QUESTIONS PRESENTED

1. Whether the court of appeals correctly held unconstitutional an Arkansas statute banning abortion at 12 weeks of pregnancy, months before the point of viability, in light of this Court's precedents consistently recognizing that a woman's right to end a pregnancy prior to viability is constitutionally protected?

2. Whether this Court should revisit forty years of precedent holding that the Constitution protects a woman's right to end a pregnancy before the point of viability, absent any conflict of authority among the lower courts, and when Petitioners have offered no rationale that this Court has not previously considered and rejected?

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INTRODUCTION

Consistent with over forty years of this Court's jurisprudence and Petitioners' concession that Arkansas's abortion ban applies months before viability, the United States Court of Appeals for the Eighth Circuit correctly held that the ban cannot stand. That decision properly applies this Court's precedents, is in conflict with the decision of no other court, and thus merits no further review.

Since this Court first recognized constitutional protection for abortion before the point of viability, two generations of Americans have come of age, depending on constitutional protection for their dignity in making reproductive decisions. *See Roe v. Wade*, 410 U.S. 113 (1973). This Court has repeatedly reaffirmed the viability line as *Roe*'s core principle; the viability line has proved enduringly "workable"; and there remains "no line other than viability which is more" so. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992). Petitioners' defense of the ban rests explicitly on the proposition that there should be no such line, and thus no constitutional limit on when a state may wrest from a woman the decision of whether to continue or end a pregnancy. There is thus no way to uphold the Arkansas ban without overturning the core principle of *Roe* and *Casey*.

Hence, the decision below correctly applied long-established precedent, which plainly condemns the Act. *See infra* Point I. The decision below is also consistent with the decisions of every other federal court of appeals and state court of last resort that has reviewed the constitutionality of a ban on abortion before viability, and there is therefore no

conflict of authority for this Court to resolve. *See infra* Point II. Moreover, there is no way to adopt Petitioners' arguments without overturning the bedrock precedents that have guided all those courts for over forty years. *See infra* Point III. Finally, the Petition offers no compelling reason and no new reason to overturn the core principle of *Roe* and *Casey*: that the Constitution protects a woman's decision whether to continue a pregnancy until viability. *See infra* Point IV. Accordingly, this Court should deny the writ.

COUNTER-STATEMENT OF THE CASE

Respondents agree that this case raises only a legal question: whether a state may ban abortion months before viability, the point at which "there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." *Colautti v. Franklin*, 439 U.S. 379, 388 (1979). Arkansas Act 301 of 2013, Ark. Code Ann. §§ 20-16-1301, -1303, -1304 ("the Act"), prohibits abortion starting at twelve weeks,[1] and Petitioners do not and could not dispute that viability occurs only months later, at approximately 24 weeks, *see* Pet. App. at 4 (8th Cir. Decision referring to Respondents' uncontroverted evidence); *id.* at 24 (D. Ct. decision

[1] The Act bans abortion beginning at 12 weeks if fetal cardiac activity is "detect[able]" via "an abdominal ultrasound test." Ark. Code Ann. §§ 20-16-1303(b)(1), 1303(d)(3), 1304(a); *accord* Appellants' Br. at 1, May 27, 2014. Because it is uncontroverted that such is the case at 12 weeks in all normally-progressing pregnancies, the Act bans abortion starting at 12 weeks. *See* Pet. App. at 4 (8th Cir. decision).

quoting Respondents' uncontroverted evidence) (Petitioners neither introduced nor disputed any evidence, and agreed "that 'a fetus at [twelve] weeks is not and cannot be viable' and that viability generally is not possible until at least twenty-four weeks" (alteration in original)); *see also* Appellants' Br. at i, May 27, 2014 ("The matters to be decided by this Court are questions of law . . . .").

