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 AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN HUMANIST ASSOCIATION, BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE, AND INTERFAITH ALLIANCE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN HUMANIST ASSOCIATION, BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE, AND INTERFAITH ALLIANCE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are organizations that share a commitment to preserving religious freedom for all. They deeply value the rich religious diversity that the Constitution has enabled to grow and thrive, and they recognize that this healthy pluralism cannot exist when government picks and chooses among religions and enforces conformity to the dictates of any faith. They therefore support legal rules that avoid that favoritism and thereby forestall religiously based oppression, discord, and strife.

The *amici* are:

- Americans United for Separation of Church and State.
- American Humanist Association.
- Bend the Arc: A Jewish Partnership for Justice.
- Interfaith Alliance Foundation.

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their counsel, or their members made a monetary contribution to the brief's preparation or submission. The parties' consents to the filing of *amicus* briefs are on file with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

At our best, this nation is a refuge for diverse faiths and viewpoints respecting matters of religion. That is no accident. The framers of our Constitution sought to spare us the strife, division, and oppression that governmental control over religion had wrought in England and, too often, in America as well.

Influenced by those historical experiences and a theology and political philosophy that recognized the centrality of rights of conscience, they crafted a political order that would safeguard matters of belief against governmental interference, so that all might worship and practice their faith, or not, as conscience dictates. The plan that they wrought has encouraged pluralism and enhanced religious freedom and comity. These values, expressly stated in the First Amendment's Religion Clauses but also foundational to ordered liberty and baked into our entire system of government, obviated the need for faith groups to vie for political dominance in order to avoid becoming victim to religious impositions by others. As the religious diversity of our populace increases, this recipe for peaceful coexistence is ever more important.

This Court's jurisprudence setting the terms for permissible regulation respecting abortion reflects these concerns. Before viability—the biological point at which independent existence outside the womb becomes possible—one's perspective on abortion necessarily depends at least in part on one's beliefs about what life is and when it begins. It is thus grounded in irreducible matters of conscience that, for many people, turn on inherently religious considerations. The Court's viability standard helps insulate from the push and pull of ordinary politics these most difficult,

divisive theological and philosophical questions. In doing so, it respects a healthy religious pluralism by not compounding the dangers of violent, religiously based strife, even as the issues remain hotly contentious and sadly all too divisive. And it avoids adding to the formidable pressure on political institutions to impose laws the legitimacy of which turns on whether one happens to hold a particular set of religious precommitments.

Abandoning the viability standard would place these most serious theological conflicts back wholly in the political arena. It would thus threaten far greater religious strife, turmoil, and rancor than already exists, by creating stronger incentives for religious groups to seek to impose their own beliefs through legislation so as to prevent others' beliefs from being forced on them. And it would dangerously increase the already substantial mistrust of our political institutions, by miring them yet more deeply in theological matters that they are not institutionally competent to resolve.

The Court's viability standard, and its respect for religious pluralism and social stability, should be preserved.

ARGUMENT

I. Our Constitutional Order Is Designed To Protect Religious Pluralism.

A. The Framers sought to avoid religiously based oppression and civil discord.

The Framers' experience of religious oppression dovetailed with the theology and political philosophy in which they were steeped, leading them to conclude that religion flourishes best when government is least

involved, and that, as James Madison put it, "Religion & Govt. will both exist in greater purity, the less they are mixed together" (Letter from James Madison to Edward Livingston (July 10, 1822), https://bit.ly/3lwDDlo). The Framers thus set out to craft a political order that would safeguard religious pluralism and protect dissent so as to avoid the evils of religious oppression and religiously based civil strife.

1. History.

Though our nation was more homogeneous at its founding than it is today, America has, from the beginning, been home to unprecedented religious diversity. Congregationalists maintained a stronghold in New England; Anglicans dominated religious life in the South; and Quakers influenced society significantly in Pennsylvania. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 45 (1998); Winthrop S. Hudson, *Religion in America* 46 (3d ed. 1981). Within colonies, too, substantial diversity of religious traditions abounded. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1422-1425 (1990). In some places, including New York, New Jersey, Rhode Island, and Pennsylvania, the people enjoyed relative peace and tolerance of religious differences. *Id.* at 1424-1425. In others, official and often violent religious oppression was all too common. *Id.* at 1422-1424.

That violence did not come as a surprise to the framers of our Constitution. For they well knew that the "centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy."

Everson v. *Board of Educ.*, 330 U.S. 1, 8-9 (1947); see also *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 127 n.10 (1982); *Engel* v. *Vitale*, 370 U.S. 421, 432-433 (1962).

