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 *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the *Roe*/*Casey* framework should be replaced in order to reduce the number and intensity of religious liberty conflicts.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference.

Becket has represented religious people and institutions with a wide variety of views about abortion, including religious people and institutions likely to take different positions on the question presented to the Court in this case. Becket takes no position on abortion as such, nor on the particulars of the Mississippi law at issue here. But Becket does take a position on the impact of the Court's abortion jurisprudence on the First Amendment in general and religious liberty in particular.

Amicus and its counsel have repeatedly represented parties before this Court addressing religious liberty questions touching on abortion, contraception, and abortion-causing drugs. See, *e.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *McCullen* v. *Coakley*, 573 U.S. 464 (2014); *Wheaton College* v. *Burwell*, 573 U.S. 943 (2014);

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Zubik v. *Burwell*, 136 S. Ct. 1557 (2016); *Stormans* v. *Wiesman*, 136 S. Ct. 2433 (2016); *First Resort, Inc.* v. *Herrera*, 138 S. Ct. 2709 (2018); *Mayor & City Council of Baltimore* v. *Greater Baltimore Center for Pregnancy Concerns, Inc.*, 138 S. Ct. 2710 (2018); *Little Sisters of the Poor* v. *Pennsylvania*, 140 S. Ct. 2367 (2020); *Roman Catholic Diocese of Albany* v. *Lacewell*, No. 20-1501 (pet. filed Apr. 23, 2021) (state abortion mandate). Becket continues to represent religious entities in the lower courts on similar issues.

These cases have all had something in common: they are religious liberty disputes that arose from efforts by abortion proponents to impose penalties on religious people who object to abortion. Becket offers this brief to explain how this Court's failed *Roe*/*Casey* framework has made these religious liberty disputes more common, more intense, and more divisive, than they ought to be.

INTRODUCTION AND SUMMARY OF ARGUMENT

Abortion haunts the law. The Court's abortion cases—and the *Roe*/*Casey* framework in particular—neither fit within the bounds of the Constitution's design nor help to resolve in any meaningful way the underlying societal conflict over abortion. The most obvious symptom of this malfunctioning legal structure is the Court's stunted and divisive abortion jurisprudence itself. But because *Roe* and *Casey* reached beyond the Constitution to make it impossible for the political process to address the contending social forces and ideas regarding abortion, the conflict also spills out into other areas of law.

One casualty of this phenomenon is the law of

religious liberty, which has also been haunted by abortion. For example, a decade after the contraceptive mandate was first promulgated, religious nonprofits still face the imposition of millions of dollars in fines. But in all that time, no one has identified a single woman who could not obtain contraceptives if the government simply left ministries like the Little Sisters of the Poor alone. Thus, abortion proponents' purpose in ensuring that the mandate is applied to religious nonprofits is not to solve any real-world problem but is instead symbolic: to ensure that all organizations, religious or not, toe the party line on contraception and abortion.

As it happens, this effort to force religious objectors to conform betrays an underlying fragility. Abortion proponents have obtained a far more abortion-permissive regime than they could ever hope to obtain through the political process. See Section II.B. below (describing far less permissive regimes in Europe). But because that success does not reflect underlying political and constitutional realities, it rests on precarious foundations. Attempts to eliminate religious dissent are therefore meant to build a protective hedge around *Roe* and *Casey*.

Those attempts come at a high cost. Although for abortion proponents the value of attacks on religious exercise is symbolic, the resulting government restrictions and litigation impose real and enormous burdens on religious actors. The simplest practical solution—providing an exemption covering religious objectors while leaving the general rule in place—is also unacceptable to many abortion advocates precisely because that would eliminate the symbolic victory they are fighting for. Thus the ghost animating

the machine of the contraceptive mandate cases is the fact that *Roe* and *Casey* have put the conflict over abortion off limits as a legal matter.

The same is true of many other conflicts over religious objections to abortion-related legislative or regulatory action. No one was prevented from getting the morning-after or week-after pills because of the conscientious objectors in *Stormans, Inc.* v. *Wiesman*, 136 S. Ct. 2433 (2016). No one was unable to access an abortion clinic because Eleanor McCullen was talking on a sidewalk. *McCullen* v. *Coakley*, 573 U.S. 464 (2014). And no one was unable to obtain an abortion because the pregnancy centers in *NIFLA* v. *Becerra* did not post signs telling them where to find one. 138 S. Ct. 2361 (2018). This dysfunctional dynamic—where *Roe* and *Casey* function as a mechanism for generating conflicts across many areas of religious life—thus proves the truth of Justice Ginsburg's observation that "[h]eavy-handed judicial intervention [in *Roe*] was difficult to justify and appears to have provoked, not resolved, conflict." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 385-386 (1985).

