

No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, 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 *AMICI CURIAE* HUMAN RIGHTS
WATCH, GLOBAL JUSTICE CENTER, AND
AMNESTY INTERNATIONAL IN SUPPORT OF
RESPONDENTS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. ABORTION BANS JEOPARDIZE PREG- NANT INDIVIDUALS' HEALTH AND, IN PARTICULAR, DISADVANTAGE PEOPLE LIVING IN POVERTY AND MINORITY POPULATIONS	5
A. Abortion bans lead to more unsafe abor- tions	5
B. Unsafe abortion is one of the leading causes of maternal mortality and mor- bidity	6
C. The impact of abortion restrictions falls disproportionately on the most marginal- ized groups.....	9
II. COUNTRIES ACROSS THE WORLD AL- LOW ABORTION ON BROAD GROUNDS.	11
III. INTERNATIONAL LAW COHERES WITH TRENDS IN COMPARATIVE LAW	14
A. The United States must comply with its obligations under international law.....	15
B. The right of access to abortion is pro- tected under international law.....	18
CONCLUSION	32

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Avero Belgium Ins. v. American Airlines, Inc.</i> , 423 F.3d 73 (2d Cir. 2005)	16
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INTEREST OF *AMICI CURIAE*¹

Human Rights Watch is a non-profit, non-partisan organization established in 1978 that investigates and reports on violations of fundamental human rights in over 100 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. Human Rights Watch (“HRW”) has filed amicus briefs before various bodies, such as the U.S. Supreme Court, U.S. courts of appeal and the Inter-American Commission on Human Rights.

Global Justice Center is a non-partisan, non-profit organization dedicated to promoting the enforcement of international law in a progressive, non-discriminatory manner. Global Justice Center works for peace, justice, and security by enforcing international laws that protect human rights and promote gender equality. The organization seeks to promote gender equality by focusing on and advocating for change in two primary areas: fighting for sexual and reproductive rights and demanding justice for sexual and gender-based violence.

¹ Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. The parties have filed blanket consents to the filing of *amicus* briefs in support of either or no party.

Amnesty International is an international non-governmental, non-profit organization representing the largest grassroots human rights movement in the world, with more than ten million members and supporters. Amnesty International's mission is to advocate for global compliance with international human rights law, the development of human rights norms, and the effective enjoyment of human rights by all persons. It monitors state compliance with international human rights law and engages in advocacy, litigation, and education to prevent and end human rights violations and to demand justice for those whose rights have been violated. Amnesty International has researched, documented, and campaigned on the human rights impact and rights violations due to criminalization of abortion and restrictive abortion laws in specific countries. Amnesty International has also engaged in strategic litigation before international and regional human rights bodies in cases challenging restrictive abortion laws and their application.

Together, amici share a commitment to ensuring that the United States complies with its obligations under international human rights law. That commitment motivates this brief. Amici wish to demonstrate the incompatibility of banning abortion with the United States' obligations under international human rights treaties.

SUMMARY OF ARGUMENT

1. Near-categorical bans on abortions will have a significant, real, and negative impact on the health of pregnant individuals.

The worst such impacts will be borne by marginalized groups, including people living in economic poverty and by Black, Indigenous, and people of color.

These are the very groups whose health the law should protect. Banning abortion does the opposite.

In country after country, abortion bans have not led to a decrease in the number of abortions, but rather an increase in the number of unsafe abortions—especially affecting people of limited means.

These risks are neither theoretical nor conjectural. In countries across the world, including Romania, South Africa, El Salvador, and Ecuador, there is a statistical relationship between the imposition of restrictive abortion legislation and increases in maternal mortality and morbidity. The lesson for this case is clear: If an abortion ban like H.B. 1510 is upheld, more women² in Mississippi are likely to die.

2. Consistent with these findings, countries around the world allow abortion on broad grounds.

Amicus briefs submitted in support of Petitioners claim that most countries ban or severely restrict abortion. See 141 Int'l Legal Scholars Br. at 22. That assertion distorts reality. In fact, a strong majority of women of reproductive age—approximately 60%—live in countries where abortion is available upon request or otherwise broadly available on a variety of social, economic, and health grounds.

² When referring to women or girls in this brief, amici are including in this term people who can become pregnant and pregnant people or individuals. This recognizes that while the majority of personal experiences with abortion relate to cisgender women and girls (that is, women and girls whose sense of personal identity and gender corresponds with the sex they are assigned at birth), intersex people, transgender men and boys, and people with other gender identities may have the reproductive capacity to become pregnant and may need and have abortions.

By contrast, just a handful of countries, representing 5% of women of reproductive age, ban abortion without exception. Mississippi's H.B. 1510 is an unmistakable step in this latter direction, away from the global norm and towards this small minority position.

Furthermore, where only economically developed or highly developed countries are considered, an even more robust consensus emerges. Of the 36 highly developed countries, 34 offer abortion on broadly-available grounds. A significant number of nations offer abortions free of charge to low-income pregnant individuals.

3. International law coheres with these trends in comparative law. Contrary to amicus briefs submitted supporting Petitioners, international human rights law recognizes the well-known risks created by restrictive abortion legislation and requires states to ensure abortion access.

Access to safe and lawful abortion services is firmly rooted in the rights to life; to non-discrimination; to be free from torture, cruel, and degrading treatment; and to privacy. These rights are recognized in international human rights treaties ratified by the United States, such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture. The United States cannot, given its international obligations, enact legislation that transgresses these commitments. Banning abortion clearly does so.

