most contentious social debate in  
4 American life and to do so in a situation where  
5 they say that the Constitution is neutral on the  
6 question of abortion, the text and history, that  
7 the Constitution's neither pro-life nor  
8 pro-choice on the question of abortion, and they  
9 would say, therefore, it should be left to the  
10 people, to the states, or to Congress.

11 And I think they also then continue,  
12 because the Constitution is neutral, that this  
13 Court should be scrupulously neutral on the  
14 question of abortion, neither pro-choice nor  
15 pro-life, but, because, they say, the  
16 Constitution doesn't give us the authority, we  
17 should leave it to the states and we should be  
18 scrupulously neutral on the question and that  
19 they are saying here, I think, that we should  
20 return to a position of neutrality on that  
21 contentious social issue rather than continuing  
22 to pick sides on that issue.

23 So I think that's, at a big-picture  
24 level, their argument. I want to give you a  
25 chance to respond to that.

1 MS. RIKELMAN: Yes. A few points if I  
2 may, Your Honor.

3 First, of course, those very same  
4 arguments were made in Casey, and the Court  
5 rejected them, saying that this philosophical  
6 disagreement can't be resolved in a way that a  
7 woman has no choice in the matter.

8 And, second, I don't think it would be  
9 a neutral position. The Constitution provides a  
10 guarantee of liberty. The Court has interpreted  
11 that liberty to include the ability to make  
12 decisions related to child -- childbearing,  
13 marriage, and family. Women have an equal right  
14 to liberty under the Constitution, Your Honor,  
15 and if they're not able to make this decision,  
16 if states can take control of women's bodies and  
17 force them to endure months of pregnancy and  
18 childbirth, then they will never have equal  
19 status under the Constitution.

20 JUSTICE KAVANAUGH: And I want to ask  
21 a question about stare decisis and to think  
22 about how to approach that here because there  
23 have been lots of questions picking up on  
24 Justice Barrett's questions and others. And  
25 history helps think about stare decisis, as I've

1 looked at it, and the history of how the Court's  
2 applied stare decisis, and when you really dig  
3 into it, the history tells a somewhat different  
4 story, I think, than is sometimes assumed.

5           If you think about some of the most  
6 important cases, the most consequential cases in  
7 this Court's history, there's a string of them  
8 where the cases overruled precedent. Brown v.  
9 Board outlawed separate but equal. Baker versus  
10 Carr, which set the stage for one person/one  
11 vote. West Coast Hotel, which recognized the  
12 states' authority to regulate business. Miranda  
13 versus Arizona, which required police to give  
14 warnings when the right to -- about the right to  
15 remain silent and to have an attorney present to  
16 suspects in criminal custody. Lawrence v.  
17 Texas, which said that the state may not  
18 prohibit same-sex conduct. Mapp versus Ohio,  
19 which held that the exclusionary rule applies to  
20 state criminal prosecutions to exclude evidence  
21 obtained in violation of the Fourth Amendment.  
22 Gideon versus Wainwright, which guaranteed the  
23 right to counsel in criminal cases. Obergefell,  
24 which recognized a constitutional right to  
25 same-sex marriage.



1           In each of those cases -- and that's a  
2 list, and I could go on, and those are some of  
3 the most consequential and important in the  
4 Court's history -- the Court overruled  
5 precedent. And it turns out, if the Court in  
6 those cases had -- had listened, and they were  
7 presented in -- with arguments in those cases,  
8 adhere to precedent in *Brown v. Board*, adhere to  
9 *Plessy*, on *West Coast Hotel*, adhere to *Atkins*  
10 and adhere to *Lochner*, and if the Court had done  
11 that in those cases, you know, this -- the  
12 country would be a much different place.

13           So I assume you agree with most, if  
14 not all, the cases I listed there, where the  
15 Court overruled the precedent. So the question  
16 on *stare decisis* is why, if -- and I know you  
17 disagree with what about I'm about to say in the  
18 "if" -- if we think that the prior precedents  
19 are seriously wrong, if that, why then doesn't  
20 the history of this Court's practice with  
21 respect to those cases tell us that the right  
22 answer is actually a return to the position of  
23 neutrality and -- and not stick with those  
24 precedents in the same way that all those other  
25 cases didn't?

1 MS. RIKELMAN: Because the view that a  
2 previous precedent is wrong, Your Honor, has  
3 never been enough for this Court to overrule,  
4 and it certainly shouldn't be enough here when  
5 there's 50 years of precedent. Instead, the  
6 Court has required something else, a special  
7 justification. And the state doesn't come  
8 forward with any special justification. It  
9 makes the same exact arguments the Court already  
10 considered and rejected in its stare decisis  
11 analysis in Casey.

12 And, in fact, there is nothing  
13 different. There is no less need today than 30  
14 years ago or 50 years ago for women to be able  
15 to make this fundamental decision for themselves  
16 about their bodies, lives, and health.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Barrett?

