No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., IN HIS OFFICIAL CAPACITY AS STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

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

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

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Dated: July 29, 2021

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QUESTION PRESENTED

Whether all pre-viability prohibitions on elective abortions are unconstitutional.

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INTERESTS OF AMICUS CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to these goals.

Judicial Watch seeks to participate as an *amicus curiae* in this matter for two reasons. First, Judicial Watch is concerned about the erosion of the principles of federalism. These principles are imperative for the proper functioning of our republic. Second and related to the first, as an organization that litigates frequently in both federal and state courts, clearly defined spheres of legal authority are particularly important to Judicial Watch. The Fifth Circuit's opinion in this case demonstrates the difficulty lower courts have encountered in trying to square this Court's inconsonant jurisprudence regarding abortion with the principles of federalism on which our system of government was built.

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[1] *Amicus curiae* states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *Amicus curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Petitioner and Respondent granted blanket consent for the filing of *amicus curiae* briefs in this matter.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision to uphold the district court and hold Mississippi's Gestational Age Act, Miss Code Ann. § 41-41-191, unconstitutional is a perfect snapshot of how distorted abortion jurisprudence has become.[2] At a point in time when nearly everyone agrees that the legal foundation for *Roe v. Wade* was pure fiction, lower courts continue to be handcuffed to *Roe* and its progeny. Respectfully, this Court should overturn *Roe* and by extension, *Casey*, and return abortion regulation to the States where it began and where it belongs.

Our Founding Fathers very carefully crafted the Constitution and Bill of Rights to protect the individual sovereignty of the states. The resulting principles of federalism purposefully guided the jurisprudence of this country for more than 150 years, maintaining fairly clear spheres of federal and state power. Trading in history, precedent, and judicial impartiality, this Court slowly began to blur the two spheres with the federal sphere gaining more power and principles of federalism suffering.

Abortion policy began in the states where the people used the democratic process to voice their moral, religious, and scientific opinions. *Roe* needlessly wrenched abortion policy from the states and, relying on "penumbras formed by emanations," seven unelected judges created a brand-new

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[2] *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (2019).

constitutional right to abortion. The response was immediate and lasting and after 48 years, strong opposition to *Roe* and its progeny remain.

While there are numerous reasons to uphold Mississippi's Gestational Age Act and strike down *Roe*, this *amicus curiae* brief will focus on just one: that abortion policy never belonged in the federal sphere and the *Roe* Court violated the principles of federalism. The Founders intended for the states to determine the laws for their own state, subject only to those specifically enumerated in the Constitution as reserved to the federal government. Respectfully, the Court should return abortion policy to the states and renew the proper functioning of federalism.

ARGUMENT

I. Abortion Regulation Belongs in the Realm of the States and State Governance.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those that are to remain in the State governments are numerous and infinite. The former will be exercised principally on external objects: as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, government, and prosperity of the State.

The Federalist No. 45, p. 236 (James Madison) (G. Willis ed. 1982).

James Madison delivered these words on January 26, 1788. Prior to this date, only five states had ratified the Constitution and fear remained of concentrated federal power. Madison's words clearly and concisely separated the state and federal spheres and described the power each contained. There was no balancing or weighing: the states indisputably outweighed the federal government in power.

A. The Founders Relied on the Principles of Federalism.

The delicate balance of state and federal power was a heavily debated issue leading up to and during the Constitutional Convention. When the delegates departed Philadelphia with a draft Constitution, the two opposing philosophies – the Federalists and the anti-Federalists – appeared unable to find a workable compromise. Proponents of both began a public opinion campaign by publishing the Anti-Federalist and Federalist Papers – letters addressed primarily to the people of New York, who represented a microcosm of the heated debate between the two groups.