ARGUMENT

I. ABORTION BANS JEOPARDIZE PREGNANT INDIVIDUALS' HEALTH AND, IN PARTICULAR, DISADVANTAGE PEOPLE LIVING IN POVERTY AND MINORITY POPULATIONS.

A. Abortion bans lead to more unsafe abortions.

Global research paints a consistent picture: abortion restrictions result in many more unsafe abortions. According to the data, the rate of unsafe abortions is nearly 45 times higher in countries with highly restrictive abortion laws than in countries where abortion is legal and provided without restriction.³

Notably, the *overall rate* of abortion in countries with restrictive laws is not lower than those where pregnant individuals have greater access to abortion. To the contrary, in countries where abortion is prohibited altogether or permitted only to save the life or physical health of the pregnant person (*i.e.*, a near facsimile of H.B. 1510), the rate of abortion is statistically identical to countries where abortion is broadly legal: about 40 per 1000 women aged 15 to 44.⁴ The rate of unintended pregnancies ending in abortion decreased

³ See Guttmacher Inst., *Abortion Worldwide 2017: Uneven Progress and Unequal Access*, Appendix Table 2, 51 (Mar. 2018), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf.

⁴ See *Unintended Pregnancy and Abortion Worldwide*, Guttmacher Inst., (July 2020), <https://www.guttmacher.org/factsheet/induced-abortion-worldwide>; for underlying data, see Jonathan Bearak et al., *Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates From a Comprehensive Model for 1990–2019*, 8 *Lancet Glob. Health* 1152, 1159 (2020).

in countries with broadly legal abortion access, while there was “no evidence that abortion rates were lower in settings where abortion was restricted.”⁵

Summarizing the impact of legal restrictions on abortion, the U.N. High Commissioner on Human Rights noted that, “when faced with restricted access[,] women often engage in clandestine abortions including self-administering abortifacients, at risk to their life and health.”⁶ Abortion restrictions simply change abortions from safe medical procedures to unsafe, clandestine ones.

B. Unsafe abortion is one of the leading causes of maternal mortality and morbidity.

Approximately seven million women are admitted to hospitals every year in developing countries because of unsafe abortions.⁷ Tragically, unsafe abortions kill an estimated 22,800 to 31,000 women annually, representing about 7.9% of all maternal deaths worldwide.⁸

⁵ Bearak, *supra* note 5, at 1159.

⁶ U.N. Office of the High Comm’r for Human Rights (OHCHR), *Information Series on Sexual and Reproductive Health: Abortion* (2020), https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf.

⁷ WHO, *Preventing Unsafe Abortion* (Sept. 25, 2020), <https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion>

⁸ WHO, *Maternal Mortality* (Sept. 19, 2019), <https://www.who.int/news-room/fact-sheets/detail/maternal-mortality> (reporting approximately 295,000 women dying during pregnancy and childbirth in 2017); Lale Say, et al., *Global Cause of Maternal Death: A WHO Systematic Analysis*, 2 *Lancet Glob. Health* 323, 331 (June 2014), <https://www.thelancet.com/action/showPdf?pii=S2214-109X%2814%2970227-X> (estimating rate of

Public health experts believe that the true global rate of abortion-related maternal mortality may be significantly higher, as maternal deaths attributable to unsafe abortion may be underreported due to stigma and misclassification.⁹

These deaths and injuries are preventable. Abortion “has emerged as one of the safest procedures in contemporary medical practice.”¹⁰ Countries with the lowest rates of unsafe abortion generally have permissive abortion laws, high rates of contraceptive use, and quality reproductive health services.¹¹

On the other hand, deaths due to unsafe abortion occur disproportionately in countries with restrictive abortion laws and practices. Pregnant individuals living in these countries are more likely to resort to unsafe abortions. Out of a lack of availability and a fear of punishment, pregnant individuals often resort to desperate measures, attempting to abort by inserting sharp objects into their bodies or even by ingesting poisons.¹² Even when unsafe abortion does not lead to

maternal mortality from unsafe abortion as between 7.9 and 13%).

⁹ *Id.*

¹⁰ David Grimes et al., *Unsafe Abortion: The Preventable Pandemic*, WHO (2006) (pre-print copy of a paper published in *The Lancet* as: *Unsafe abortion: the preventable pandemic*, 368 *The Lancet* Sexual and Reprod. Health Series 1908 (2006)).

¹¹ OHCHR, *supra* note 7.

¹² Alia Januwalla, *Human Rights Law and Abortion in El Salvador*, *Health & Human Rts. J.* (Aug. 26, 2016), <https://www.hhrjournal.org/2016/08/human-rights-law-and-abortion-in-el-salvador/>.

death, pregnant individuals can suffer significant complications such as hemorrhages, infections, sterility, and trauma.¹³

The impact of restrictive abortion laws, moreover, extends well beyond the procedure itself. Being denied access to an abortion can have serious and lasting consequences for a woman's health and wellbeing, as well as that of her family. The U.N. Special Rapporteur on Extreme Poverty and Human Rights has stated that the "lack of access to abortion services traps many women in cycles of poverty."¹⁴ Studies show that a woman denied abortion care is at increased risk of poverty, physical health impairments, and intimate partner violence.¹⁵

Abortion restrictions harm pregnant individuals' wellbeing in every country. A 2013 study in the United States that compared similarly-situated pregnant people seeking abortions found that those who were denied abortions were more likely to suffer hypertension and chronic pelvic pain, were three times more likely to be unemployed, and were several times more likely

¹³ *Id.*

¹⁴ U.N. Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, ¶ 56, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018).