20 JUSTICE BARRETT: I want to ask you a  
21 follow-up question. You know, the Chief was  
22 asking you about the viability line and if that  
23 was the right place, if that's the right line to  
24 draw. So let's take it out of the question of  
25 stare decisis and imagine that there is a state

1 constitution that's identical to the Fourteenth  
2 Amendment's Due Process Clause, and a state  
3 supreme court has to decide as a matter of state  
4 constitutional law what the scope of an abortion  
5 right is. And the second trimester ends at 27  
6 weeks. And so that state supreme court says, we  
7 think that the right exists, you know, in a --  
8 in a -- in an absolute sense, that the state  
9 cannot take away the right up to 27 weeks and  
10 then after that adopts an undue burden standard.

11 As a matter of first principles, is  
12 that line acceptable as a matter of  
13 constitutional law?

14 MS. RIKELMAN: Your Honor, it may be,  
15 but I think that the question in this case is  
16 whether a line is obviously more principled or  
17 obviously more workable than viability because  
18 of the stare decisis context.

19 JUSTICE BARRETT: Why -- I mean,  
20 that's the Roe framework basically, the  
21 trimester. Why wouldn't that be workable if you  
22 pick a line and say the end of the second  
23 trimester, 27 weeks; the third trimester,  
24 state's interests increase? I don't understand  
25 why 27 weeks is less workable than 24.

1 MS. RIKELMAN: I'm not trying to  
2 suggest it is, Your Honor. What I was trying to  
3 suggest is that the viability line is a  
4 principled and workable line, so, to change it,  
5 there would have to be a new line that's  
6 obviously more principled and more workable.  
7 And -- and the line that the Court has  
8 drawn actually --

9 JUSTICE BARRETT: But that's stare  
10 decisis. I'm asking as a matter of first  
11 principles.

12 MS. RIKELMAN: As a matter of first  
13 principle, the viability line makes sense  
14 because, if the -- the state constitution was  
15 the same --

16 JUSTICE BARRETT: As a matter of  
17 prudential judgment. It's not constitutionally  
18 required as a matter of first principles  
19 because, in fact, we could decide to be more  
20 protective and say 27 weeks, end of the second  
21 trimester.

22 MS. RIKELMAN: You could, Your Honor,  
23 but the -- the viability line makes sense given  
24 the protection for liberty because it comes from  
25 the woman's liberty interest in resisting state

1 control of her body. And, once the Court  
2 recognizes that interest, it does need to draw a  
3 line, as it does in many other constitutional  
4 contexts, like the Fourth and Fifth Amendment.

5 And the viability line, as I  
6 mentioned, makes sense because it focuses on the  
7 fetus's ability to survive separately, which is  
8 an appropriate legal line because it's  
9 objectively verifiable and doesn't delve into  
10 philosophical questions about when life begins.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 General Prelogar?

14 ORAL ARGUMENT OF GENERAL ELIZABETH B. PRELOGAR  
15 FOR THE UNITED STATES, AS AMICUS CURIAE,  
16 SUPPORTING THE RESPONDENTS

17 GENERAL PRELOGAR: Mr. Chief Justice,  
18 and may it please the court:

19 For a half century, this Court has  
20 correctly recognized that the Constitution  
21 protects a woman's fundamental right to decide  
22 whether to end a pregnancy before viability.  
23 That guarantee that the state cannot force a  
24 woman to carry a pregnancy to term and give  
25 birth has engendered substantial individual and

1 societal reliance.

2           The real-world effects of overruling  
3 Roe and Casey would be severe and swift. Nearly  
4 half of the states already have or are expected  
5 to enact bans on abortion at all stages of  
6 pregnancy, many without exceptions for rape or  
7 incest.

8           Women who are unable to travel  
9 hundreds of miles to gain access to legal  
10 abortion will be required to continue with their  
11 pregnancies and give birth, with profound  
12 effects on their bodies, their health, and the  
13 course of their lives.

14           If this Court renounces the liberty  
15 interest recognized in Roe and reaffirmed in  
16 Casey, it would be an unprecedented contraction  
17 of individual rights and a stark departure from  
18 principles of stare decisis.

19           The Court has never revoked a right  
20 that is so fundamental to so many Americans and  
21 so central to their ability to participate fully  
22 and equally in society. The Court should not  
23 overrule this central component of women's  
24 liberty.

25           JUSTICE THOMAS: General, would you

1 specifically tell me -- specifically state what  
2 the right is? Is it specifically abortion? Is  
3 it liberty? Is it autonomy? Is it privacy?

4 GENERAL PRELOGAR: The right is  
5 grounded in the liberty component of the  
6 Fourteenth Amendment, Justice Thomas, but I  
7 think that it promotes interest in autonomy,  
8 bodily integrity, liberty, and equality. And I  
9 do think that it is specifically the right to  
10 abortion here, the right of a woman to be able  
11 to control, without the state forcing her to  
12 continue a pregnancy, whether to carry that baby  
13 to term.