But it does not have to be this way. It is possible to address abortion through ordinary politics, free from the systemic deformations and misincentives generated by the *Roe*/*Casey* regime. This is the American experience related to abortion before the Court departed from the Constitution's text, structure, history and tradition in *Roe*/*Casey*. And it is the American experience with a variety of other contested issues related to human life and religious liberty, and the experience of many European countries today.

Replacing the *Roe*/*Casey* framework with a constitutionally-rooted standard will therefore not only improve our broken abortion jurisprudence, but will also lower the number and intensity of religious liberty conflicts.

ARGUMENT

I. The failed *Roe*/*Casey* framework has needlessly inflamed religious liberty conflicts.

A. The *Roe*/*Casey* framework lies at the root of many religious liberty conflicts.

Several categories of religious liberty conflict to come before this Court can be traced back to the ill-starred *Roe*/*Casey* regime.

1. Contraceptive and abortion mandates.

In 2014 and 2015, this Court decided four landmark religious freedom cases—*Town of Greece* v. *Galloway*, *Burwell* v. *Hobby Lobby Stores*, *Holt* v. *Hobbs*, and *EEOC* v. *Abercrombie & Fitch*. Yet of these, only *Hobby Lobby* drew hundreds of protestors to the steps of the Court.[2] The *amicus* interest was equally lopsided,[3] as was the press coverage.[4] Why all

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[2] Adam Liptak, *Supreme Court Rejects Contraceptives Mandate for Some Corporations*, N.Y. Times, June 30, 2014, https://perma.cc/GL7C-TLJN.

[3] 82 merits amicus briefs were filed in *Hobby Lobby*, 39 were filed in *Town of Greece*, 18 in *Holt*, and 13 in *Abercrombie*.

[4] A search in LexisNexis's news database for "Burwell v. Hobby Lobby" in the week following the decision in *Hobby Lobby* yields 1,077 results. By contrast, a search for "Holt v. Hobbs" in the week following the decision in *Holt* yields 98 results; a search for "EEOC v. Abercrombie" in the week following the decision in

the heat? Because the contraceptive mandate at issue in *Hobby Lobby* had great symbolic value for abortion proponents. Indeed, "[d]ay after day, week after week, and year after year, regardless of the case being argued and the case being handed down, the issue that brings protesters to the plaza of the Supreme Court building is abortion," Dahlia Lithwick, *Foreword:* Roe v. Wade *at Forty*, 74 Ohio St. L.J. 5, 11-12 (2013).

The contraceptive mandate is an administrative rule that requires many employer-provided insurance plans to cover all FDA-approved contraceptives, including those like Plan B and Ella that are used after intercourse and may result in the destruction of a fertilized human egg. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 697 (2014). This requirement created a grave and immediate conflict of conscience for religious people and institutions who believe that human life begins at conception. See *Little Sisters of the Poor* v. *Pennsylvania*, 140 S. Ct. 2367, 2377 (2020). But it also was perceived to help President Obama politically. When then-Vice President Biden "objected" to this religious burden on "Catholic hospitals and other institutions," "[s]ome of Obama's political advisers concluded that Biden's political radar was out of date."[5] This opposition meant that there would be no broad exemption for religious

Abercrombie yields 105 results; and a search for "Greece v. Galloway" in the week following the decision in *Town of Greece* yields 228 results.

[5] Evan Osnos, *The Biden Agenda*, The New Yorker, July 20, 2014, https://perma.cc/L2ML-TEA8.

organizations.[6] As a result, over the decade since it was first promulgated, the mandate has spawned over sixty lawsuits and three separate merits decisions in this Court.[7]

Although at the time federal law prohibited an abortion mandate, all parties understood that abortion was plainly in view. During oral argument in *Hobby Lobby*, Justice Kennedy asked whether a for-profit corporation could be "forced * * * to pay for abortions," and Solicitor General Donald Verrilli confirmed that under the government's theory, they could. *Burwell* v. *Hobby Lobby Stores*, No. 13-354 (Oral Arg. Mar. 25, 2014), Tr. at 75:1-5, 19-23. Indeed, that same year, California began to apply its abortion mandate to all managed health care plans in the state, ending its longstanding practice of exempting group

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[6] Jo Becker, *The Other Power in the West Wing*, N.Y. Times, Sept. 1, 2012, https://perma.cc/6RND-NTC3.