¹⁵ Joshua Lang, *What Happens to Women Who Are Denied Abortions?*, N.Y. Times (June 12, 2013), <https://www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html?r=0>; see also *Turnaway Study: Long-Term Study Shows That Restriction Abortion Harms Women*, ANSIRH, https://www.ansirh.org/sites/default/files/publications/files/turnaway_study_brief_web.pdf (last visited Aug. 15, 2021).

to have income below the poverty line than those who did terminate their pregnancy.¹⁶

C. The impact of abortion restrictions falls disproportionately on the most marginalized groups

The harms of unsafe abortion also fall unequally. According to the U.N. Working Group on Discrimination Against Women, “in countries where induced termination of pregnancy is restricted by law and/or otherwise unavailable, *safe termination of pregnancy is a privilege of the rich*, while women with limited resources have little choice but to resort to unsafe providers and practices.”¹⁷ Laws designed to restrict access to safe abortion have the tragic (but all too predictable) consequence of exacerbating this inequality, thereby increasing the burden of abortion-related maternal mortality on the populations already at greatest risk. International bodies have emphasized this point.¹⁸

Conversely, countries that have loosened abortion laws dramatically decreased their rates of abortion-related maternal mortality, especially among at-risk populations. Several case studies are particularly worth highlighting.

¹⁶ *Id.*

¹⁷ OHCHR, *supra* note 7 (emphasis added).

¹⁸ See U.N. Human Rights Council, *Report of the Working Group on the Issue of Discrimination Against Women in Law and In Practice On Its Mission to the United States of America*, ¶ 68, U.N. Doc. A/HRC/32/44/Add.2 (Aug. 4, 2016) (“These [abortion] restrictions have a disproportionate and discriminatory impact on poor women. As the experts observed [in] one of the poorest regions in the country, immigrant women face severe barriers in accessing sexual and reproductive health services.”).

Human Rights Watch research in Ecuador has demonstrated that penalizing or restricting abortion in the country directly causes pregnant people to have illegal and unsafe abortions. As a result, Ecuador has had a “stubbornly high rate of preventable maternal death.”¹⁹

By the same token, a study conducted in El Salvador found that restrictive abortion laws penalized pregnant individuals of little or no income, mainly from “rural or marginal urban areas.”²⁰ These pregnant individuals were more likely to seek reproductive health services from public hospitals, which were among the first targets for implementation of the abortion-restriction legislation.

In contrast to Ecuador and El Salvador, a study of public hospitals across South Africa found that, following a 1996 law legalizing abortion in that country, annual deaths from unsafe procedures fell by 91% (from

¹⁹ Human Rights Watch, *Submission to Commission on Unalienable Rights* 11, n.50 (May 2020), https://www.hrw.org/sites/default/files/media_2020/05/HRW%20Submission%20to%20Commission%20on%20Unalienable%20Rights_May%202020.pdf; Human Rights Watch, “*Why Do They Want To Make Me Suffer Again?*”, 77–78 (July 14 2021) <https://www.hrw.org/report/2021/07/14/why-do-they-want-make-me-suffer-again/impact-abortion-prosecutions-ecuador>.

²⁰ Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion* 13–14 (May 30, 2014); see also U.N. Human Rights Council, Working Group on Arbitrary Detention, *Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-Sixth Sess.*, ¶ 51, U.N. Doc. A/HRC/WGAD/2019/68 (Mar. 4, 2020).

425 deaths in 1994 to only 40 nationwide in 1999–2001), with teenage girls benefitting most.²¹

Additionally, in Romania, the maternal mortality ratio fell 16-fold after restrictions on abortion were lifted following 28 years of draconian restrictions imposed by Nicolae Ceaușescu—from 148 maternal deaths per 100,000 live births in 1989 to only 9 per 100,000 in 2002.²²

II. COUNTRIES ACROSS THE WORLD ALLOW ABORTION ON BROAD GROUNDS

Ecuador, El Salvador, South Africa, and Romania provide concrete and dramatic evidence in support of broadening access to safe abortion services. Most recently, both Mexico²³ and Argentina²⁴ have taken significant steps to move away from abortion bans, noting the public health consequences of unsafe abortions and the disproportionate impact on marginalized groups, as well as guidance from international human rights standards. Consistent with this trend, countries around the world today recognize the health and social

²¹ Rachel Jewkes, et al., *The Impact of Age on the Epidemiology of Incomplete Abortions in South Africa After Legislative Change*, 112 BJOG: Int'l J. of Obstetrics & Gynecology 355 (2005).

²² Brooke R. Johnson, Mihai Horga & Peter Fajans, *A Strategic Assessment of Abortion and Contraception in Romania*, 12 Reprod. Health Matters 184, 185 (2004).

²³ Natalie Kitroeff and Oscar Lopez, *Mexico's Supreme Court Votes to Decriminalize Abortion*, N.Y. Times (Sept. 7, 2021), <https://www.nytimes.com/2021/09/07/world/americas/mexico-supreme-court-decriminalize-abortion.html>.