14 JUSTICE THOMAS: I understand we're  
15 talking about abortion here, but what is  
16 confusing is that we -- if we were talking about  
17 the Second Amendment, I know exactly what we're  
18 talking about. If we're talking about the  
19 Fourth Amendment, I know what we're talking  
20 about because it's written. It's there.

21 What specifically is the right here  
22 that we're talking about?

23 GENERAL PRELOGAR: Well, Justice  
24 Thomas, I think that the Court in those other  
25 contexts with respect to those other amendments

1 has had to articulate what the text means and  
2 the bounds of the constitutional guarantees, and  
3 it's done so through a variety of different  
4 tests that implement First Amendment rights,  
5 Second Amendment rights, Fourth Amendment  
6 rights.

7           So I don't think that there is  
8 anything unprecedented or anomalous about the  
9 right that the Court articulated in Roe and  
10 Casey and the way that it implemented that right  
11 by defining the scope of the liberty interest by  
12 reference to viability and providing that that  
13 is the moment when the balance of interests tips  
14 and when the state can act to prohibit a woman  
15 from -- from getting an abortion based on its  
16 interest in protecting the fetal life at that  
17 point.

18           JUSTICE THOMAS: So the right  
19 specifically is abortion?

20           GENERAL PRELOGAR: It's the right of a  
21 woman prior to viability to control whether to  
22 continue with the pregnancy, yes.

23           JUSTICE THOMAS: Thank you.

24           JUSTICE SOTOMAYOR: General, I am  
25 interested in Justice Kavanaugh's long litany of



1 cases in which we've overruled precedent, and we  
2 have. Yet, you did call this unprecedented. As  
3 I see the structure of the Constitution, the  
4 body of it is the relationship of the three  
5 branches of government, and then there is the  
6 relationship of the federal government to the  
7 state, and, through our incorporation of the  
8 Fourteenth Amendment, of the state vis-à-vis the  
9 individual, it's the federal government and the  
10 states' relationship to individuals.

11 And I see the Bill of Rights,  
12 including the Fourteenth Amendment, as basically  
13 setting the limits, giving individual freedom to  
14 do certain things and stopping the government  
15 from intruding in those liberties, in those Bill  
16 of Rights, correct?

17 Of all of the decisions that Justice  
18 Kavanaugh listed, all of them invite --  
19 virtually, except for maybe one, involved us  
20 recognizing and overturning state control over  
21 issues that we said belong to individuals, the  
22 right in Miranda to be warned was an individual  
23 right, correct?

24 GENERAL PRELOGAR: That's right,  
25 Justice Sotomayor, and I think that that is a

1 key distinction with the list of precedents that  
2 Justice Kavanaugh was relying on.

3 I think that there are really two key  
4 distinctions, and the first is that in the vast  
5 majority of those cases, the Court was actually  
6 taking the issue away from the people and saying  
7 that it had been wrong before not to recognize a  
8 right. And I think that matters because it goes  
9 straight to reliance interests.

10 Here, the Court would be doing the  
11 opposite. It would be telling the women of  
12 America that it was wrong, that, actually, the  
13 ability to control their bodies and perhaps the  
14 most important decision they can make about  
15 whether to bring a child into this world is not  
16 part of their protected liberty, and I think  
17 that that would come at tremendous cost to the  
18 reliance that women have placed on this right  
19 and on societal reliance and what this right has  
20 meant for further ensuring equality.

21 JUSTICE BREYER: The reliance point is  
22 a -- is a good point, and this may be my fault.  
23 I'm talking about pages 854 to 863 in the Casey  
24 case. And I've already used up too much time.  
25 I can't read those pages out loud. But they do

1 not include the list that Justice Kavanaugh had.  
2 They do include two. One is Brown, and the  
3 second one is West Coast Hotel versus Parrish.  
4 And you could add the gay rights cases as a  
5 third which would fit the criteria.

6 But there are complex criteria that  
7 she's talking about that link to the position in  
8 the rule of law of this Court, so all I would  
9 say is you have to read them before beginning to  
10 say whether they are overruling or not  
11 overruling in the sense meant there calling for  
12 special concern.

13 Now they say in those, maybe I'd  
14 mention two, wait a minute, of course, Plessy  
15 was wrong when decided, but, just a minute, also  
16 remember Plessy said that separate but equal was  
17 a badge of inferiority. No, they said, it  
18 isn't. Well, all you have to do is open your  
19 eyes and look at the South, my friend, and you  
20 will see whether it was or it wasn't in 1954.

21 And they made a similar point. They  
22 said, are you going to sit here in the middle of  
23 the Depression and tell me that -- that Lochner,  
24 with its other cases, and pure, just about pure  
25 laissez faire, that we can run the country that

1 way?