During the seventeenth and eighteenth centuries, Catholics and Puritans in England were subjected to laws enacted to "destroy dissenting religious sects and force all the people of England to become regular attendants at [the] established church." *Communist Party of U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 149 (1961) (Black, J., dissenting). Parliament's adoption of the Book of Common Prayer and the persistent controversies over its content compounded the troubles, "repeatedly threaten[ing] to disrupt the peace." *Engel*, 370 U.S. at 425-427. "Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government * * * in order that the official religious establishment would advance their particular religious beliefs." *Ibid.*

To escape this religiously based political conflict and persecution, dissenters emigrated to colonial America. See, *e.g.*, *Engel*, 370 U.S. at 427 ("[G]roups[] lacking the necessary political power to influence the Government * * * decided to leave England and its established church and seek freedom in America from England's governmentally ordained and supported religion."); Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 Geo. J.L. & Pub. Pol'y 51, 57 (2009).

Yet "when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country * * *, they passed laws making their own religion the official religion of

their respective colonies." *Engel*, 370 U.S. at 427; accord *Everson*, 330 U.S. at 9-10; see, *e.g.*, McConnell, 103 Harv. L. Rev. at 1422 ("Having carved their communities out of the rocky wilderness of a distant land, the Puritans of New England saw no reason to allow ungodly individuals to spoil their vision of a Christian commonwealth. This vision allowed no room for religious pluralism or even for toleration."); *id.* at 1423-1424 (detailing violent measures taken in Massachusetts, Virginia, and Maryland to punish or banish religious dissenters); Andy G. Olree, *"Pride Ignorance and Knavery": James Madison's Formative Experiences with Religious Establishments*, 36 Harv. J.L. & Pub. Pol'y 211, 215, 226-227, 266-267 (2013) (describing persecution of Baptists and other dissenters in Virginia).

To put it mildly, these "historical instances of religious persecution and intolerance * * * gave concern to those who drafted" the Constitution. *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986); see also *Engel*, 370 U.S. at 432. Madison explained: "Torrents of blood ha[d] been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 11 (1785), *reprinted in Everson*, 330 U.S. at 63 (appendix to dissent of Rutledge, J.). Though perhaps painting a rosier picture of religious toleration on the home front than some of the colonies deserved, Madison noted that, in America, "the forbearance of our laws to intermeddle with Religion" "has produced" "moderation and harmony." *Ibid.*

2. Theology.

The Framers were also grounded in the theological principle that freedom of conscience is an essential

component of faith. Familiar with the long, sad history of religiously based strife and oppression, they recognized that governmental support for religion corrodes true belief, makes houses of worship beholden to the state, and coerces individuals and faith groups to conform.

This understanding traces back to the thirteenth-century writings of Thomas Aquinas, who reasoned that conscience must be a moral guide and that acting against one's conscience constitutes sin. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 356-357 (2002). Martin Luther built on the idea, teaching that the Church lacks authority to bind believers' consciences on spiritual questions: "the individual himself c[an] determine the content of his conscience based on scripture and reason." *Id.* at 358-359. John Calvin developed the idea further, preaching that individual conscience absolutely deprives civil government of authority to dictate in matters of faith. See *id.* at 359-361.

These tenets found expression in the teachings of Roger Williams, the Baptist theologian and founder of Rhode Island. Williams preached that for religious belief to be genuine, people must come to it of their own free will. Compelled belief and punishment of dissent are anathema to true faith, and religious practices are sinful unless performed "with[] *faith* and true perswasion that they are the true institutions of God." Roger Williams, *The Bloudy Tenent of Persecution for Cause of Conscience* (1644), *reprinted in* 3 *Complete Writings of Roger Williams* 12 (Samuel L. Caldwell ed., 1963).

Thus, Williams taught, keeping government from taking sides in matters of faith is crucial to protect religious dissenters against persecution and to safe-

guard religion itself against impurity and dilution. See Williams, *The Bloudy Tenent* 12-13; Edwin S. Gaustad, *Roger Williams* 59-60 (2005); Richard P. McBrien, *Caesar's Coin: Religion and Politics in America* 248 n.37 (1987). When government involves itself in matters of religion, even if just to give the barest nod of approval to a particular faith or set of beliefs, he warned, the inherent coercive authority of the state impedes the exercise of free will, interfering with and even precluding genuine faith. See, *e.g.*, Williams, *The Bloudy Tenent* 3-4.

3. Political philosophy.

That theological perspective was foundational to the political thought on which our constitutional order was built. Most notably, John Locke incorporated it into his argument for religious toleration:

> Whatsoever may be doubtful in Religion, yet this at least is certain, that no Religion, which I believe not to be true, can be either true, or profitable unto me. In vain therefore do Princes compel their Subjects to come into their Church-communion, under pretence of saving their Souls. * * * [W]hen all is done, they must be left to their own Consciences.