Petitioners thus concede that the Act bans pre-viability abortions, *e.g.*, Pet. at 3–4 & n.3, and, indeed, the Act could have had no other intended application. As the Legislature was well aware, Arkansas has long banned post-viability abortion except as "necessary to preserve the life or health of the woman." Ark. Code Ann. § 20-16-705. Like North Dakota's ban at six weeks, *see MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015) (describing North Dakota ban on abortions when embryonic heartbeat is detectable via vaginal ultrasound, generally at six weeks), *pet. for cert. filed*, No. 15-627 (Nov. 10, 2015), the Act's ban at twelve weeks is an outlier. And its reach is significant: "the State's own statistics show that twenty percent of abortions in Arkansas occur at or after twelve weeks." Pet. App. at 24 (D. Ct. decision).

Moreover, the Act's exceptions—which cannot and do not alter the unconstitutionality of a pre-viability ban—are far narrower than Petitioners contend. They do not encompass all "cases of rape, incest, danger to the life or health of the mother, or diagnosis of a lethal fetal disorder." Pet. at 5–6. Rather, they permit a woman to end a medically dangerous pregnancy only if necessary to prevent death, Ark. Code Ann. §§ 20-16-1305(a)(1), (b)(1),

(b)(3), 1302(6)(A), or if and when her condition deteriorates to the point of a "medical emergency," where continuing the pregnancy creates "a serious risk of substantial and irreversible impairment of a major bodily function," *id.* § 20-16-1302(6)(A), 1305(b)(3).[2] Similarly, the Act's exception for rape or incest is limited to victims of crimes under only two particular Arkansas statutes, *id.* § 20-16-1305(b)(2) (citing *id.* § 5-14-103 and § 5-26-202), thus excluding survivors of sexual assault that does not involve the use of force, such as a 14-year-old impregnated by her teacher, *see id.* § 5-14-124 (first-degree sexual assault), or an inmate impregnated by a prison guard, *see id.* § 5-14-126 (third-degree sexual assault). Finally, a woman who learns after eleven weeks of pregnancy that her fetus has a lethal anomaly may end her pregnancy only if the disorder qualifies as "highly lethal" (a term that has not yet been defined by the Arkansas State Medical Board, as provided in the statute). *Id.* § 20-16-1302(6)(B).

[2] Unlike the law this Court upheld with a similar exception in *Casey*, 505 U.S. at 880, the Act does not merely impose a 24-hour delay on a non-emergency abortion a woman needs to protect her health; rather, the Act bans it.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS A STRAIGHTFORWARD APPLICATION OF THIS COURT'S WELL-ESTABLISHED PRECEDENT.

The Eighth Circuit's decision is a straightforward application of this Court's precedents and does not merit further review. Recognizing "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty," this Court has made explicit that a "woman has a right to choose to terminate her pregnancy" before viability. *Casey*, 505 U.S. at 869–70. Indeed, this Court has described the right of each woman to obtain an abortion before the point of viability as "the most central principle of *Roe v. Wade*." *Id.* at 871; *see also Gonzales v. Carhart*, 550 U.S. 124, 145–46 (2007) ("assuming" the principle that, "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 879)); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declining to "revisit" the legal principle reaffirmed in *Casey* that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870)).

Thus, a ban on abortion at a point prior to viability is impermissible. "Before viability, the State's interests are not strong enough to support a prohibition of abortion . . . . Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the

ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879; *see also id.* at 846 (same). Nor can a state diminish this protection by setting any single factor, including a fixed number of weeks of pregnancy, as the point at which it "has a compelling interest in the life or health of the fetus. Viability is the critical point." *Colautti*, 439 U.S. at 389. The Eighth Circuit correctly applied these precedents: Given Petitioners' concession that the Act bans abortion at a point in pregnancy months before viability, the Eighth Circuit could reach no other conclusion. The line at viability that this Court has drawn and repeatedly reaffirmed compels this result, which calls for no further review.

Moreover, Petitioners simply ignore this Court's explicit language and holding in suggesting that *Gonzales* somehow diminished the import of the viability line. *See* Pet. at 1, 3, 14, 20. That decision could not have been clearer: the government may "use its voice and its regulatory authority to show its profound respect for the life within the woman"—but if and only if such actions do not "strike at the right itself." *Gonzales*, 550 U.S. at 157–58. The Act's pre-viability ban does precisely that, and thus cannot stand.[3]

[3] *Gonzales* did not involve a ban on abortion; rather, it considered the validity of a prohibition on the use of a single *method* of abortion. 550 U.S. at 146–47. Its holding, that the State may prohibit the single abortion method at issue, provides no justification for the Act's outright ban, or for reviewing over forty years of precedent.