2 I mention that because I want people  
3 to read those 15 pages with care, and that's why  
4 I said that. If you have anything to add to my  
5 plea to read it, please do.

6 GENERAL PRELOGAR: Well, Justice  
7 Breyer, I agree completely. I have read those  
8 pages and re-read them many times, and I think  
9 that this is actually another key distinction  
10 from the cases that Justice Kavanaugh was  
11 referring to, and that is, as I understand those  
12 passages in Casey, the Court carefully walked  
13 through each and every stare decisis factor that  
14 this Court focuses on. It looked at workability  
15 of the viability rule, doctrinal underpinnings,  
16 legal and factual developments, and, critically,  
17 reliance interests.

18 And down the line, it found that the  
19 case for reaffirming Roe was overwhelming. And  
20 in that situation, when every factor that the  
21 Court consults to determine whether to retain  
22 precedent counsels in favor of retaining it, I  
23 think Casey properly perceived that a decision  
24 to overrule nevertheless, perhaps based on a  
25 conclusion that the justices thought the case

1 was wrongly decided in the first instance, would  
2 run counter to the ability of stare decisis to  
3 function as a cornerstone of the rule of law in  
4 this context.

5 JUSTICE ALITO: Is it your argument  
6 that a case can never be overruled simply  
7 because it was egregiously wrong?

8 GENERAL PRELOGAR: I think that at the  
9 very least, the state would have to come forward  
10 with some kind of materially changed  
11 circumstance or some kind of materially new  
12 argument, and Mississippi hasn't done so in this  
13 case. It is --

14 JUSTICE ALITO: Really? So suppose  
15 Plessy versus Ferguson was re-argued in 1897, so  
16 nothing had changed. Would it not be sufficient  
17 to say that was an egregiously wrong decision on  
18 the day it was handed down and now it should be  
19 overruled?

20 GENERAL PRELOGAR: It certainly  
21 was egregiously wrong on the day that it was  
22 handed down, Plessy, but what the Court said in  
23 analyzing Plessy to Brown and Casey was that  
24 what had become clear is that the factual  
25 premise that underlay the decision, this idea

1 that segregation didn't create a badge of  
2 inferiority, had been entirely mistaken.

3 JUSTICE ALITO: So is your -- is it  
4 really --

5 GENERAL PRELOGAR: And, here, the  
6 state is not --

7 JUSTICE ALITO: -- is it your answer  
8 that we needed all the experience from 1896 to  
9 1954 to realize that Plessy was -- was wrongly  
10 decided? Would you answer my question? Had it  
11 come before the Court in 1897, should it have  
12 been overruled or not?

13 GENERAL PRELOGAR: I think it should  
14 have been overruled, but I think that the  
15 factual premise was wrong in the moment it was  
16 decided, and the Court realized that and  
17 clarified that when it overruled in Brown.

18 JUSTICE ALITO: So there are --

19 GENERAL PRELOGAR: And, here --

20 JUSTICE ALITO: -- circumstances in  
21 which a decision may be overruled, properly  
22 overruled, when it must be overruled simply  
23 because it was egregiously wrong at the moment  
24 it was decided?

25 GENERAL PRELOGAR: Well, I think --

1 JUSTICE ALITO: Correct?

2 GENERAL PRELOGAR: -- every other --

3 JUSTICE ALITO: Is that correct?

4 GENERAL PRELOGAR: -- stare decisis  
5 factor likewise would have justified overruling  
6 in that interest, that actually it would run  
7 counter to any notion of reasonable reliance,  
8 that it was not a workable rule, that it had  
9 become an outlier in our understanding of  
10 fundamental freedoms.

11 JUSTICE ALITO: Well, there was a lot  
12 of reliance on --

13 GENERAL PRELOGAR: And so I think,  
14 looking at all of the facts --

15 JUSTICE ALITO: -- there was a lot of  
16 reliance on Plessy. The -- the South built up a  
17 whole society based on the idea of white  
18 supremacy. So there was a lot of reliance. It  
19 was rely -- it was improper reliance. It was  
20 reliance on an egregiously wrong understanding  
21 of what equal protection means.

22 But your answer is -- I don't -- I  
23 still don't understand -- I still don't have  
24 your answer clearly. Can a decision be  
25 overruled simply because it was erroneously

1 wrong, even if nothing has changed between the  
2 time of that decision and the time when the  
3 Court is called upon to consider whether it  
4 should be overruled? Yes or no? Can you give  
5 me a yes or no answer on that?

6 GENERAL PRELOGAR: This Court, no, has  
7 never overruled in that situation just based on  
8 a conclusion that the decision was wrong. It  
9 has always applied the stare decisis factors and  
10 likewise found that they warrant overruling in  
11 that instance. And -- and Casey did that. It  
12 applied the stare decisis factors.