²⁴ Taylor Boas, et al., *Argentina Legalized Abortion. Here's How It Happened and What It Means for Latin America*, Wash. Post (Jan. 18, 2021), <https://www.washingtonpost.com/politics/2021/01/18/argentina-legalized-abortion-heres-how-it-happened-what-it-means-latin-america/>.

risks of restricting abortion and, by extension, the corresponding benefits to expanding abortion access.²⁵

On this particular point, several briefs submitted in support of Petitioners state that “most States prohibit or restrict abortion.” Br. of 141 Int’l Legal Scholars at 6; see also Ctr. for Family & Human Rights Br. at 14 (stating that “abortion-on-demand . . . is only legal in a small minority of countries.”).

These statements misrepresent reality. A significant majority of women of reproductive age—almost 60%—live in countries where abortion is generally available, either on request or for a variety of grounds.²⁶ Only 26 countries, representing 5% of women of reproductive age, ban or prohibit abortion altogether.²⁷ Abortion bans like Mississippi’s H.B. 1510 are an unambiguous and unmistakable step towards this minority position.²⁸ For Petitioners’ amici, that position—*i.e.*, the one with the least amount of support across the

²⁵ The U.N. Human Rights Committee “has noted the specific relationship between restrictive abortion laws and threats to women’s and girl’s lives.” See *supra* note 20, Human Rights Watch, *Submission to Commission on Unalienable Rights*. It has thus frequently called for expansion of abortion services in countries around the world. *Id.* at n.17 (listing reports).

²⁶ *The World’s Abortion Laws*, Ctr. for Reprod. Rts., <https://maps.reproductiverights.org/worldabortionlaws> (last visited Sep. 15, 2021).

²⁷ *Id.*

²⁸ Mississippi is not alone. Other states, like Texas, Florida, Arkansas, and South Dakota are in the process of enacting ever more draconian and severe bans even while this litigation remains pending. See Alice Miranda Ollstein & Josh Gerstein, *Texas Abortion Ban Spawns Look-alike Laws But Could Be Short-Lived*, Politico (Sept. 2, 2021), <https://www.politico.com/news/2021/09/02/texas-abortion-law-private-right-to-sue-509244>

globe—is the desired end goal. The amicus brief from the Center for Family and Human Rights all but argues that the Court should uphold not just H.B. 1510, but *any* law that restricts or bans abortion altogether. See Ctr. for Family & Human Rights Br. at 3 (“[I]t is not necessary for the Court to decide whether abortion is *per se* a violation of the right to life. . . . The Court should nonetheless say something on the topic.”); *id.* at 29–34 (asking the Court to define the legal status of “children in the womb” and review law consistent with that view).

When the set of countries is restricted only to economically developed or highly economically developed nations—those nations most comparable to the United States—an even more unified consensus emerges. The United Nations classifies countries into three categories: developed economies, economies in transition, and developing economies.²⁹ As of 2014, 36 countries fell within the “developed economies” group, including the United States.³⁰

Of these 36 countries, 34 allowed for abortion on request or made abortion available on broad economic and social grounds.³¹ Only two of the countries included in the report—Malta and Poland—have more restrictive laws. Overwhelmingly, developed economies make abortion widely accessible. Even Petitioners’ amici concede this point. See European Ctr. for

²⁹ U.N. Dep’t of Econ. and Soc. Affairs, *Country Classification: World Economic Situations and Prospects*, 143–144 (2014), https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf.

³⁰ *Id.* at 145.

³¹ *The World’s Abortion Laws*, Ctr. For Reprod. Rts., <https://maps.reproductiverights.org/worldabortionlaws> (last visited Sep. 16, 2021).

Law & Justice Br. at 20 (“This is so only because of the general toleration of abortion in Europe.”).

III. INTERNATIONAL LAW COHERES WITH TRENDS IN COMPARATIVE LAW

Access to safe and legal abortion is rooted in multiple and complementary rights recognized under international human rights law, including the right to life, the right to privacy, and other rights.

Here again Petitioners’ amici make a contrary claim. Purporting to interpret international law, they assert that “[t]here is an international duty to prevent abortion” and that “international human rights law does not establish a right to abortion.” European Ctr. for Law & Justice Br. at 4–15; Ctr. for Family & Human Rights Br. at 15–22. Once again, these briefs are wrong.

As a threshold matter, *any* amici seeking to offer guidance must, at a minimum, make clear which legal instruments matter and what those instruments say. The amicus briefs supporting Petitioners fail to do this. Instead of even trying to invoke a workable legal framework, these briefs engage in a freewheeling analysis, selectively quoting from articles, statements, and other sources. That is not how international law is properly construed.

Instead, a rigorous and cogent analysis requires a review of what international instruments bind the United States and what the authoritative interpretations of these instruments say about abortion.

A. The United States must comply with its obligations under international law

1. The United States is bound by certain treaties.

The United States has ratified several foundational international human rights instruments, including the International Covenant on Civil and Political Rights (“ICCPR”);³² the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”);³³ and the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”).³⁴

It has also signed (but not yet ratified) several other related instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)³⁵ and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).³⁶

Where the United States has ratified a treaty, it is bound to follow the terms stated therein. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003) (citing *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35

³² International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 3.

³³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 113.

³⁴ International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978), S. Treaty Doc. 95-18, 660 U.N.T.S. 195, 212.