John Locke, *A Letter Concerning Toleration* 38 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689).

"Writing in the aftermath of religious turmoil in England and throughout Europe," Locke recognized "the tendency of both religious and governmental leaders to overstep their bounds and intermeddle in the others' province," producing civil strife. McConnell, 103 Harv. L. Rev. at 1431-1432. Thus, he reasoned, "civil government" should not "interfere with matters of religion except to the extent necessary

to preserve civil interests." Feldman, 77 N.Y.U. L. Rev. at 368.

Viewing "conscience as the defining character of religious identity," Locke reasoned that "the state has no greater capacity than the morally sovereign individual to decide" spiritual matters. Jack N. Rakove, *Beyond Belief, Beyond Conscience: The Radical Significance of the Free Exercise of Religion* 37-39 (2020). And he explained that a neutral refusal to legislate matters of faith is a prerequisite to lasting peace:

> No body * * * ha[s] any just Title to invade the Civil Rights and Worldly Goods of each other, upon pretence of religion. Those that are of another Opinion, would do well to consider with themselves how pernicious a Seed of Discord and War, how powerful a provocation to endless Hatreds, Rapines, and Slaughters, they thereby furnish unto Mankind.

Locke, *Letter Concerning Toleration* 33; see also John Locke, *Second Treatise of Government* §§ 209-210 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) (observing that if the people are "persuaded in their consciences" that the civil authorities threaten their religion, or "if they see several experiments made of arbitrary power, and that religion underhand favoured * * * which is readiest to introduce it," they will seek to "save [themselves]" by rebelling against this "illegal force").

4. Framers' application.

a. It was against this historical, theological, and philosophical backdrop that Virginia enacted Thomas

Jefferson's Bill for Establishing Religious Freedom.[2] The Virginia Statute forthrightly declared it an "impious presumption of legislators and rulers, civil as well as ecclesiastical, * * * [to] assume[] dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others." Thomas Jefferson, *The Virginia Statute for Establishing Religious Freedom* (Jan. 16, 1786), *reprinted in Founding the Republic: A Documentary History* 94-95 (John J. Patrick ed., 1995).

Madison elaborated: "experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." Madison, *Memorial and Remonstrance* ¶ 7. Religion would not be aided by political imposition but instead was "best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights by any Sect, nor suffering any Sect to invade those of another." *Id.* ¶ 8.[3]

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[2] The immediate impetus for the Virginia Statute was opposition to Patrick Henry's 1784 Bill for the Support of Christian Teachers. See Esbeck, 7 Geo. J.L. & Pub. Pol'y at 77-78. Madison objected that Henry's proposal would infringe "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience," intruding on religious freedom while also threatening civil governance. Madison, *Memorial and Remonstrance* ¶¶ 12-13, 15. He offered up, and his fellow Virginians embraced, Jefferson's bill as the antidote to those twin evils.

[3] This view has been borne out by empirical research showing that fewer people attend weekly worship services in countries with established religions (see Charles M. North & Carl R. Gwin, *Religious Freedom and the Unintended Consequences of State*

The Virginia Statute thus embodied the beliefs that religion neither requires nor benefits from the support of government, and that even modest, seemingly benign governmental favoritism influences individual religious practice and pressures clergy, houses of worship, and denominations to conform their teachings to the predilections of civil magistrates. Jefferson, *Virginia Statute* 94-95 (official support in any measure "tends only to corrupt the principles of that very Religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it").

b. "[T]he provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson*, 330 U.S. at 13 (citing *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871); *Davis* v. *Beason*, 133 U.S. 333, 342 (1890)). Jefferson and Madison's "plan of preserving religious liberty to the fullest extent possible in a pluralistic society" defined

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Religion, 71 S. Econ. J. 103, 111 (2004)), and poll data showing higher religiosity in the United States than in Western Europe (see Jonathan Evans, *U.S. Adults Are More Religious Than Western Europeans*, Pew. Rsch. Ctr. (Sept. 5, 2018), https://pewrsr.ch/3hl1pja), despite the long history of official support for religion there.

As Justice O'Connor observed: "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish." *McCreary Cnty.* v. *ACLU of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

the original understanding that religion should remain "a matter for the individual conscience, not for the prosecutor or bureaucrat." *McCreary Cnty.* v. *ACLU of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring). "[T]he Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition." *Everson*, 330 U.S. at 39 (Rutledge, J., dissenting).