13 If stare decisis is to mean anything,  
14 it has to mean that that kind of extensive  
15 consideration of all of the same arguments for  
16 whether to retain or discard a precedent itself  
17 is an additional layer of precedent that needs  
18 to be relied on and can form a stable foundation  
19 of the rule of law.

20 JUSTICE KAGAN: General, you've talked  
21 a number of times about the reliance interests  
22 here, and I think I'd like you to say a little  
23 bit more about that because, you know,  
24 sometimes, when we talk about reliance  
25 interests, it's like there's a rule of law and



1 you look at it and you say, oh, somebody will  
2 enforce my contract because of this rule, and it  
3 has a very kind of grounded quality to it.

4 And, as Casey talked about the  
5 reliance interests here, they're a little bit  
6 more airy. And I just wanted to get your sense  
7 of what are the reliance interests here and how  
8 does -- how do they cash out on the ground?

9 GENERAL PRELOGAR: Well, there are  
10 multiple reliance interests here, as I think  
11 Casey correctly recognized. Casey pointed to  
12 the individual reliance of women and their  
13 partners who had been able to organize their  
14 lives and make important life decisions against  
15 the backdrop of having control over this  
16 incredibly consequential decision whether to  
17 have a child. And people make decisions in  
18 reliance on having that kind of reproductive  
19 control, decisions about where to live, what  
20 relationships to enter into, what investments to  
21 make in their jobs and careers.

22 And so I think, on a very individual  
23 level, there has been profound reliance. And  
24 it's certainly the case that not every woman in  
25 America has needed to exercise this right or has

1 wanted to, but one in four American women have  
2 had an abortion, and for those women, the right  
3 secured by Roe and Casey has been critical in  
4 ensuring that they can control their bodies and  
5 control their lives.

6           And then I think there's a second  
7 dimension to it that Casey also properly  
8 recognized, and that's the societal dimension.  
9 That's the -- the understanding of our society,  
10 even though this has been a controversial  
11 decision, that this is a liberty interest of  
12 women. It's the case that not everyone agrees  
13 with Roe versus Wade, but just about every  
14 person in America knows what this Court held,  
15 they know how the Court has defined this concept  
16 of liberty for women and what control they will  
17 have in the situation of an unplanned pregnancy.

18           And for the Court to reverse course  
19 now, I think, would run counter to that societal  
20 reliance and the very concept we have of what  
21 equality is guaranteed to women in this country.

22           JUSTICE SOTOMAYOR: It is certainly  
23 true that there can be some planning by some  
24 people about pregnancy. People who are raped  
25 don't have a choice, whether it's by an outsider

1 or their own husband. And not everybody can  
2 afford contraceptives, contrary to the -- the --  
3 your adversary's brief. In fact, 19 percent of  
4 the women in Mississippi are uninsured, so they  
5 don't have money to pay for contraceptives.

6 So -- but why -- their point in their  
7 brief was, you know, contraceptives, if you use  
8 them, the failure rate is very small, et cetera,  
9 et cetera, how can there be real reliance. So  
10 could you address that issue?

11 GENERAL PRELOGAR: Of course.

12 So, first, this is not a new  
13 circumstance since Roe and Casey.  
14 Contraceptives existed in 1973 and in 1992, and  
15 still the Court recognized that unplanned  
16 pregnancies would persist and deeply implicate  
17 the liberty interest of women.

18 But I think even on the facts, the  
19 state is mistaken here. Contraceptive failure  
20 rate in this country is at about 10 percent,  
21 using the most common methods. That means that  
22 women using contraceptives, approximately one in  
23 10 will experience an unplanned pregnancy in the  
24 first year of use alone. About half the women  
25 who have unplanned pregnancies were on

1       contraceptives in the month that that occurred.  
2       And so I think the idea that contraceptives  
3       could make the need for abortion dissipate is  
4       just contrary to the factual reality.

5                   JUSTICE SOTOMAYOR:  You also  
6       mentioned, or maybe it was your co-counsel, that  
7       life changes for women after 15 weeks.

8                   GENERAL PRELOGAR:  That's exactly  
9       right, Justice Sotomayor, and I think that this  
10      is responsive as well to the questions that the  
11      Chief Justice was asking about, in particular,  
12      the impact of enforcing a 15-week bar in this  
13      case.  The Court has always looked at that issue  
14      by looking at the people for whom the law is a  
15      restriction, not those for whom it's irrelevant.