³⁵ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 12, 1979, 1249 U.N.T.S. 13.

³⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976).

(1869)). Countries that have ratified a treaty are, therefore, “legally obligated to uphold the principles embodied in that treaty.” *Id.*

Similarly, although the United States is not formally bound by treaties it has signed but not ratified, it must, as a signatory, nevertheless refrain from taking actions that “defeat the object and purpose of the treaty.”³⁷

2. Courts look to the text and the authoritative guidance when interpreting international treaties.

When interpreting treaties, courts begin—as with domestic statutes—by examining their plain language. *Medellin v. Texas*, 552 U.S. 491, 506 (2008) (“The interpretation of a treaty, just like the interpretation of a statute, begins with its text.”).

In the event that the plain language does not clearly resolve the question at hand, many of these instruments explicitly establish an international committee to monitor implementation of the instrument.

The U.N. Human Rights Committee, for example, is “the body charged under the ICCPR with monitoring its implementation.” *United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000). Among its other responsibilities, the Human Rights Committee makes recommendations in individual cases, “stud[ies] . . . reports submitted by” participating countries, and issues “general comments” that provide guidance on the

³⁷ Vienna Convention on the Law of Treaties art. 18(a), May 23, 1969, 1155 U.N.T.S. 331. Although the United States is not a party to the Vienna Convention, the treaty’s provisions are considered customary international law. *Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 79 n.8 (2d Cir. 2005).

treaty's terms.³⁸ These responsibilities are spelled out in the international legal instrument itself.

“The Human Rights Committee’s General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR.” *Duarte-Acero*, 208 F.3d at 1287–88; *accord Maria v. McElroy*, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999). Guidance from other committees plays a similar role for other international instruments.

In instances where neither the plain language of the instrument nor the resulting guidance from committees is conclusive, *some* courts consult the negotiation and drafting history—documents known as the *travaux préparatoires*—as well as post-ratification understanding. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999); see also *Medellin*, 552 U.S. at 507 (courts “consider[] as ‘aids to its interpretation’ . . . ‘the post-ratification understanding’ of signatory nations.”).

Examining the *travaux préparatoires*, however, is “appropriate only where [other tools of] interpretation . . . leave[] the meaning ambiguous or leads to a result which is manifestly absurd or unreasonable.” *Cornejo v. Cnty. of San Diego*, 504 F.3d 853, 863 (9th Cir. 2007).³⁹

In this respect, the *travaux préparatoires* occupies the same conceptual ground as legislative history; reliance on either is generally disfavored unless the balance of such history is clear. See *Lamie v. U.S. Trustee*,

³⁸ ICCPR art. 40.

³⁹ See also Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 (noting that *travaux préparatoires* are a supplementary source of interpretation).

540 U.S. 526, 541-42 (2004) (“[C]ompeting interpretations of the legislative history make it difficult to . . . rely[] on legislative history . . . and the advantage of our determination to rest our holding on the statutory text.”); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) (“Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote”).

In short, when the text and guidance—the first outposts for interpreting international instruments—are clear, the *travaux préparatoires* cannot be authoritative. *Cornejo*, 540 F.3d at 863 (when “*travaux préparatoires* [are] susceptible to different interpretations,” they cannot “create” a “right not explicitly found in the text.”); *cf. Milner v. Dep’t of Navy*, 562 U.S. 562, 572 (2011) (“[A]mbiguous legislative history [cannot] muddy clear statutory language”).

B. The right of access to abortion is protected under international law.

The international human rights commitments that the United States has made are expressed not just in one instrument, but in multiple instruments and through multiple forms of authoritative guidance.

The United States’ specific commitments include protecting: (1) the right to life; (2) the right to non-discrimination; (3) the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment; and (4) the right to privacy. As discussed below, these rights each require access to abortion on broad grounds.

1. The right to life. Article 6 of the ICCPR provides that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

That abortion bans violate Article 6 should be abundantly evident. Abortion bans result in more unsafe abortions, which directly lead to greater maternal mortality. More pregnant individuals will likely die unnecessarily and arbitrarily because of abortion bans.

In other words, the plain language—the starting point of any form of interpretation—is clear. Legal restrictions on abortion are connected with more unsafe abortions, which in turn cause higher maternal mortality and morbidity. But even if the plain text were in any way ambiguous, authoritative international guidance both contemplates *and* prohibits abortion bans.

Even Petitioners’ amici, in a telling admission, concede this point: “UN treaty bodies have systematically read a right to abortion in various treaties and multinational agreements.” Ctr. for Family & Human Rights Br. at 21. On this matter, regarding the right to life, the U.N. Human Rights Office of the High Commissioner considers restrictive abortion legislation a violation of ICCPR Article 6.⁴⁰ The U.N. Human Rights Committee confirmed this interpretation in its General Comment No. 36, which sought to provide States Parties guidance as to the implementation of Article 6.⁴¹

General Comment No. 36 focuses attention on two forms of direct obligations that States must carry out:

⁴⁰ OHCHR, U.N. POPULATION FUND, *Reproductive Rights Are Human Rights: A Handbook for National Human Rights Institutions* (2014), <https://www.ohchr.org/Documents/Publications/NHRI-Handbook.pdf>.