* * *

In short, the Framers intended both to protect "the freedom of the individual to worship in his own way" and to guard against the "anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval." *Engel*, 370 U.S. at 429. Our constitutional order was designed to "'assure the fullest possible scope of religious liberty and tolerance for all,'" which was understood to be the only way "to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (quoting *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

B. Preserving a healthy religious pluralism requires ongoing attention.

1. Over time, our Nation has become ever more religiously pluralistic. In the early days of the Republic, religious diversity was chiefly among Christians; today, the more than 1,000 Christian denominations and sects, with all their theological differences, together still comprise a majority of the populace, but not an overwhelming one. J. Gordon Melton, *Melton's Encyclopedia of American Religions* 1 (8th ed. 2009);

In U.S., Decline of Christianity Continues at Rapid Pace, Pew Rsch. Ctr. (Oct. 17, 2019), https://pewrsr.ch/3leWDF8; Stephen Ansolabehere et al., *Guide to the 2020 Cooperative Election Study* 71-72 (2021), https://bit.ly/3luVFVc. Jews and Muslims, present since the colonial era, have grown in numbers. See, *e.g.*, Melton 896-897, 925-926.[4] Many Native American religions have maintained a presence also. *Id.* at 24.

As immigration from more parts of the world increased beginning in the mid-twentieth century, many other religions, including Buddhism, Hinduism, Sikhism, Zoroastrianism, and more—each with its own internal diversity of views and perspectives—have become an increasing presence. See Pluralism Project: Harvard Univ., *A New Multi-Religious America* (2020), https://bit.ly/3nxTMdj. The United States is now home to more than 2,000 religious groups. Melton 1; see also Pluralism Project: Harvard Univ., *supra*. And more than one-quarter of Americans are religiously unaffiliated—including atheists, agnostics, and those who may consider themselves religious or spiritual but do not identify with any particular denomination or house of worship. See *Decline of Christianity*, *supra*.

With this increasing diversity, the dangers of intractable political division along religious lines become more serious, not less. Cf. *Lee* v. *Weisman*, 505 U.S. 577, 592 (1992). And the antidote that the Framers prescribed—the safeguarding of the fundamental freedom for all to believe and practice, or not,

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[4] Many of the earliest Muslims to arrive in America did not, however, come of their own volition: They were enslaved West Africans, whose religious beliefs and practices were not accepted by white society. See Melton 925.

according the dictates of conscience, without influence or interference from government—is all the more crucial.

2. Thus, in interpreting and applying the Religion Clauses this Court has time and again looked to the original objects of protecting pluralism and averting religious conflict and oppression.

When addressing interference with churches' selection of their ministers, for example, the Court "looked to the 'background' against which 'the First Amendment was adopted,'" including the benighted history of control by the Crown and Parliament over the selection of clergy and the content and modes of worship, and the persistence of governmental control over high religious offices in the colonies. *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2061-2062 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 183 (2012)); see also *Hosanna-Tabor*, 565 U.S. at 182-184.

In concluding that a Florida city had impermissibly gerrymandered its laws to target and exclude the Santeria faith, the Court underscored that "[t]he Free Exercise Clause commits government itself to religious tolerance," and therefore "[t]hose in office * * * must ensure that the sole reasons for imposing the burdens of law and regulation are secular." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993).

In striking down devotional Bible readings in public schools, the Court emphasized that government must remain neutral with respect to religion, for "[w]e have come to recognize through bitter experience that it is not within the power of government to invade that

citadel, whether its purpose or effect be to aid or oppose." *Schempp*, 374 U.S. at 226.

When invalidating prayer at a public-school graduation, the Court reminded that "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 592; *id.* at 591-592 ("The explanation" for the constitutional "prohibition on forms of state intervention in religious affairs * * * lies in the lesson of history that * * * in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.").[5]

And in invalidating a public high school's policy of having students decide whether to open football games with prayer, the Court warned that putting religious practices to a vote "encourages divisiveness along religious lines," "turns the school into a forum for religious debate," and enables a majority "to subject students of minority views to constitutionally improper messages." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 316-317 (2000).

This Court has thus been steadfast in recognizing, as Justice O'Connor put it, that "[a]llowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs" (*McCreary*, 545 U.S. at 883 (O'Connor, J., concurring))—an evil that the Framers fervently sought to forestall.

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[5] The Court noted in *Lee* that while risk of divisiveness alone might not "necessarily invalidate[] the State's attempts to accommodate religion in all cases," it is "of particular relevance" when there are "subtle coercive pressures" to participate in a religious exercise. 505 U.S. at 587-588.