16                   So the question is, why would women  
17      need access to abortion after 15 weeks, and what  
18      is the effect on them?  And there are any number  
19      of women who cannot get an abortion earlier.  
20      They don't realize that they're pregnant.  
21      That's especially true of women who are young or  
22      don't have -- haven't experienced a pregnancy  
23      before, or their life circumstances change, as  
24      you referred to, Justice Sotomayor.  They lose  
25      their job or their relationship breaks apart or

1 they have medical complications. Or, for many  
2 women, they don't have the resources to pay for  
3 it earlier. It takes time for them to raise the  
4 money or make the appropriate logistical  
5 arrangements to be able to take time off work  
6 and travel and have childcare. And for all  
7 those women in this category who need access  
8 to abortion after 15 weeks, the fact that other  
9 women were able to exercise their constitutional  
10 rights does nothing to diminish the impact on  
11 their liberty interest in forcing them to  
12 continue with that pregnancy.

13 JUSTICE SOTOMAYOR: Thank you.

14 CHIEF JUSTICE ROBERTS: General,  
15 following up on that, would that argument be  
16 true in terms of viability as well? In other  
17 words, what -- your discussion of the reliance  
18 interests and the ability of women and men to  
19 control their lives in reliance on the right to  
20 -- to an abortion, the argument would not be as  
21 strong, I think you'll have to concede, given  
22 what we're talking about, which is not a  
23 prohibition; it's a 15-week line.

24 Is that right?

25 GENERAL PRELOGAR: Yes. So this --

1 CHIEF JUSTICE ROBERTS: There -- you  
2 have to hypothesize people who have planned  
3 their lives according to a 24 or whatever week  
4 limit it is but not a 15-week limit on abortion,  
5 right?

6 GENERAL PRELOGAR: Well, I don't think  
7 the Court has ever analyzed reliance with that  
8 kind of parsing. I think, here, the -- I -- the  
9 -- the force of the viability line is that it's  
10 clearly demarcated to the scope of a  
11 woman's protected liberty interest in this  
12 context. And the state is not actually asking  
13 this Court to replace it with a clear 15-week  
14 line that would provide some measure of  
15 continued protection for this right. They're  
16 asking the Court to reverse the liberty interest  
17 altogether or leave it up in the air.

18 And if that were to happen, then  
19 immediately states with six-week bans,  
20 eight-week bans, ten-week bans, and so on, would  
21 seek to enforce those with no continued guidance  
22 of what the scope of the liberty interest is  
23 going forward.

24 CHIEF JUSTICE ROBERTS: Well, that may  
25 be what they're asking for, but the thing that

1 is at issue before us today is 15 weeks. And I  
2 just wonder what the strength of your reliance  
3 arguments, which sounded to me like being based  
4 on a total prohibition, would be if there isn't  
5 a total prohibition, and as far as viability  
6 goes, I don't see what that has to do with the  
7 question of choice at all.

8 GENERAL PRELOGAR: Well, I think, as  
9 Casey emphasized in reaffirming the viability  
10 line, the Court justified that as having both a  
11 logical and a biological justification that it  
12 marks the point in pregnancy when the fetus is  
13 capable of meaningful life --

14 CHIEF JUSTICE ROBERTS: No, that's  
15 what John Hart Ely explained was a complete  
16 syllogism. That's the definition of viability.  
17 It's not a reason that viability is a good line.

18 GENERAL PRELOGAR: Well, it's focused  
19 on the idea of fetal separateness, and I think  
20 that that is a line that also accords with the  
21 history and tradition in this country of  
22 abortion regulation. Contrary to the state's  
23 arguments here, at the time of the founding and  
24 for most of early American history, women had an  
25 -- an ability to access abortion in the early

1 stages of pregnancy, and it was only when the  
2 fetus was deemed sufficiently separate that  
3 states could act to bar that.

4 So I think that the viability line  
5 also aligns with history and tradition in that  
6 respect.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Thomas?

9 JUSTICE THOMAS: You heard my question  
10 to counsel earlier about the woman who was  
11 convicted of criminal child neglect. What would  
12 be your reaction to that as far as her liberty  
13 and whether or not the liberty interest that  
14 we're talking about extends to her?

15 GENERAL PRELOGAR: Well, Justice  
16 Thomas, I have to confess that I haven't read  
17 the specific case you're referring to, but, if I  
18 understand the question you were posing, it  
19 sounds as though the state is seeking to  
20 regulate for a child that's been born that was  
21 injured while it was inside the womb.

22 And I think that we are not denying  
23 that a state has an interest there. We're not  
24 denying that a state has an interest here  
25 either. Roe recognized that states have



1 interests that exist from the outset of  
2 pregnancy.

3 But, with respect to this specific  
4 right to abortion, there are also profound  
5 liberty interests of the woman on the other side  
6 of the scale in not being forced to continue  
7 with a pregnancy, not being forced to endure  
8 childbirth and to have a child out in the world.

9 And the state's arguments here seem to  
10 ask this Court to look only at its interests and  
11 to ignore entirely those incredibly weighty  
12 interests of the women on the other side.