⁴¹ U.N. Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, U.N. Doc. CCPR/C/GC/36 (Sep. 3, 2019).

that States (1) “should not introduce new barriers” to abortion and (2) “should remove existing barriers that deny effective access by women and girls to safe and legal abortion.”⁴²

To carry out these two goals, the comment notes that “restrictions on the ability of women or girls to seek abortion must not . . . jeopardize their lives, subject them to physical or mental pain or suffering . . . , discriminate against them or arbitrarily interfere with their privacy.”⁴³ The comment further provides that “parties must provide safe, legal and effective access to abortion . . . where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable.”⁴⁴ And, critically here, on the issue of abortion bans and morbidity, the comment provides that “[s]tates parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions, and they should revise their abortion laws accordingly.”⁴⁵

Thus, to the extent there is *any* doubt about what Article 6 means when it speaks of an arbitrary deprivation of life, General Comment No. 36 offers abundant clarity. Abortion bans like H.B. 1510, which categorically ban abortion based on gestational age and do not even provide an exception for rape, are wholly inconsistent with that Comment specifically and Article 6 more generally.

⁴² *Id.* ¶ 8.

⁴³ *Id.* ¶

⁴⁴ *Id.*

⁴⁵ *Id.*

Instead of engaging on the specific text of Article 6 and its common-sense implications, the amicus briefs supporting Petitioners instead embark upon a meandering exercise into when life begins and when rights attach to the unborn. In doing so, they cull selectively from the *travaux préparatoires* and other sources to argue that rights begin at conception.

That discussion and its corresponding conclusion is incorrect. *First*, these amicus briefs quote sources which have nothing to do with abortion or reproductive health. Consider, for example, the Brief of 141 International Legal Scholars, which claims that the *travaux préparatoires* of the ICCPR “safeguard[s] the unborn.” Br. of 141 Int’l Legal Scholars at 19; see also Ctr. for Family & Human Rights Br. at 5 (quoting art. 6.5 of ICCPR, which states that “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age.”). But the *full* citation from the relevant *travaux préparatoires* states that, “the principal reason for including [this paragraph] of the original text was that the death sentence should not be carried out.”⁴⁶ Similarly, the brief points to the Geneva Protocol, but the language of that instrument—which addresses armed conflicts—prohibits “pregnant women or mothers of young children from [being sentenced to] *the death penalty*.” Br. of 141 Int’l Legal Scholars at 20 (emphasis added). In other words, this part of the *travaux préparatoires* is centered on state-sanctioned punishment, not abortion.

The question of whether legal abortion is tantamount to capital punishment is not before this Court. The ICCPR excludes death sentences for crimes com-

⁴⁶ Report of the Third Committee to the 12th Session of the General Assembly, ¶ 118, U.N. Doc. A/3764 (Dec. 5, 1957).

mitted by persons below age eighteen and for individuals who choose to carry a pregnancy to term—but those are entirely different situations from a person, by their own volition, choosing to terminate a pregnancy. When looking specifically at the issue at hand, the drafting history of Article 6 illustrates that an amendment to extend the right to life to fetuses was explicitly rejected.⁴⁷

Second, these briefs mislead and misrepresent. The overwhelming balance of legal authority and scholarship finds that, “[u]nder international law, analyses of major international human rights treaties on the right to life confirm that it does not extend to fetuses.”⁴⁸

Third and finally, these briefs err as a matter of interpretation by jumping directly to the *travaux préparatoires* which, as noted above, is at best a secondary interpretation tool. See Ctr. for Family & Human Rights Br. at 9 (going directly to *travaux préparatoires*). The decision to flip commonly-accepted interpretative tools on their head to arrive at a pre-destined conclusion is no accident. But doing so is inconsistent with fundamental rules of treaty interpretation, and simply cannot support an argument for rights conferred at conception.

⁴⁷ *Id.* ¶ 119(q).

⁴⁸ Committee on the Elimination of Discrimination Against Women, *Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, ¶ 68, U.N. Doc. CEDAW/C/OP.8/GBR/1 (Feb. 23, 2018); accord Nils Muiznieks (Comm’r for Human Rights on the Council of Europe), *Report by Nils Muiznieks Following his Visit to Ireland from 22 to 25 November 2016*, ¶ 93, CommDH(2017)8, (Mar. 29, 2017) (“[T]he position consistently held by human rights bodies that the right to life, as enshrined in relevant international treaties, does not apply to prenatal life.”).

2. The right to non-discrimination. International human rights treaties ratified by the United States expressly prohibit discrimination and require it to take measures to eradicate all forms of discrimination against individuals.

The ICCPR sets forth both a general right to be free from discrimination of any kind,⁴⁹ as well as a right to be free from discrimination with respect to the rights specifically protected by the Covenant.⁵⁰ The Human Rights Committee has issued authoritative guidance noting that interference with pregnant individuals' access to reproductive health care, including failure to ensure that pregnant people do not have "to undergo life-threatening clandestine abortions" violates their right to non-discrimination.⁵¹ In addition, the Committee, in considering individual cases under its optional protocol has found that the denial of abortion in those cases constituted violations of the right to be free from discrimination under Article 26 of the Covenant.⁵²

Committee members have said the right to non-discrimination on the basis of sex and gender equality and non-discrimination "obligates States to ensure that State regulations, including with respect to access to health services, accommodate the fundamental bio-

⁴⁹ ICCPR art. 26.

⁵⁰ ICCPR art. 2-3.