3. Our commitment to religious pluralism "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate" (see *Engel*, 370 U.S. at 432)—perversion that occurs when a faith is favored just as when one is disfavored (see *Lee*, 505 U.S. at 608 (Blackmun, J., concurring) ("The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation.")). Hence, it has been central to our constitutional order from the beginning that both official favor and official disfavor are anathema to freedom of conscience and peaceful coexistence in a pluralistic society such as ours.

II. The Court's Viability Standard Respects Religious Pluralism.

Nowhere in recent decades has the battle over political power to impose particular religious views been more pronounced, more heated, or more dangerous to social stability and religious freedom than in the context of abortion.[6] But as severe as the social tensions and the sometimes violent conflicts have been, even worse are the assaults on conscience—and the bloody and socially destructive violence that has followed from them—whenever inherently religious questions are subjected to ordinary political processes. For time and again (see, *e.g.*, Section I.A.1., *supra*), and

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[6] *Amici* would note that the narrative that this Court's decision in *Roe* is the primary cause of that conflict (see Pet. Br. 3) is belied by the historical record. See, *e.g.*, Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade: *New Questions About Backlash*, 120 Yale L.J. 2028, 2034, 2076-2085 (2011); Br. Amici Curiae American Society for Legal History et al.

seemingly inevitably, the perceived need to use political power to defend against religious coercion has morphed into coercive imposition of one's own practices at the expense of others.

What is more, the political process depends on a commitment to give-and-take compromise: All have to be prepared to accept as authoritative (at least for a time) decisions taken collectively by our political institutions according to rules of process, even when objecting vehemently to the substance of any particular outcome. When, however, deep spiritual precommitments make accepting the outcomes of democratic processes not just unpleasant but impious—and especially when, as here, that is true for some on both sides of a dispute—the stakes may be altogether different: Quite understandably, some may be unable to accept a political decision that they view as coming at the cost of their soul. That is why battles for religious dominance have historically been so persistent, and so bloody—and why the Framers sought to keep the most deeply divisive religious disputes cordoned off from the hurly-burly of ordinary politics.

The Court's legal standard prohibiting bans on abortion before viability has avoided contributing to that divisiveness by helping insulate some of the most contentious and inherently religious matters against the assaults on conscience that come with political control. This critical safeguard for religious freedom and social stability should be preserved.

A. Whether human life begins before viability raises deep, inherently religious questions that implicate freedom of conscience.

People hold a wide range of religious, moral, and philosophical views about the appropriateness of abortion. See Br. *Amici Curiae* Catholics for Choice et al. Parts I-II. That is because, if one goes beyond the biological facts about when a fetus may survive independently, one is left to confront the deepest and most profound mysteries about the nature of human existence: What constitutes life? What makes a person a person? What is a soul? Under what circumstances might ensoulment occur, and what is its significance?

The specific point at which life begins is thus a matter for theologians and philosophers to debate and for individuals to ponder. It is quintessentially a concern of religion, and one that each of us must resolve in accordance with conscience: "At 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 851 (1992).

Hence, this Court has observed: "Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy." *Casey*, 505 U.S. at 850; cf. *June Med. Servs., L.L.C.* v. *Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) (identifying "imponderable values" at issue).

B. The Court's viability standard reduces incentives to use political institutions in ways that may incite religiously based conflict.

Our constitutional order embodies a commitment to respecting this diversity of religious and moral viewpoints. By reducing the perceived need for religious groups to grasp at the levers of political power and "struggle[] among themselves to impress their particular views upon the Government" (*Engel*, 370 U.S. at 426) as a means to protect their own rights of conscience against impositions by others, the legal standard of viability has carefully avoided undercutting that fundamental aim. It has thus left space for each of us to act in accordance with our deeply held religious and philosophical beliefs.

1. The viability standard—the "most central principle" of the Court's jurisprudence in this area (*Casey*, 505 U.S. at 871 (joint opinion))—has delimited permissible and impermissible spheres of regulation that "reflect[] the biological facts and truths of fetal development." *Id.* at 932-933 (Blackmun, J., concurring in part) (viability "marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman." (citation omitted)).