13 JUSTICE THOMAS: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Breyer?

16 Justice Alito? No?

17 Justice Gorsuch, anything further?

18 JUSTICE GORSUCH: I just want to make  
19 sure I understand your response to the Chief  
20 Justice. If this Court will reject the  
21 viability line, do you see any other  
22 intelligible principle that the Court could  
23 choose?

24 GENERAL PRELOGAR: Well, I think that  
25 it would be critically important, even if this

1 Court were to reject the viability line, to  
2 reinforce and reaffirm the fundamental and  
3 profound liberty interest --

4 JUSTICE GORSUCH: That -- that --

5 GENERAL PRELOGAR: -- at stake here,  
6 and I --

7 JUSTICE GORSUCH: Counsel, I'm sorry  
8 for interrupting, but that wasn't my question.  
9 I understand -- I understand you -- I understand  
10 that point fully by the end of this argument.  
11 That is deeply clear to me. I understand your  
12 position.

13 I -- I'm just asking a question about  
14 whether you think there would be another  
15 alternative line that the government would  
16 propose or not. You emphasized that if -- if 15  
17 weeks were approved, then we'd have cases about  
18 12 and 10 and 8 and 6, and so my question is, is  
19 there a line in there that the government  
20 believes would be principled or not?

21 GENERAL PRELOGAR: I don't think  
22 there's any line that could be more principled  
23 than viability. You know, I think the factors  
24 the Court would have to think about are what is  
25 most consistent with precedent, what would be

1 clear and workable, and what would preserve  
2 the -- the essential components of the liberty  
3 interest, and viability checks all of those  
4 boxes and has the advantage as well as being a  
5 rule of law for 50 years.

6 JUSTICE GORSUCH: Thank you. That's  
7 helpful, counsel. Appreciate it.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh?

10 JUSTICE KAVANAUGH: You -- you make a  
11 very forceful argument and identify critically  
12 important interests that are at stake in this  
13 issue, no doubt about that.

14 The other side says, though, that  
15 there are two interests at stake, that there's  
16 also the interest in -- in fetal life at stake  
17 as well. And in your brief, you say that the  
18 existing framework accommodates -- that's your  
19 word -- both the interests of the pregnant woman  
20 and the interests of the fetus.

21 And -- and the problem, I think the  
22 other side would say and the reason this issue  
23 is hard, is that you can't accommodate both  
24 interests. You have to pick. That's the  
25 fundamental problem. And one interest has to

1 prevail over the other at any given point in  
2 time, and that's why this is so challenging, I  
3 think.

4           And the question then becomes, what  
5 does the Constitution say about that? And I  
6 just want to get your reaction to what the other  
7 side's theme is, and I've mentioned it in my  
8 prior questions.

9           When you have those two interests at  
10 stake and both are important, as you  
11 acknowledge, why not -- why should this Court be  
12 the arbiter rather than Congress, the state  
13 legislatures, state supreme courts, the people  
14 being able to resolve this? And there will be  
15 different answers in Mississippi and New York,  
16 different answers in Alabama than California,  
17 because they're two different interests at stake  
18 and the people in those states might value those  
19 interests somewhat differently.

20           Why is that not the right answer?

21           GENERAL PRELOGAR: Justice Kavanaugh,  
22 it's not the right answer because the Court  
23 correctly recognized that this is a fundamental  
24 right of women, and the nature of fundamental  
25 rights is that it's not left up to state

1 legislatures to decide whether to honor them or  
2 not.

3           And it's true, different rules would  
4 prevail throughout the country if this Court  
5 were to overrule Roe and Wade -- Roe and Casey,  
6 but what that would mean is that women in those  
7 states who are refusing to honor their rights  
8 and who are forcing them to continue to use  
9 their bodies to sustain a pregnancy and then to  
10 bring a child into the world will have no  
11 recourse other than to travel if they're able to  
12 afford it or to attempt abortion outside the  
13 confines of the medical system or to have a  
14 child even though that was not the best choice  
15 for them and their family.

16           JUSTICE KAVANAUGH: Thank you.

17           CHIEF JUSTICE ROBERTS: Justice  
18 Barrett.

19           JUSTICE BARRETT: I have a follow-up  
20 to Justice Kagan's question about reliance. I'm  
21 just trying to nail down, and I -- and I asked  
22 Ms. Rikelman this question too, but I'm not sure  
23 that I fully understand the government's  
24 position or Ms. Rikelman's position.

25           So, on pages 18 and 19 of your brief,

1 you talk about reliance interests and you quote  
2 some of the language from Casey about a woman's  
3 ability to participate in the social and  
4 economic life of the nation.

5 And I mentioned the safe haven laws to  
6 Ms. Rikelman, and it -- it seems to me I fully  
7 understand the reliance interests. There are  
8 the airy ones Justice Kagan was referring to and  
9 then there are the more specific ones about a  
10 woman's access to abortion as a backup form of  
11 birth control in the event that contraception  
12 fails so that she need not bear the burdens of  
13 pregnancy.