Even after the Constitution was ratified by the minimum number of required states, the quest to define the distinct role of the states and the federal government remained. Several states ratified the Constitution with the promise that "the scope of federal power would be strictly limited."[3] James Madison began his pursuit to alleviate the concerns of both parties by drafting amendments to the Constitution. Heavily influenced by his home state of Virginia, the Ninth and Tenth Amendments, were proposed as providing a prohibition against the expansion of power by the federal government as well

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[3] Kurt T. Lash, "James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment," 74 Geo. Wash. L. Rev. 165, 170-172 and n. 51 (2006) [hereafter "Madison's Report"].

as a rule limiting the construction of federal power.[4] "As a restrictive clause, the Ninth preserves the principle enshrined in the Tenth."[5]

Madison and the proposed amendments were quickly faced with a challenge with efforts to create a National Bank. In a speech to Congress opposing a National Bank, Madison relied on the Ninth and Tenth Amendments operating together to limit the sphere of federal power.[6] Madison's speech gave him the opportunity to explain the Amendments and how they limited federal power in a very concrete way. In a news article the following day it was reported:

> The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they have not only been proposed by Congress, but ratified by nearly three-fourths of the states. He read several of

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4 *Id*. at 167 ("The Tenth Amendment established the principle of enumerated power, with all nondelegated power reserved to the states. The Ninth, on the other hand, limited the interpretation of those federal powers that were enumerated. In this way, the rule of the Ninth preserved the principle of the Tenth.")

5 *Id*. at 175.

6 Kurt T. Lash, "The Lost Original Meaning of the Ninth Amendment," 83 Tex. L. Rev. 331, 383-84 (2004) [hereafter "Lost Meaning"].

> the articles proposed, remarking particularly on the 11th and 12th. [T]he former, as guarding against a latitude of interpretation – the latter, as excluding every source of power not within the constitution itself.[7]

Ultimately, the remaining states were satisfied that the Ninth and Tenth Amendments adequately limited federal power and protected state power and the Bill of Rights was ratified.[8] Madison's "twin principles of federalism" continued to be used as a "rule of strict construction of federal power" by both legal treatise writers and courts.[9] In cases such as *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810), and *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814), courts upheld state sovereignty on the principles of federalism grounded in the legal authority of the Ninth and Tenth Amendments.[10]

With the arrival of the Alien and Sedition Acts, Madison's "twin principles" of federalism began to be blurred into one – promoting the Tenth Amendment

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7 Lash, "Madison's Report," at 175, n. 87 (explaining the original Ninth and Tenth Amendments were first known as the eleventh and twelfth prior to ratification).

8 *See* Lash, "Madison's Report," at 175.

9 Lash, "Lost Meaning," p. 40; *see e.g.*, St. George Tucker, John Taylor, and Supreme Court Justice Joseph Story discussed in detail in "Lost Meaning," at 396-400.

10 *Id*. at 403-409.

as the guardian of state sovereignty.[11] However, the dual importance of the Ninth and Tenth Amendments stood for 150 years as the foundation of the supremacy of state sovereignty in all areas save for those specifically enumerated powers delegated to the federal sphere.[12] Regretfully, as time progressed, this Court undermined the strict construction of federal power founded in the Ninth and Tenth Amendments and then the New Deal threw open the door to expanded federal power.[13]

Once the Ninth Amendment was divorced from its original intent and abandoned, it was ripe for refashioning. This is precisely what the Court did in

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[11] Madison's reference to his opposition to the National Bank ought to have implicated the Ninth Amendment's role in restricting federal power. Unfortunately, the absence of an explicit reference to the Ninth Amendment began its diminished role until it was revived as a source of personal "liberties" in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See* Lash, "Lost Meaning," at 409-14.

[12] *See e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *United States v. Butler*, 297 U.S. 1 (1936) in which the Supreme Court rejected attempts by the federal government to expand its sphere of federal power due to the emergency associated with the Great Depression. *See* Lash, "Madison's Report," at 189-90.

[13] *Id.* at 192-93 ("After the new deal … the Court uncoupled the determination of the scope of federal power from any consideration of the retained rights of the states. Once the Court established a reasonable link between a legislative act and an enumerated power, Ninth and Tenth Amendment claims necessarily failed.")