[7] See Becket Fund for Religious Liberty, HHS Case Database, https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/ (listing cases); *Hobby Lobby*, 573 U.S. 682; *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016); *Little Sisters of the Poor*, 140 S. Ct. 2367. As Judge Kleinfeld observed, even in the most recent cases nearly a decade after the dispute arose, "[n]o woman sued for an injunction" and "no affidavits have been submitted from any women establishing any question in this case about whether they will be deprived of reproductive services or harmed in any way by the modification of the regulation." *California* v. *U.S. Dep't of HHS*, 941 F.3d 410, 431-432 (9th Cir. 2019) (Kleinfeld, J. dissenting), cert. granted and judgment vacated *sub nom. Little Sisters of the Poor Jeanne Jugan Residence* v. *California*, 141 S. Ct. 192 (2020). See also U.S. Br., *Zubik*, at 65 (conceding that women who do not receive contraceptive coverage from their employer can "ordinarily" get it from "a family member's employer," "an Exchange," or "another government program").

insurance plans offered by churches and religious nonprofits.[8] And in 2017, New York—whose state contraceptive mandate was a model for the federal mandate[9]—abruptly reinterpreted its insurance law to require coverage of surgical abortions, with only the narrowest of religious exemptions.[10]

The contraceptive mandate litigation was an entirely avoidable conflict, as are the state abortion mandate cases that have followed in its wake. Surely the federal government has many ways to distribute contraceptives to American women without dragooning the Little Sisters of the Poor or other religious nonprofits. Cf. *Zubik*, 136 S. Ct. 1557. And surely state governments have many ways to ensure access to abortion without involving churches. But the shadow of *Roe* and *Casey* prompted these governments to deny exemptions to religious groups, or to eliminate religious exemptions that had existed for decades.

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[8] See *Foothill Church* v. *Watanabe*, No. 19-15658, 2021 WL 3028052 at *2-3 (9th Cir. July 19, 2021) (Bress, J., dissenting) ("In response to learning that two Catholic universities in California had removed elective abortion coverage from their employee health plans, abortion advocates urged the [California Department of Managed Health Care] to stop permitting health plans under which religious employers could offer more limited abortion coverage options. Yielding to this request, the DMHC's Director eventually agreed to make a policy change.")

[9] *Compare* N.Y. Insurance Law § 3221 [*l*] [16] [A] [1] (New York contraceptive mandate exemption) *with* 76 Fed. Reg. 46,621 (Aug. 3, 2011) (original HHS contraceptive mandate exemption).

[10] See *Diocese of Albany*, No. 20-1501 (pet. filed Apr. 27, 2021).

2. Pharmacist regulations.

Another area where abortion proponents have attacked religious exercise is pharmacy regulations. In some states, government officials have sought to force pharmacists to dispense Plan B and Ella despite—or even because of—their religious objections.

For example, Washington State, acting at the behest of abortion advocates, required religious objectors to dispense Plan B and Ella despite the fact that the State allowed pharmacies not to stock or dispense these drugs for "'an almost unlimited variety of secular reasons[.]'" *Stormans*, 136 S. Ct. at 2437 (Alito, J., dissenting) (quoting *Stormans Inc.* v. *Selecky*, 844 F.Supp.2d 1172, 1188 (W.D. Wash. 2012)). This even though the objectionable drugs were "stocked by *more than 30 other pharmacies within five miles*" of the objecting pharmacy. *Stormans*, 136 S. Ct. at 2433 (Alito, J., dissenting) (emphasis original); see also *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1141 (9th Cir. 2009) (same). Indeed, the district court found that the "regulations were adopted with 'the predominant purpose' to 'stamp out the right to refuse' to dispense emergency contraceptives for religious reasons." *Stormans*, 136 S. Ct. at 2434 (quoting *Stormans Inc.* v. *Selecky*, 844 F.Supp.2d at 1178).

Similarly, in Illinois, Governor Rod Blagojevich—at the prompting of abortion advocates—issued an emergency rule requiring religiously objecting pharmacists to dispense Plan B, regardless of whether other nearby pharmacies without objections could do so. *Morr-Fitz, Inc.* v. *Blagojevich*, 901 N.E.2d 373, 379 (Ill. 2008). Governor Blagojevich explained his edict by making an argument about morals: "If a pharmacy wants to be in the business of dispensing

contraceptives, then it must fill prescriptions without making moral judgments. Pharmacists—like everyone else—are free to hold personal religious beliefs, but pharmacies are not free to let those beliefs stand in the way of their obligation to their customers." *Id.* at 380 (quoting press release). Yet in rejecting that rule, the Illinois courts found "no evidence of a single person who ever was unable to obtain emergency contraception because of a religious objection." *Morr-Fitz, Inc.* v. *Blagojevich*, No. 2005-CH-000495, 2011 WL 1338081 (Ill. Cir. Ct. Apr. 5, 2011).