II. THERE IS NO CONFLICT OF AUTHORITY FOR THE COURT TO REVIEW OR RESOLVE.

The most common reason for this Court to exercise its authority to grant certiorari is to resolve an important conflict among either the decisions of federal courts of appeals or state courts of last resort. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.3 (10th ed. 2013); U.S. Sup. Ct. R. 10(a). As Petitioners acknowledge, there is no such conflict to resolve here. *See* Pet. at 31. Nearly a quarter century ago, this Court, affirming the "central principle" of its earlier decision in *Roe v. Wade*, clarified that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion . . . ." *Casey*, 505 U.S. at 846. Since then, every federal appellate court and state court of last resort faced with the question has ruled that a law prohibiting abortions before viability, with or without exceptions, violates the Fourteenth Amendment; furthermore, this Court has affirmed or denied certiorari in each one of those cases it has been asked to review. *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013) (striking down ban on pre-viability abortions at twenty weeks with exceptions), *cert. denied*, 134 S. Ct. 905 (2014); *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999) (striking down ban on the methods used in "the vast majority" of abortions after thirteen weeks), *aff'd*, 530 U.S. 914, 922 (2000); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) (same), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117–18 (10th Cir. 1996) (striking down ban on pre-viability abortions at twenty-two weeks with exceptions), *cert. denied sub*

nom Leavitt v. Jane L., 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (striking down ban on all abortions with exceptions), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69 (9th Cir. 1992) (same), *cert. denied*, 506 U.S. 1011 (1992); *DesJarlais v. State, Office of Lieutenant Governor*, 300 P.3d 900, 904–05 (Alaska 2013) (invalidating proposed pre-viability ban on all abortions with exception for "necessity"); *In re Initiative Petition No. 395, State Question No. 761*, 286 P.3d 637, 637–38 (Okla. 2012) (invalidating proposed definition of a fertilized egg as a "person" under due process clause), *cert. denied sub nom. Personhood Okla. v. Barber*, 133 S. Ct. 528 (2012); *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 287 (Wyo. 1994) (ruling proposed ban on abortions would be unconstitutional); *In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d 1, 7 (Okla. 1992) (striking down proposed abortion ban with exceptions). The appellate decision below is entirely consistent with all those before it addressing bans on abortion before the point of viability, and does not merit the Court's review.

III. PETITIONERS' PROPOSAL TO ALLOW STATES TO DECIDE WHEN THE CONSTITUTION PROTECTS A WOMAN'S RIGHT TO END A PREGNANCY IS IRRECONCILABLE WITH *ROE* AND *CASEY*.

Petitioners assert that the Arkansas ban does not directly "challenge . . . the[] foundational principles of the Court's abortion jurisprudence," and is perfectly consistent with constitutional protection

for "the individual liberty interest found in *Roe*." Pet. at 1, 21. That assertion is wrong. To uphold the ban, Petitioners call on this Court to jettison the viability line, *id.* at 1–2, 5, 6, 17, 19–27, and instead allow each state to determine the point at which its interest in potential life "outweighs a woman's interest" in deciding whether or not she will remain pregnant and give birth, *id.* at 3. That is a call to extinguish the core protection of *Roe* and *Casey*.

As an initial matter, this Court's clear pronouncements foreclose Petitioners' argument that "the viability rule has no greater claim to precedential effect than *Roe*'s trimester framework overruled in *Casey*." Pet. at 21. A "woman's right to terminate her pregnancy before viability is the *most central* principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Casey*, 505 U.S. at 871 (emphasis added); *see also id.* at 846 ("*Roe*'s essential holding . . . is a recognition of the right of the woman to choose to have an abortion before viability"); *id.* at 860 (describing the viability line as "*Roe*'s central holding"); *id.* at 864 (same); *id.* at 865 (same); *id.* at 870 (the viability line is "the essential holding of *Roe*"); *id.* at 879 (reaffirming the "central holding of *Roe v. Wade*"). Hence, overturning the viability line would necessarily overturn over forty years of precedent.