Griswold v. Connecticut, 381 U.S. 479 (1965). No longer Madison's strict rule of construction, the Ninth Amendment became the adversary of the Tenth Amendment and repurposed as a federal check on state power. Contrary to its adoption by a people desirous to keep federal power limited and checked, *Griswold* used the Ninth Amendment precisely as the Founders feared: a vehicle for the federal government to suppress the democratic processes in the states and turn federalism on its head.[14]

The principles of federalism have suffered greatly at the hands of activist courts which have sought to expand federal power based on *Griswold*'s transformed notion of the Ninth Amendment and a subservient view of the Tenth Amendment. On many occasions, members of this Court have attempted to reign in that power and reposition the Tenth Amendment as a source of rights and powers that constrains the federal government:

> [T]he Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. 'That those limits may not be mistaken, or forgotten, the constitution is written.'

[14] Had the Founders been able to envision "penumbras formed by emanations" or "zones of privacy," they would have likely retained Roger Sherman's draft of the Ninth Amendment which spoke more directly to the autonomy of the states. The Founding Fathers thought Sherman's language was unnecessary in light of the clearly articulated principles of federalism in the Amendments. *See* Lash, "Lost Meaning," at 365-66.

> Accordingly, the Federal Government may act only where the Constitution authorizes it to do so.

Printz v. United States, 521 U.S. 898, 936-37 (1997) (Thomas, J. concurring) (quoting *Marbury v. Madison,* 5 U.S. 137 (1803) (internal citations omitted)).

> The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

Alden v. Maine, 527 U.S. 706, 713-14 (1999) (internal citations omitted).

> [T]he Court's approach intrudes less upon the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to

> acknowledge are left to be democratically adopted or rejected by the people, with the assurance that their decision is not subject to judicial revision.

McDonald v. City of Chicago, 561 U.S. 742, 805 (2010) (Scalia, J., concurring).

> To my knowledge, no court has ever suggested that the Tenth Amendment which 'reserve[s] to the States' powers not delegated to the Federal Government, could or should be applied against the States. To incorporate that limitation would be to divest the States of all powers not specifically delegated to them, thereby inverting the original import of the Amendment.

Town of Greece v. Galloway, 572 U.S. 565, 606 (2014) (Alito, J., concurring).

Regardless of the ideological persuasion of the Court over time, the origins and purpose of state sovereignty cannot be altered. The Founding Fathers ordained a system where the principles of federalism operated to restrict federal power and reserve anything not expressly enumerated to the states. Abortion is not an enumerated right and belongs to the state sphere.

B. States Demonstrated the Ability to Self-Govern Prior to *Roe*.

Prior to the unconstitutional usurpation of power by the *Roe* Court, the states legislated abortion

independently.[15] Citizens of the individual states considered and voted on laws pertaining to abortion as they had done so with other "affairs, concern[ing] the lives, liberties, and properties of the people."[16]

Connecticut was the first state to criminalize abortion in 1821. *See Roe*, 410 U.S. at 138. By 1910, every state in the Union except Kentucky had enacted abortion-related laws.[17] *See* Karen J. Lewis, "Abortion: Judicial Control," Congressional Research Service (May 11, 1988).[18] In 1961, 25 states permitted abortion if necessary to save the life of the mother and Alabama and the District of Columbia extended that exception to include the health of the mother. *See Roe,* 410 U.S. at 138-139 and n. 34. California and Colorado voted to liberalize but not repeal their abortion laws in 1967 with the states of North Carolina and Georgia following suit the next year. *See* Russell Hittinger, "Abortion Before Roe," First Things (March 2010) at 3.[19] South Carolina reformed its

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[15] *Roe*'s holding is impossible without the foundation of *Griswold*'s penumbras, emanations, and zones. *See Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965).

[16] The Federalist No. 45, p. 236 (James Madison) (G. Willis ed. 1982).

[17] Kentucky courts had declared abortion illegal. Lewis at 2.