3. Pregnancy center regulations.

States and municipalities have also aggressively regulated pregnancy centers that counsel pregnant women on non-abortion options, often for religious reasons. Typically, the regulations come in response to requests from abortion advocates that government officials force these centers *themselves* to inform their clients about where to obtain abortions. Thus in *NIFLA*, California specifically targeted what it called "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." 138 S. Ct. at 2368 (quoting California State Assembly report). The ideological nature of California's self-"congratulatory" statute was not lost on Justice Kennedy: "it is not forward thinking to force individuals to 'be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.'" *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (quoting *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977)) (alterations in original).

The Fourth Circuit recognized the same ideologically-driven effort to suppress religious

expression in *Greater Baltimore Center for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Baltimore*, 879 F.3d 101 (4th Cir. 2018), cert. denied, 138 S. Ct. 2710 (2018):

> Weaponizing the means of government against ideological foes risks a grave violation of one of our nation's dearest principles: "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." * * * It may be too much to hope that despite their disagreement, pro-choice and pro-life advocates can respect each other's dedication and principle. But, at least in this case, * * * it is not too much to ask that they lay down the arms of compelled speech and wield only the tools of persuasion. The First Amendment requires it.

Id. at 113 (Wilkinson, J.) (quoting *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943)). The Fourth Circuit emphasized that there was no real problem in need of solving, finding that "[a]fter seven years of litigation and a 1,295–page record before us, the City does not identify a single example of a woman who entered the [center]'s waiting room under the misimpression that she could obtain an abortion there." *Id.* at 112. Cf. *Tepeyac* v. *Montgomery County*, 5 F.Supp.3d 745, 768-769 (D. Md. 2014) (Chasanow, J.) ("Quite simply, the County has put no evidence into the record to demonstrate that [pregnancy centers'] failure clearly to state that no doctors are on premises has led to any negative health outcomes.").

Despite the Fourth Circuit's admirable sentiments, as long as conflicts are forced by the *Roe*/*Casey*

framework to find expression in ideological conflicts over religious objections to abortion, we can expect there to be continued weaponization of government means in furtherance of ideological ends.

4. Sidewalk counselor regulations.

Yet another area where occupation of the field by *Roe* and *Casey* have forced ideological conflicts over abortion to migrate into the realm of religious exercise has been the issue of sidewalk counselors. As Justice Kennedy observed, these counselors respond to "what they consider to be one of life's gravest moral crises" by trying "to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law." *Hill* v. *Colorado*, 530 U.S. 703, 792 (2000) (Kennedy, J., dissenting). In the process, exercises of free speech once considered sacrosanct—peaceful religious speech on public sidewalks—became yet another arena for abortion-related conflict. See, *e.g., id.* at 765 (Kennedy, J., dissenting) ("The Court's holding contradicts more than a half century of well-established First Amendment principles," and that "[f]or the first time, the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk.").

In *McCullen*, Massachusetts enacted a 35-foot buffer zone around abortion clinics that prohibited Plaintiff Eleanor McCullen's religiously-motivated speech on a "public way or sidewalk." *McCullen*, 573 U.S. at 469 (quoting Mass. Gen. Laws, ch. 266, §§ 120E½(a), (b) (West 2012)). All nine Justices agreed that Massachusetts violated the First Amendment when it outlawed even peaceful, consensual speech on public sidewalks. The Court called the law "truly

exceptional" and an "extreme step." *McCullen*, 573 U.S. at 490, 497. The Court found that Massachusetts had not sufficiently considered using the "less intrusive tools readily available to it." *Id.* at 494. Somehow, however, a governmental restriction of speech that nine Justices agreed was unconstitutional won the endorsement of the ACLU, the Solicitor General, and thirteen States. That support was surely driven by the *Roe*/*Casey*-inflected politics of abortion, rather than First Amendment principles.[11]

B. The *Roe*/*Casey* framework has also made political solutions to religious liberty conflicts harder.

In addition to exacerbating conflicts over religion, the *Roe*/*Casey* regime also makes it harder for political actors to "follow[ ] the best of our traditions" and accommodate "a variety of beliefs and creeds." *Zorach* v. *Clauson*, 343 U.S. 306, 313-314 (1952). For example, while a "wall-to-wall coalition" pursued RFRA as an answer to this Court's error in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), RFRA later came under attack in no little part due to the politics and jurisprudence of abortion.