⁵¹ U.N. Human Rights Committee, *General Comment No. 28 Article 3 (The Equality of Rights Between Men and Women)*, ¶ 20, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

⁵² U.N. Human Rights Committee, *Whelan v. Ireland*, Commc'n No. 2425/2014, ¶ 7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (July 11, 2017); U.N. Human Rights Committee, *Mellet v. Ireland*, Commc'n No. 2324/2013, ¶ 7.11, U.N. Doc. CCPR/C/116/D/2324/2013 (Nov. 17, 2016).

logical differences between men and women in reproduction and do not directly or indirectly discriminate on the basis of sex.”⁵³

Similarly, ICERD mandates that States Parties “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.”⁵⁴ Under ICERD, the United States must undertake to eliminate racial discrimination and guarantee to everyone, without distinction, the right to public health and medical care.⁵⁵ ICERD specifically prohibits any policy that has the purpose or effect of restricting rights on the basis of race or ethnicity.⁵⁶ Governments must, when the circumstances warrant, take “special and concrete measures” to ensure the development and protection of certain racial groups “for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”⁵⁷

Together, these obligations require that the United States address all forms of discrimination, including racial disparities in accessing reproductive health care such as abortion, and ensure equal protection before the law. The ICERD Committee has in fact specifically noted its concerns regarding “the persistence of racial disparities in the field of sexual and reproductive

⁵³ See *supra* note 53, U.N. Human Rights Comm., *Mellet v. Ireland*, ¶ 7, (Cleveland, S., concurring); see also *supra* note 53, U.N. Human Rights Comm., *Whelan v. Ireland* (Cleveland, S., concurring).

⁵⁴ ICERD art. 5.

⁵⁵ ICERD art. 2(1), 5(e)(iv).

⁵⁶ ICERD art 1(1).

⁵⁷ ICERD art. 2(2).

health” and called on the United States government to eliminate these disparities.⁵⁸

Abortion bans like H.B. 1510 transgress the international commitment to non-discrimination because they discriminate against women and exacerbate racial inequalities in access to health care. Moreover, given that Black people in Mississippi are disproportionately low-income and marginalized, they are also disproportionately likely to be affected by H.B. 1510, and other such abortion bans, and are less likely to be able to travel to other states to access an abortion.⁵⁹ The bill plainly cannot be squared with the right to non-discrimination as protected by international law.

3. The right to be free from torture and other cruel, inhuman, or degrading treatment or punishment. The prohibition against torture is explicitly recognized within multiple legal instruments that the United States has ratified. Article 7 of the ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Similarly, Article 16 of the CAT specifies that every Party “shall undertake to prevent in any territory under its jurisdiction . . . acts of cruel, inhuman or degrading treatment or punishment.” More broadly, the prohibition against torture is one of the most firmly rooted principles of international human rights

⁵⁸ Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, ¶ 15, U.N. Doc. CERD/C/USA/CO/7-9 (Sep. 25, 2014).

⁵⁹ Mississippi Department of Health, Mississippi Maternal Mortality Report 2013–2016 5 (Mar. 2021), https://msdh.ms.gov/msdhsite/index.cfm/31,8127,299,pdf/MS_Maternal_Mortality_Report_2019_Final.pdf.

law and has become a well-accepted norm of customary international law, recognized and applied by U.S. courts. See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716 (9th Cir. 1992) (“There is no doubt that the prohibition against official torture is a norm of customary international law.”).

A relationship exists between denials of abortion and severe pain or suffering for pregnant individuals, which meet the threshold of cruel, inhuman or degrading treatment.⁶⁰ The pain experienced has been described as physical or mental, and in certain cases is foreseeable.⁶¹

The Committee Against Torture, charged with monitoring the implementation of the CAT, has expressed concern at the severe physical and mental anguish and distress experienced by pregnant individuals due to abortion restrictions, and has called upon States such as Ireland and Ecuador to “allow for legal exception to the prohibition of abortion in specific circumstances in which the continuation of pregnancy is likely to result in severe pain and suffering, such as when the pregnancy is the result of rape or incest or in cases of fatal fetal impairment.”⁶²

⁶⁰ U.N. Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Juan E. Méndez* ¶ 46, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013); *see also* U.N. Human Rights Committee, *K.L. v. Peru*, Commc’n No. 1153/2003, ¶ 6.3, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005) (The Committee found that forcing an adolescent to carry her pregnancy to term, despite confirmation of a severe fetal impairment caused severe mental anguish, violated ICCPR art. 7).

⁶¹ U.N. Human Rights Council, *supra* note 61, ¶ 46; *see also* U.N. Human Rights Comm., *K.L. v. Peru*, *supra* note 61, ¶ 6.3.

⁶² *See* CAT Committee, *Concluding Observations on the Second Periodic Report of Ireland*, U.N. Doc. CAT/C/IRL/CO/2 (Aug. 31,

The Committee Against Torture has also condemned restrictions on access to legal abortions where laws are unclear, where third-party authorizations are required to obtain an abortion, or where physicians or clinics refuse to perform abortions on the basis of conscientious objection.⁶³

The U.N. Special Rapporteur on Torture has stated that “[h]ighly restrictive abortion laws that prohibit abortions even in cases of incest, rape or fetal impairment or to safeguard the life or health of the woman violate women’s right to be free from torture and ill-treatment.”⁶⁴

Likewise, the U.N. Human Rights Committee, the Committee Against Torture, and the European Court of Human Rights have all recognized that restrictive abortion laws and state denial of abortion-related services are a form of torture or other ill-treatment.⁶⁵

2017); CAT Committee, Concluding Observations on the Seventh Periodic Report of Ecuador, U.N. Doc. CAT/C/ECU/CO/7 (2016).