[18] Available at: https://digital.library.unt.edu/ark:/67531/metacrs8889/m1/1/high_res_d/IB88006_1988Mar10.pdf

[19] Available at: https://www.firstthings.com/article/2010/03/abortion-before-roe

abortion law in 1970.[20] *Id*. By the end of 1970, New York, Hawaii, Alaska, and Washington had all legalized abortion and 14 states adopted abortion statutes permitting abortions for multiple exceptions. *See Roe* 410 U.S. at 140 and n. 37.

On the flip side, in 1971 the states of Montana, New Mexico, Iowa, Minnesota, Maryland, Colorado, Massachusetts, Georgia, Connecticut, Illinois, Maine, Ohio and North Dakota all rejected efforts to repeal their respective state abortion laws. *See* Hittinger at 4. In 1972, the Massachusetts House voted to extend legal rights to unborn children and the voters in the states of South Dakota, North Dakota, Missouri, and Michigan voted to reject a repeal of their respective state abortion laws. *Id*.

The pre-*Roe* landscape was anything but single-minded. In each of the states mentioned above, the people spoke, and they utilized the democratic process to reflect their collective voices for the good of their individual state. And in some states, the state courts fulfilled their role in interpreting the laws. Consider Georgia – Georgians decided that abortion should not carry a criminal penalty but should also remain illegal. This was a careful, deliberate finding by the people of Georgia. Consider Massachusetts – Massachusetts voters desired to not just make abortion illegal but to also protect unborn children legally. Providing protection to unborn children

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[20] Colorado and Georgia voted to reform and decriminalize abortion but rejected the vote to completely repeal the abortion laws. *See* Hittinger at 4-5.

would offer more than just protection from abortion, it could have conceivably provided extra protection in the realm of criminal and medical liability as well as making child support available much earlier. Why would anyone but the people of Massachusetts decide how to best protect the unborn children of Massachusetts?

Lastly, consider New York – New Yorkers voted to legalize abortion. Should the states neighboring New York which had voted to keep their state abortion laws decide what New York should do? Should the Massachusetts House's vote to legally protect unborn children trump New York's repeal? Before *Roe*, each state had the freedom to decide how best to legislate abortion and each utilized their state sovereignty to do so.

Despite creative judicial legislating, it is crystal clear that abortion does not involve war, peace, negotiation, foreign commerce, or taxation. Abortion fits squarely into the states' sphere of objects that concern the "lives, liberties, and properties of the people." *See supra* note 14. Not being an enumerated power, the *Roe* Court did not have the authority to overturn the abortion laws of the states.

> The Federal Government 'is acknowledged by all to be one of enumerated powers.' … Article I, for example, enumerates various legislative powers in §8, but it specifically limits Congress' authority to the "legislative Powers herein granted," §1. States face no such constraint because the Constitution does

> not delineate the powers of the States. Article I, §10, contains a brief list of powers removed from the States, but States are otherwise 'free to exercise all powers that the Constitution does not withhold from them.' … As Justice Story explained, '[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.'

Chiafalo v. Washington, 140 S. Ct. 2316, 2333-334 (2020) (J., Thomas, concurring) (internal citations omitted).

C. States Remain Capable of Self-Governance Regarding Abortion.

Far from creating a national consensus, *Roe* threw the states into a 48-year contentious legal battle. Even some abortion advocates eschew the injudicious method of federalizing abortion as short-circuiting a naturally evolving jurisprudence under state laws.[21] As federal and state judges attempt to apply this Court's precedents, a national landscape of inconsistent, inconclusive, and untenable rules have

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[21] *See* Scott A. Moss and Douglas M. Raines, "The Intriguing Federalist Future of Reproductive Rights," 88 B.U.L. Rev. 175, 182-84 (2008) (discussing the "friendly fire" from abortion supporters who criticize Roe).

emerged. As a national policy, abortion jurisprudence is, in a word, a mess. Stubbornly holding on to unconstitutional precedent will never have a positive outcome.[22] It is time to return abortion policy to the states where it belongs and where the democratic process can effectively work.