Moreover, Petitioners' proposal—that each state's "elected representatives" should ban abortion when they see fit by "drawing lines that," in their assessment, "strike the proper balance between [the] different interests" at stake, Pet. at 24—is irreconcilable with the constitutional protections of *Roe* and *Casey*. As this Court has stated explicitly,

"fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . . One's . . . fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

Indeed, Petitioners' own examples of legislative line-drawing make clear that the Constitution would play no role once the legislature decides how much time it is "reasonable" for a woman to have to make her decision. *See* Pet. at 6. The range of legislative choices they propose includes banning all abortions starting at twelve weeks, as the Act would do; all abortions starting at six weeks, *id.* at 4 n.3 (citing *Stenehjem*, 795 F.3d at 773 (describing North Dakota ban)); and all abortions, starting at conception, *id.* at 4 nn.4–5; *id.* at 28–29 ("[E]ven if abortions were prohibited" altogether, a state could strike the proper balance by enacting a safe haven law); *see also Stenehjem*, 795 F.3d at 773 (describing North Dakota's "conten[tion that] viability occurs at conception"). Contrary to Petitioners' arguments, there is no principled way to condone the line that the Arkansas Legislature found "singularly profound" at twelve weeks, Pet. at 24, without inviting every legislature to bring to this Court the line it deems singular at eleven weeks, at six weeks, or at conception. The Petition misapprehends the nature of constitutional protections, and does not warrant granting the writ.

IV. THE PETITION OFFERS NO PERSUASIVE REASON TO RECONSIDER THE CENTRAL PRINCIPLE ANNOUNCED IN *ROE* AND REAFFIRMED IN *CASEY*, AND *STARE DECISIS* COUNSELS AGAINST DOING SO.

Contrary to Petitioners' assertions, this case does not warrant reconsideration of the Court's "unbroken commitment . . . to the essential holding of *Roe*" and *Casey*, 505 U.S. at 870. It is as true today as when those cases were decided that, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851. As the Court explained in *Casey*, the "underlying constitutional issue" is whether the State can deny a woman the right to answer these "philosophic questions" for herself. *Id.* at 850–51. Because decisions about childbearing are "central to personal dignity and autonomy," *id.* at 851, the Court has repeatedly answered this question with a resounding "no." The Petition presents no basis for now changing the answer to this "fundamental constitutional question[]." *Id.* at 845.

In *Casey*, the Court's controlling opinion stressed the importance of adhering to precedent in this context when only one "watershed decision" was at stake. *Id.* at 867. If anything, those considerations are even stronger after *Casey*. The doctrine of *stare decisis* "require[s] a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996)); *accord Michigan v. Bay Mills Indian*

Cmty., 134 S. Ct. 2024, 2036 (2014). Petitioners present no such special basis. Instead, each of the prudential and pragmatic factors this Court considers when asked to repudiate well-established precedent counsels against doing so here. *See Casey*, 505 U.S. at 854–69 (setting out and discussing the four *stare decisis* factors).

First, for over four decades, the viability line has proved enduringly "workable," "representing as it does a simple limitation beyond which a state law is unenforceable." *Id.* at 855. This is evidenced by the consistency with which the lower courts have applied the viability standard. *See supra* Point II. *Roe* and *Casey* do not, as Petitioners assert, require legislatures "to speculate about viability as a matter of constitutional law." Pet. at 14 (citing Pet. App. 10–11). To the contrary, this Court upheld the viability standard in *Casey* precisely because it presents a "clear" line for legislators and judges, and thus helps to ensure that a woman's liberty is not "extinguished." *See Casey*, 505 U.S. at 869.

Second, two generations of American women and families have "come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." *Id.* at 860. "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856. For generations of women, present and future, reconsidering the constitutional precedent that has facilitated such economic and spiritual self-determination—and the dignity this allows—would carry a "terrible price" indeed. *Id.* at 864.