But more importantly, the Court adopted the viability line based on careful, compassionate understanding "of the deep and seemingly absolute convictions that [abortion] inspires," as well as the many and varied religious views about when life begins and the multiplicity of ways that "[o]ne's philosophy, one's experiences, one's exposure to the raw edges of human

existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe" all affect these fundamental matters of conscience. *Roe* v. *Wade*, 410 U.S. 113, 116, 160-161 (1973).[7]

Thus, in determining the point at which governmental interests in protecting fetuses become sufficiently weighty to permit substantial exercise of the police power, the Court looked for a standard that would not impose or enforce any particular religious views or practices against those who have different religious convictions. And the Court found that standard, showing respect for everyone's right of conscience, by recognizing differing degrees of regulatory authority depending on whether a fetus is capable of independent existence.[8]

2. While those who wish to move the legal line one way or the other may disparage this standard as

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[7] Reflective of the role that religion plays, five members of the clergy were plaintiffs in the challenge to Georgia's abortion statute that was decided together with *Roe*. See *Doe* v. *Bolton*, 410 U.S. 179, 184, 189 (1973). And religious engagement on all sides has been a hallmark of the controversy ever since, up to and including the numerous denominations and clergy appearing as *amici* on both sides in this case.

[8] In doing so, the Court apparently shared Judge Newman's view in *Abele* v. *Markle* that the governmental interests in regulation after viability "could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than the interest in preventing the abortion of a fetus that is not viable." 351 F. Supp. 224, 232 (D. Conn. 1972), *vacated and remanded in light of Roe*, 410 U.S. 951 (1973); see Andrew D. Hurwitz, *Jon O. Newman and the Abortion Decisions: A Remarkable First Year*, 46 N.Y.L. Sch. L. Rev. 231, 239, 244-246 (2003) (detailing strong influence of *Abele* on the deliberations and decision in *Roe*).

arbitrary, the Court in fact reached—and repeatedly reaffirmed—the considered conclusion that viability is not just logically defensible on religiously neutral grounds, but that it is the demarcation criterion for regulatory authority that is least susceptible to what truly would be arbitrary and unfair—namely, imposition of officially favored religious beliefs on people who hold different but equally sincere, considered convictions.

In other words, the viability standard respects the considerable variation in religious views about abortion, by preventing legislatures from "resolv[ing] these philosophic questions in such a definitive way" (*Casey*, 505 U.S. at 850) that they absolutely override others' fundamental beliefs and enforce religious conformity, at a point when the states' nonreligious interests in regulation—*i.e.*, those that all can understand regardless of their faith perspective—are at their weakest. Cf. *Lukumi*, 508 U.S. at 547 (concluding that Free Exercise Clause's guarantee of "religious tolerance" requires "[t]hose in office * * * [to] ensure that the sole reasons for imposing the burdens of law and regulation are secular").

As a legal standard, viability has thereby reduced the impetus for religious groups to function as political factions that must strive at all costs to impose their views and practices on perceived rivals, lest they themselves become victims of others' exercise of that power. Cf. The Federalist No. 51, at 324-325 (James Madison) (Clinton Rossiter ed., 1961).

3. The standard has also helped safeguard a related personal autonomy, by enabling those who are or may become pregnant to exercise control over whether and when to have children, helping them "to participate equally in" work, education, and all other

aspects of "the economic and social life of the Nation." *Casey*, 505 U.S. at 856. And as an increasing portion of the population has come of age with awareness of the right of abortion before viability, people have "made choices that define their views of themselves and their places in society, in reliance on the availability of abortion." *Ibid.*

4. Abandoning the viability standard would erase the only credibly coherent line anyone has yet identified that preserves even a modicum of respect for the many different faith perspectives that the people of this nation hold dear. Any newly minted substitute would not just take sides on what for many people are irreducibly spiritual matters, but also require religious dissenters to live according to official diktats.

Throwing these matters back wholly into the political arena would thereby also increase destructive political fragmentation and "divisiveness along religious lines" (*Santa Fe*, 530 U.S. at 317), with candidates, politicians, and voters pressured to align themselves and compete with each other according to religion. And those religious groups that are less popular or numerous might find themselves utterly overpowered—just the situation that the founders of this nation sought to avoid.

C. The Court's viability standard limits political control over matters that are irreducibly religious and philosophical, and thus avoids further undermining public trust in our political institutions.

1. Political decision-making in our constitutional system necessarily relies on compromise: Legislatures debate; and through give and take, a majority comes together to pass a particular measure. Or it doesn't.

And then tomorrow, the members debate some other measure, hold another vote, and put another issue to bed, at least for a while.

This democratic governance "becomes possible * * * only when certain emotionally charged solidarities and commitments are displaced from the political realm." Stephen Holmes, *Gag Rules or the Politics of Omission*, *in Constitutionalism and Democracy* 19, 24 (Jon Elster & Rune Slagstad eds., 1993). Majoritarian institutions are simply not competent to address fundamentally and quintessentially religious matters when spiritual commitments on one or both sides mean that the politics of compromise would entail compromising one's faith. See *id.* at 23. When they try, they engender grave mistrust from those who see their faith being threatened.