⁶³ See, e.g., CAT Committee, Concluding Observations on the Third Periodic Report on the Former Yugoslav Republic of Macedonia, U.N. Doc. CAT/C/MKD/CO/3 (2015); CAT Committee, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Peru, U.N. Doc. CAT/C/PER/CO/5-6 (2013); CAT Committee, Concluding Observations on the Second Periodic Report of Bolivia, U.N. Doc. CAT/C/BOL/CO/2 (2013); CAT Committee, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Poland, U.N. Doc. CAT/C/POL/CO/5-6 (2013); CAT Committee, Concluding Observations on the Second Periodic Report of Kenya, U.N. Doc. CAT/C/KEN/CO/2 (2013).

⁶⁴ U.N. Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 43, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).

⁶⁵ Alyson Zurieck, *(En)gendering Suffering: Denial of Abortion as a form of Cruel, Inhuman, or Degrading Treatment*, 38 Fordham Int’l L.J. 99, 112 (2015).

Based on the foregoing, abortion bans openly transgress the right to be free from torture and cruel, inhuman, or degrading treatment.

4. The right to privacy. Article 17 of the ICCPR provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” The U.N. Human Rights Committee has concluded, in multiple contexts, that restrictions on abortion infringe upon this right of privacy.

In 2005, for example, the Human Rights Committee considered the case of K.L., a woman who sought an abortion in Peru.⁶⁶ Medical officials, however, declined to perform an abortion, citing article 119 of Peru’s criminal code, which—akin to H.B. 1510—“permitted [therapeutic abortion] only when termination of the pregnancy was the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health.”⁶⁷ Under these facts, the Human Rights Committee determined that “the refusal to act in accordance with the [woman’s] decision to terminate her pregnancy was not justified.”⁶⁸ The committee agreed with the woman’s claim that Peruvian officials “interfered arbitrarily in her private life,” and found their actions “amount[ing] to a violation of article 17 of the” ICCPR.⁶⁹

Similarly, in 2016, the Human Rights Committee concluded that Ireland’s constitutional prohibition on

⁶⁶ U.N. Human Rights Comm., K.L. v. Peru, *supra* note 61.

⁶⁷ *Id.* ¶ 2.3.

⁶⁸ *Id.* ¶ 6.4.

⁶⁹ *Id.*

abortion represented an arbitrary interference in a woman’s right to privacy, in violation of ICCPR Article 17.⁷⁰

Just like the legislation at issue in Peru and Ireland, abortion bans improperly abrogate the right to privacy. The Fifth Circuit concluded as much. In its opinion, it acknowledged, pursuant to this Court’s precedent, that “the right to privacy ‘is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,’” and that the district court “applied these principles straightforwardly” in invalidating H.B. 1510. *Jackson Women’s Health Organization v. Dobbs*, 945 F.3d 265, 271 (5th Cir. 2019) (citing *Roe*, 410 U.S. at 153). Affirming the Fifth Circuit’s opinion would thus be consistent with both U.S. constitutional jurisprudence, see *Roe*, 410 U.S. at 152, and U.S. obligations under Article 17 of the ICCPR.

* * * * *

No abortion law is written on a blank slate. The United States can and should learn from the experiences and outcomes from other nations. That experience teaches us, at the least, three important lessons.

First, restrictive abortion laws increase maternal mortality and morbidity, while dealing a particularly severe blow to individuals living in poverty and racial and ethnic minorities. Mississippi sits at the confluence of these factors. According to census data, Black or African Americans represent a higher percentage of Mississippi’s population than that of any other state in

⁷⁰ U.N. Human Rights Comm., *Mellet v. Ireland*, *supra* note 53, ¶ 7.8.

America,⁷¹ and approximately one-third of the state's Black population is at or below the poverty line.⁷² Abortion bans risk exacerbating existing inequalities by disproportionately impacting low-income and Black pregnant individuals' access to affordable care—compounding economic and personal health disparities.

Second, countries around the world, in recognition of the risks of restrictive abortion laws, have moved to expand access to abortion. Mississippi does the opposite, by moving unequivocally to ban this critical practice.

Third, the United States must comply with its international human rights commitments because of the binding nature of the treaties it has ratified. Those commitments require the United States to ensure access to abortion, as rendered clear by the plain meaning of the text and by the interpretive guidance. Even Petitioners' amici concede this point. As they acknowledge, "all nine expert bodies monitoring compliance with the core United Nations human rights treaties have made recommendations to United Nations Member States to change their abortion laws to make abortion progressively more available." Ctr. for Family & Human Rights Br. at 22. Abortion bans run

⁷¹ U.S. Dep't of Commerce, Census Bureau, *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, (Aug. 12 2021) <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html> (last revised Aug. 17, 2021).

⁷² Kaiser Family Found., *Poverty Rate by Race/Ethnicity*, <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&selectedDistributions=black&selectedRows=%7B%22states%22:%7B%22mississippi%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Sep. 15, 2021).

afoul of these commitments in not just one way, but in multiple ways: by violating the rights to life, non-discrimination, freedom from torture, and privacy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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