Less than 20 years after *Roe*, this Court essentially rejected *Roe* without overturning *Roe* and set up a new standard which permitted states to restrict abortion within their borders barring an "undue burden" on women. *Planned Parenthood v. Casey*, 505 U.S. 833, 874-75 (1992), another splintered opinion and holding, recognized the states' interest in protecting prenatal life after viability but fell short of recognizing the preeminence of state power.[23]

Perhaps recognizing their proper role in abortion policy or simply recognizing the legal frailty of *Roe*, states have utilized their own democratic processes and demonstrated that they are more than capable of self-governance in the area of abortion.

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[22] Any argument that *Roe* must be maintained for the purposes of *res judicata* fall short. "A demonstrably incorrect judicial decision, by contrast, is tantamount to *making* law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of legislative power." *Gamble v. U.S.*, 139 S. Ct. 1960, 1984 (2019) (J., Thomas, *concurring*) (emphasis in original).

[23] It has been admitted even by abortion advocates that *Casey* removed abortion from the realm of "fundamental rights." *See* Scott at 181. By reducing the standard of review, the Court essentially demoted abortion. This further shows that abortion does not belong to the federal sphere.

States have a number of effective ways to address abortion policy. One way is through the state legislatures. Those elected by the people to represent the people are tasked with making law. When the elected officials vary too much from the peoples' viewpoint, they can be replaced democratically by the people. This is the process the Founders laid out. Another way to address abortion policy is through the state constitutions. States may amend their constitutions to reflect the rights states want enshrined. Both methods are preferrable to the federal sphere because they address the needs and philosophies of the individual states. They are also preferrable because change at the state level is more easily accomplished and more closely connected to the people. State judges are also often elected by the people of the state and do not hold lifetime appointments.

This year alone, many states have used state laws, state constitutions, and even budgets to craft abortion policy for their individual states. Laws restricting abortion include: requiring the protection and treatment of babies born alive after an abortion or attempted abortion (Alabama, Kentucky, South Dakota, and Wyoming); protecting prenatal children with genetic abnormalities (Arizona and South Dakota; prohibiting abortion after the detection of a fetal heartbeat (Idaho, Ohio, Oklahoma, South Carolina, and Texas); requiring women to receive medical information about reversing medication abortion or limiting the use of medication abortion (Louisiana, Indiana, Montana, South Dakota, and

West Virginia); regulating where an abortion may occur, who may perform abortions, and additional information that must be given to women seeking abortions (Arkansas, Kentucky, Louisiana, Montana, and Oklahoma); banning almost all abortions (Arkansas and Oklahoma); protecting medical professionals from being forced to perform abortions (Arkansas and Ohio); amending state constitutions to declare there is no constitutional right to abortion (Kansas and Kentucky); placing a time limit on abortion (Montana and New Hampshire); and "trigger" laws if *Roe* is overturned. (Oklahoma and Texas).

Laws expanding abortion include: making public funds available for abortion or expanding insurance coverage (Colorado, Virginia, and Washington); permitting other medical professionals to perform abortions (Hawaii); and repealing old abortion penalties (New Mexico).

Each of these state initiatives represents the democratic process of that state in action. Each demonstrate a state governing the "affairs, concern[ing] the lives, liberties, and properties of the people." *See supra* n. 14. Unfortunately, many of these laws have been or will be challenged in federal courts – a great number of them by third parties, and the democratic process and principles of federalism will be frustrated as has happened since *Roe*.

Abortion is not a fundamental right. It is not an enumerated right. That some states want to enshrine abortion as a state right and expand access is up to

the people of those states. That other states want to protect women's health and protect prenatal children is up to the people of those states. *Roe* attempted to create a "one-size-fits-all" legal solution to a contentious and complicated issue and failed because abortion policy never belonged in the federal sphere. It failed because it ignored the principles of federalism.

CONCLUSION

For the foregoing reasons, *Amicus curiae* respectfully requests that the Court reverse the Fifth Circuit and uphold Mississippi's Gestational Act. *Amicus curiae* further respectfully requests that the Court overturn *Roe v. Wade* and its progeny and return abortion jurisprudence to the realm of state power where it belongs.

Respectfully submitted,

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July 29, 2021