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January 21, 2022

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization, et al., No. 19-1392.

Dear Mr. Harris:

This case involves a challenge to Mississippi's Gestational Age Act, which prohibits abortions after fifteen weeks' gestation, with exceptions for medical emergency or severe fetal abnormality. *See* Miss. Code Ann. § 41-41-191. The District Court held that the Act violated women's due process rights under the Fourteenth Amendment and that permanent injunctive relief was appropriate to enjoin the enforcement of the legislation. *See Jackson Women's Health Org.* v. *Currier*, 349 F. Supp. 3d 536 (S.D. Miss. 2018). The Fifth Circuit affirmed. *See Jackson Women's Health Org.* v. *Dobbs*, 945 F.3d 265 (CA5 2019). This Court granted certiorari on the question whether all pre-viability prohibitions on elective abortions are unconstitutional. *Dobbs* v. *Jackson Women's Health Org.*, 141 S. Ct. 2619 (May 17, 2021) (No. 19-1392).

Virginia joined a group of twenty-two States, the District of Columbia, and the North Carolina Attorney General contending that Mississippi's prohibition on pre-viability abortions is—and should remain—unconstitutional based on precedent including *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), and *Roe* v. *Wade*, 410 U.S. 113 (1973). *See* Brief for State of California, et al. as *Amici Curiae*, *Dobbs* v. *Jackson Women's Health Org.*, No. 19-1392 (Sept. 20, 2021).

Following the change in Administration on January 15, 2022, the Attorney General has reconsidered Virginia's position in this case. The purpose of this letter is to notify the Court that Virginia no longer adheres to the arguments contained in its previously filed brief. Virginia is now of the view that the Constitution is silent on the

question of abortion, and that it is therefore up to the people in the several States to determine the legal status and regulatory treatment of abortion.

Virginia now urges this Court to reverse the Fifth Circuit. First, *Roe* and *Casey* were wrongly decided. "[T]hose decisions created the right to abortion out of whole cloth, without a shred of support from the Constitution's text." *June Med. Servs. LLC* v. *Russo*, 140 S. Ct. 2103, 2142 (2020) (Thomas, J., dissenting); *Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part). Nor does our constitutional history lend any support to the right. *See Casey*, 505 U.S. at 952–53 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Roe*, 410 U.S. at 174–77 (Rehnquist, J., dissenting). The right arises from previous decisions elaborating other rights that "emanate" from "penumbras" of various constitutional provisions, rather than the text, structure, and history of the Constitution itself. *See June Med. Servs.*, 140 S. Ct. at 2149–50 (Thomas, J., dissenting).[1]

Second, the rootlessness of the right to abortion has made this Court's abortion jurisprudence unworkable. The Court promptly jettisoned *Roe*'s trimester framework, *see* 410 U.S. at 164–65, in favor of the "undue burden" standard in *Casey*, 505 U.S. at 878–79 (plurality op.). But because it arises from neither the text of the Constitution nor our historical traditions, the undue-burden standard has been little more than a judicial Rorschach test under which the constitutionality of any particular regulation of abortion is in the eye of the beholder. Indeed, this Court seems unresolved on whether the standard requires the Court to compare the costs and benefits of an abortion regulation, or to determine whether the regulation imposes a substantial obstacle to obtaining an abortion. *Compare June Med. Servs.*, 140 S. Ct. at 2132 (plurality op.), *with id.* at 2136 (Roberts, C.J., concurring in the judgment). A standard so ill-suited to ensuring predictability and stability in the law is not worth saving. *See Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991).

The Court's effort to salvage its abortion jurisprudence has distorted other, seemingly unrelated areas of the law. *See June Med. Servs.*, 140 S. Ct. at 2153 (Alito, J.,

[1] The epistemological rationale for the Court's rejection of the State's overwhelming interest in protecting human life in the womb—that the answer to the "difficult question of when life begins" is unknowable—has also been eviscerated. *Roe*, 410 U.S. at 159 ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."). Although Americans debate the moral significance that ought to attach to the moment that human life beings, there is no meaningful scientific debate about when that moment is. *See, e.g.*, T.W. Sadler, *Langman's Medical Embryology* 3 (7th ed. 1995) ("The development of a human begins with fertilization, a process by which the *spermatozoon* from the male and the *oocyte* from the female unite to give rise to a new organism, the *zygote*."); Ronan O'Rahilly & Fabiola Muller, *Human Embryology & Teratology* 8 (2d ed. 1996) ("Although life is a continuous process, fertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed.").

dissenting) ("[T]he abortion right recognized in this Court's decisions is used like a bulldozer to flatten legal rules that stand in the way."). Neutral procedural rules have been bent to accommodate the Court's abortion cases. *See, e.g.*, *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2322–23 (2016) (Thomas, J., dissenting) (third-party standing); *id.* at 2331–42 (Alito, J., dissenting) (preclusion); *id.* at 2350–52 (Alito, J., dissenting) (severability). Even fundamental rights expressly protected by the Constitution have given way to the Court's abortion jurisprudence. *See McCullen* v. *Coakley*, 573 U.S. 464, 497 (2014) (Scalia, J., concurring in the judgment) ("There is an entirely separate, abridged version of the First Amendment applicable to speech against abortion.").

Abortion is one of the most hotly contested political questions of our day. That debate has not been improved by the Court's constitutionalization of the issue in *Roe*, nor by its jurisprudence since. Justice Scalia's advice that the Court "should get out of this area, where [it] ha[s] no right to be, and where [it] do[es] neither [it]sel[f] nor the country any good by remaining," has only improved with age. *Casey*, 505 U.S. at 1002 (op. of Scalia, J.).

It is Virginia's position that the Court's decisions in *Roe* and *Casey* were wrongly decided. Unmoored from the Constitution's text, the Court's abortion jurisprudence has proven unworkable, and the Court's effort to save it has distorted other areas of the law. This Court should restore judicial neutrality to the abortion debate by permitting the people of the several States to resolve these questions for themselves.

I would appreciate it if you would circulate this letter to the Members of the Court.

Sincerely,

/s/ Andrew N. Ferguson

Andrew N. Ferguson
Solicitor General of Virginia

CC: See attached service list.