Third, "[n]o development of constitutional law since [*Roe*] was decided has implicitly or explicitly left [that case] behind as a mere survivor of obsolete constitutional thinking." *Id.* at 857. To the contrary, the Eighth Circuit correctly applied an unbroken line of precedent upholding *Roe*'s essential holding. *See supra* Point I. Moreover, Petitioners' principal argument for departing from that precedent rests on precisely the same interest that motivated *Casey*'s careful compromise: the State's "important" interest in potential life. *Id.* at 871. Although recognizing and emphasizing that this interest exists "from the outset of the pregnancy," the Court nonetheless reaffirmed the viability line, *Roe*'s "essential holding." *Id.* at 846. In doing so, the Court crafted a framework that grants the State considerable power, and certainly does not impose a "rigid rule that any restriction on a pregnant woman's ability to obtain an abortion prior to viability is *per se* unconstitutional," as Petitioners contend, Pet. at 31. Rather, *Casey* explicitly allows a State to impose restrictions on pre-viability abortion—even restrictions with "the incidental effect of increasing the cost or decreasing the availability" of abortion, 505 U.S. at 874—as long as they do not rise to the level of an outright ban or an "undue burden," *id.* at 876–77. There has been "[n]o erosion of principle" that would justify upending this framework, *id.* at 860, and Petitioners' insistence that the very same state interest underlying *Casey*'s holding has somehow rendered its reasoning obsolete is without merit.

Finally, Petitioners' assertions notwithstanding, *see* Pet. at 23–26, "no change in *Roe*'s factual underpinning . . . . ha[s] rendered

viability more or less appropriate as the point at which the balance of interests tips," *Casey*, 505 U.S. at 860–61. This is so regardless of ongoing medical advances, of which this Court was well aware in *Casey*. *See id.* at 860 ("[T]he divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding . . . . The soundness . . . of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy . . . ."). Petitioners err, for instance, in suggesting that "the early presence of a fetal heartbeat," Pet. at 24, provides any reason to overturn longstanding precedent: *Casey* expressly acknowledged that the State's interest in protecting life exists from the "outset of the pregnancy," 505 U.S. at 846, 869, well before there is any cardiac activity.

Petitioners' argument that "safe haven" laws empower a State to override a woman's constitutional right to end her pregnancy is similarly meritless. *See, e.g.*, Pet. at 30 ("[S]afe haven statutes strike at the foundation of the Court's abortion jurisprudence" and "eliminate the foundation of a woman's right to abortion"). Such laws cannot redeem an unconstitutional ban on pre-viability abortions any more than laws allowing a woman to place her infant for adoption. Those laws have always existed, have always been known to this Court, and have never justified a pre-viability ban. *See, e.g.*, *Casey*, 505 U.S. at 872 ("[T]he State may enact rules and regulations designed to encourage [a woman] to know that . . . . there are procedures and institutions to allow adoption of unwanted children").

Casey was clear that the liberty interest at stake is not only the right to "avoid unwanted parenthood," as Petitioners suggest, Pet. at 28, 30, but also the right of a woman to determine her "own concept of existence," 505 U.S. at 851, and to determine for herself whether and when to undergo the "anxieties, [] physical constraints, [and] pain that only she must bear" in pregnancy and childbirth, *id.* at 852. This Court concluded that her "suffering is too intimate and personal for the State to insist, without more, upon its own vision of [her] role . . . ." *Id.* The existence of safe haven laws has in no way rendered this constitutional analysis "obsolete." *Id.* at 860.[4]

For more than forty years, this Court has upheld *Roe*'s essential holding, and the Petition offers no reason why the Court should reject the rule of *stare decisis* here. As this Court has assured generations of Americans, a "woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Id.* at 871.

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[4] Furthermore, were Petitioners correct that a woman has no constitutional right to prevent unwanted *pregnancy*, and that any prejudice she may suffer is wholly "remedie[d]" by laws that allow her to avoid unwanted *parenthood*, Pet. at 28, then the constitutional right to contraception would be in grave doubt. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 688–89 (1977) (contraceptive "access is essential to exercise of the constitutionally protected right of decision in matters of childbearing"); *see also Casey*, 505 U.S. at 852 ("[I]n some critical respects the abortion decision is of the same character as the decision to use contraception.").

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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