14 But what do you have to say to  
15 Petitioners' argument that those reliance  
16 interests do not include the reliance interests  
17 of parenting and bringing a child into the world  
18 when maybe that's not the best thing for her  
19 family or her career?

20 GENERAL PRELOGAR: I think the state  
21 is wrong about that. And I -- I think where the  
22 analysis goes wrong in reliance on those safe  
23 haven laws is overlooking the consequences of  
24 forcing a woman upon her the choice of having to  
25 decide whether to give a child up for adoption.

1 That itself is its own monumental decision for  
2 her.

3 And so I think that there's nothing  
4 new about the safe haven laws, the -- or -- or  
5 at least nothing new about the availability of  
6 adoption as an alternative. Roe and Casey  
7 already took account of that fact. And I think  
8 that there are certainly, of course, all of  
9 the -- the bodily integrity interests that we've  
10 referred to, but, also, the autonomy interests  
11 retain in force as well.

12 JUSTICE BARRETT: Okay. So it's  
13 the -- the reliance interests and the right to  
14 be able to choose to terminate the pregnancy  
15 rather than having to terminate the parental  
16 rights?

17 GENERAL PRELOGAR: I think that that  
18 is part of it, yes. And I think, for many  
19 women, that is an incredibly difficult choice,  
20 but it's one that this Court for 50 years has  
21 recognized must be left up to them based on  
22 their beliefs and their conscience and their  
23 determination about what is best for the course  
24 of their lives.

25 JUSTICE BARRETT: Thank you, General.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 General.

3 Rebuttal, General Stewart.

4 REBUTTAL ARGUMENT OF SCOTT G. STEWART  
5 ON BEHALF OF THE PETITIONERS

6 MR. STEWART: Thank you, Mr. Chief  
7 Justice. I'd like to do my best to make three  
8 points.

9 First, picking up where -- where you  
10 just left off, Justice Barrett, on safe haven  
11 laws, the Respondents in this case, I -- I  
12 believe, as Your Honor pointed out, have  
13 emphasized parenting burdens being a lead or the  
14 lead reason that women seek abortions.

15 I would emphasize safe haven laws, as  
16 best I've been able to find, first came into  
17 existence in 1999 in Texas. They're now  
18 ubiquitous, and you're correct, Justice Barrett,  
19 that they relieve that huge burden.

20 I would also add that as to -- as to  
21 burdens during pregnancy, I would emphasize that  
22 contraception is more accessible and affordable  
23 and available than it was at the time of Roe or  
24 Casey. It serves the same goal of allowing  
25 women to decide if, when, and how many children



1 to have.

2 And I would also note, just frankly,  
3 the lowest-cost abortion at Jackson Women's  
4 Health is \$600 for the abortion. Additional  
5 costs and further fees, according to -- to my  
6 friends, the Respondents, and their amici, there  
7 are also additional costs related to travel,  
8 taking off time -- time off of work,  
9 accommodations, all of those sorts of things.  
10 Whether somebody is uninsured or not, the costs  
11 of contraception are consistently significantly  
12 less than those.

13 Number two, I -- I think you --  
14 Justice Kavanaugh, you had it exactly right when  
15 you -- when you used the term scrupulously  
16 neutral. I think that's a very good description  
17 of what we're asking for here. I think it's the  
18 problem and the value that has evaded the Court  
19 and will continue to evade this Court under Roe  
20 and Casey, but that is exact -- exactly right.

21 This is a hard issue. It involves --  
22 and -- and I would emphasize, Your Honor, that,  
23 as you said, there are interests here on -- on  
24 both sides. There are interests for everyone  
25 involved. This is unique for the woman. It's

1 unique for the unborn child too whose life is at  
2 stake in all of these decisions. It's unique  
3 for us as a society in how we decide if the  
4 states get to -- get -- get to legislate on this  
5 issue, how to decide and how to weigh these  
6 tremendously momentous issues.

7           In closing, I would say that in his  
8 dissent in Plessy versus Ferguson, Justice  
9 Harlan emphasized that there is no caste system  
10 here. The humblest in our country is the pure,  
11 the most powerful. Our Constitution neither  
12 knows nor tolerates distinctions on the basis of  
13 race.

14           It took 58 years for this Court to  
15 recognize the truth of those realities in a  
16 decision, and that was the greatest decision  
17 that this Court ever reached. We're -- we're  
18 running on 50 years of Roe. It is an  
19 egregiously wrong decision that has inflicted  
20 tremendous damage on our country and will  
21 continue to do so and take innumerable human  
22 lives unless and until this Court overrules it.

23           We ask the Court to do so in this case  
24 and uphold the state's law.

25           Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 General, counsel. The case is submitted.  
3 (Whereupon, at 11:54 a.m., the case  
4 was submitted.)  
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