When the political process cannot manage the conflict, there is also increased risk that one or both sides may resort to violent self-help remedies.[9] That,

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[9] Tragically, our society may be much closer to that line than we wish to admit. Those who would dismiss this concern as fearmongering need only reflect on the events of January 6, 2021, when armed insurrectionists, incited to distrust our political institutions and electoral system, attacked the U.S. Capitol. See, *e.g.*, Mark Mazzetti et al., *Inside a Deadly Siege: How a String of Failures Led to a Dark Day at the Capitol*, N.Y. Times (Jan. 10, 2021), https://nyti.ms/3loyfRz. And while religious disputes certainly were not the cause of those events, assertions of religious supremacy were used to fan the flames—even as faith leaders and religious denominations also courageously spoke out against the violence. See, *e.g.*, Harry Farley, *Trump's Christian Supporters and the March on the Capitol*, BBC News (Jan. 15, 2021), https://bbc.in/3EuZpyW; Elana Schor, *Christianity on Display at Capitol Riot Sparks New Debate*, A.P. News (Jan. 28, 2021), https://bit.ly/3CfuR25.

too, is a risk that the Framers knew well. See, *e.g.*, Madison, *Memorial and Remonstrance* ¶¶ 8, 11.

2. Keeping the most bitterly divisive religious disputes outside the reach of politics as much as possible is not only critical to religious freedom and social stability, but also a singularly appropriate application of the judicial power. For a key value of the courts as a check on governmental abuses is that they have been able to hone "certain capacities for dealing with matters of principle that legislatures and executives do not possess." Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 25 (2d ed. 1986).

The limits on regulatory authority that the courts have recognized in these sorts of circumstances have served to protect minority rights against systematic overreach by politically powerful majorities. See, *e.g.*, John Hart Ely, *Democracy and Distrust* 135-136 (1980). When the courts reinforce democratic political institutions against the tyranny of the majority,[10] "[l]egislators are enjoined from officially discussing questions which, if placed under the control of electoral majorities, would (it is thought) * * * exacerbate factional animosities." Holmes 21. "[B]y agreeing to privatize religion, a divided citizenry can enable itself to resolve its *other* differences rationally, by means of public debate and compromise." *Id.* at 24.

That, in turn, helps ensure that minority views—including, importantly, religious ones—can flourish,

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[10] See generally John Stuart Mill, *On Liberty* 3-5 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859); The Federalist No. 51, at 324 ("In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature.").

and that religion remains entirely free to offer answers to the most difficult questions about human existence, while legislatures and executive officials are left to deal with matters more susceptible to political give and take. And "Catholic and Jew"—and all other faiths—"are held exempt, as groups, from having to try out their strength in the political marketplace." Bickel 226.

3. The abortion controversy is already heated and sometimes violent. Undoing five decades of legal precedent to throw back fully into the political arena the most politically intractable questions about when life begins risks making things worse yet. Cf. *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986) (stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact"). For as the Chief Justice explained, when institutions of government are called upon to choose among the many deeply held and often conflicting beliefs on matters of principle to which the abortion controversy gives rise, "[t]here is no plausible sense in which *anyone* * * * could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring) (emphasis added).

The problem is no more tractable for legislatures than for judges. That is because balancing the value of "'protecting the potentiality of human life'" and the "liberty interest in defining [one's] 'own concept of existence, of meaning, of the universe, and of the mystery of human life'" (*June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring) (quoting *Casey*, 505

U.S. at 851)) necessarily requires giving content to those concepts—content that is for many people fundamentally and irreducibly religious and therefore neither epistemically accessible to those with different beliefs nor practically suited to resolution by majority rule. Cf. *Stenberg* v. *Carhart*, 530 U.S. 914, 921 (2000) (acknowledging the "virtually irreconcilable points of view" about abortion).

4. To jettison the viability standard would, in other words, force legislatures to address explosively divisive conflicts over the most fundamental questions about life and existence, when, as civil institutions, they have neither the competence nor the authority to resolve these matters. Indeed, the mere supposition in recent years that this Court might return these questions to the political realm has been enough to incite political actors to press their aims forthrightly as a religious mission.

When, for example, the Mississippi House debated the law at issue here, its sponsor justified the measure in part by declaring that "children are a gift from God." Larrison Campbell, *Abortions Banned After 15 Weeks by House*, Miss. Today (Feb. 2, 2018), https://bit.ly/38WVnk9.[11] And when the law was

[11] Though the point here is not to illuminate the statutory text but instead to show how perceived opportunities to legislate on these issues have magnified religious divisions, we note also this Court's recognition that statements by a bill's sponsor "deserve[] to be accorded substantial weight." *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); see, *e.g.*, *Wallace* v. *Jaffree*, 472 U.S. 38, 56–57 (1985) (relying on sponsor statements in determining that statute lacked genuine nonreligious purpose); *Edwards* v. *Aguillard*, 482 U.S. 578, 587, 592 (1987) (relying on sponsor statements in determining that statute coercively imposed particular religious views).

challenged, she inveighed: "Please pray that these judges know that at three months of life these babies * * * deserve the life that God has given them." *Currie's Abortion Bill Before Appeals Court*, Daily Leader (Oct. 7, 2019), https://bit.ly/3zXv8pH.

When Alabama's Governor signed a bill in 2019 to make almost all abortions punishable as felonies, she explained that the new law "stands as a powerful testament to Alabamians' deeply held belief that every life is precious and that every life is a sacred gift from God." Kim Chandler & Blake Paterson, *Alabama Governor Invokes God in Banning Nearly All Abortions*, A.P. News (May 16, 2019), https://bit.ly/3yZGlF2.

When the Arkansas Senate passed a near-total ban on abortions earlier this year, the bill's sponsor justified it by insisting: "There's six things God hates, and one of those is people who shed innocent blood." Austin Bailey, *Arkansas Senators Pass Near-Total Abortion Ban; It Now Goes to House*, Ark. Times (Feb. 22, 2021), https://bit.ly/3nhgZAe.

And when Oklahoma enacted a ban on abortions after a "fetal heartbeat" is detected, the president pro tempore of the State Senate enthused: "All life is precious and a gift from God." Press Release, Gov. Kevin Stitt, Governor Stitt Celebrates Nine New Pro-Life Laws with Ceremonial Bill Signing (Sept. 9, 2021), https://bit.ly/2XlD32b (also noting statements from other legislators, including, "God values life and so do I," and "We thank the Lord for the team of people that worked together to help make this happen, and the multitudes who have prayed for years about this. We also thank the Lord for answered prayer. To God be the glory!").

Nor is the slide into violence a long one. In the first few days since the Texas ban on abortions after six weeks went into effect, there were already reports of "vigilante activities against providers and staff," including "relentless harassment; trespassing; conducting drone surveillance; blocking roads, driveways, and entrances; yelling at staff and patients; using illegal sound amplification; video recording staff, staff vehicles, and license plates, as well as surreptitiously recording inside the health center; and trying to follow staff home." United States' Emergency Mot. for TRO or Prelim. Inj. at 11, *United States* v. *Texas*, No. 1:21-cv-796 (W.D. Tex. Sept. 14, 2021) (cleaned up).

5. Government may, of course, permissibly act in ways that "happen[] to coincide" with particular religious beliefs. *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). If not, government could seldom act at all. And individuals will often favor one or another policy based at least in part on the teachings of their faith. That they may hold and voice strong religious views about abortion is not the problem. Robust belief and the certitude that it brings are for many a central element of faith.

But whether life begins before viability, and if so, at what point—those are questions about the nature of being, human existence, and the soul that, for many people, simply cannot be pondered, much less definitively answered, except in religious terms. When one view becomes the official pronouncement of the aims and ends of government, therefore, the resulting official action may well seem justified to those who hold the religious beliefs underlying it. To those who do not, however, the action is illegitimate, if not impious. And when there are insufficient genuine, religiously neutral objectives for regulation, what is left in the

eyes of religious dissenters is a naked exercise of power that cannot be squared with equal rights of conscience for all.

6. Those sorts of impositions also have another deleterious effect: They contribute yet more to the already substantial popular mistrust of legislatures (cf. note 9, *supra*), by subjecting to political compromise and majority rule a set of issues on which, for many people on both sides, compromise simply is not possible. Removing the issues from the scope of permissible legislative action till after a fetus is viable and thereby reducing the temptation to enforce any particular set of religious commitments on those with contrary beliefs may be frustrating to some, but it at least does not cast doubt on the basic idea of majority rule. Indeed, even when legislatures do go ahead and pass pre-viability bans on abortion anyway, they do so with full knowledge that they are acting on the wrong side of the line. And the courts have a clear roadmap to correct the problem, helping ensure that all can trust that their equal rights of conscience will be respected.

This Court should not be quick to defenestrate a legal standard that has for half a century avoided compounding the most bitter religiously based political and social strife, thus helping us live in relative harmony despite deep, fundamental, and otherwise seemingly irreconcilable religious differences. Cf. *McCreary*, 545 U.S. at 882 (O'Connor, J., concurring).

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted.

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