At the time RFRA was enacted, the ACLU acknowledged that RFRA would "permit[ ] religiously sponsored hospitals to decline to provide abortion or contraception services." *Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong. 192 (1992) (statement of then-ACLU President Nadine Strossen).

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[11] See ACLU Amicus Br., U.S. Amicus Br., and N.Y. *et al.* Amicus Br., *McCullen* (No. 12-1168).

Representative Hoyer pointed out that enacting RFRA was "an opportunity to correct * * * injustice[s]" like a "Catholic teaching hospital [that] lost its accreditation for refusing to provide abortion services." 139 Cong. Rec. H2361, 1993 WL 151647 (May 11, 1993) (statement of Rep. Hoyer).

The RFRA "coalition broke apart in the late 1990s," largely over disagreements as to whether certain "rights"—like abortion—"are such compelling interests that they universally trump any claim of religious liberty, in any context, without regard to the facts of individual cases." Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J.L. & Religion 139, 148-149 (2009). "[I]n fact, the *Hobby Lobby* ruling [ ] prompted some calls to modify or even repeal [RFRA]." Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. Cal. L. Rev. 493, 501-502 (2015). Those calls came true just one year after *Hobby Lobby*. At that time, the ACLU said it "can no longer support" RFRA "in its current form," partially because RFRA might affect "access to or referrals for abortion and contraception services." Louise Melling, *ACLU: Why we can no longer support the federal 'religious freedom' law*, Wash. Post, June 25, 2015, https://perma.cc/K6FP-TRPG. The broad-based coalition in support of RFRA had been haunted out of existence by the *Roe*/*Casey* distortion.

II. Replacing the failed *Roe*/*Casey* framework will reduce the number and intensity of religious liberty conflicts.

But if the Court rejects the failed *Roe*/*Casey* framework, what comes next? Experience in both the

United States and in other countries shows that allowing the political process to address abortion would likely decrease the amount of religious liberty conflict.

A. The pre-*Roe* American experience with abortion shows that religious liberty conflicts would likely decrease post-*Roe*/*Casey*.

The United States' pre-*Roe* experience shows that eliminating *Roe* and *Casey* would reduce the amount and intensity of religious liberty disputes. For example, prior to *Roe*, several states had liberalized their abortion laws but in doing so routinely included exceptions to allow healthcare professionals to choose not to provide abortions. See, *e.g.*, N.Y. Civ. Rights Law § 79-i (McKinney 2019) (providing exemption where abortion is "contrary to the conscience or religious beliefs" of an objector); 1970 Alaska Sess. Laws 103-1 (no "hospital or person [is] liable for refusing to participate in an abortion"); 1968-69 Ark. Acts 179; 1967 Colo. Sess. Laws 285; 57 Del. Laws 411 (1970); 1972 Fla. Laws 610; 1968 Ga. Laws 1436; 1970 Haw. Sess. Laws 1; 1968 Md. Laws 875 (all similar).

Confronting one of those exceptions in *Doe* v. *Bolton*, this Court observed that, under Georgia's abortion statute, "the hospital is free not to admit a patient for an abortion" and that "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure." 410 U.S. 179, 197-198 (1973). Rather than being controversial, these provisions were described by the *Roe*/*Doe* majority as "obviously" placed in the statute "to afford appropriate protection to the individual and to the denominational hospital." *Id.* at

198. There is no indication that any of this pre-*Roe* activity generated significant conflict over religious liberty.

In this respect, the pre-*Roe* experience with abortion in the United States matches the experience the nation has had with other hotly-contested life issues and attendant conscience rights. For example, although the issues of assisted suicide and capital punishment both involve contentious questions about the taking of human life, in each area the Nation seems entirely capable of both legislating about the issue and providing for religious exemptions without significant conflict. See, *e.g.*, Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 137-147 (2012) (describing conscience exemptions in both contexts). Conscience-based exemptions from military service have likewise been largely the product of the political process. While military exemptions have been more controversial at times, they have avoided generating the kind of lasting, all-encompassing divisiveness generated by abortion after *Roe*. See 50 U.S.C. 3806(j) (military conscientious objection statute); Rienzi, 62 Emory L.J. at 130-136. In short, removing the *Roe*/*Casey* regime would reduce the number of religious liberty conflicts over abortion, both in and out of court.

B. The experience of other countries shows that without the *Roe*/*Casey* framework, religious liberty conflict is reduced.

Other countries have fewer and less intense conflicts over religious liberty—especially as related to abortion regulations—because they have not displaced abortion disputes into religious liberty law. The experiences of European countries have been

instructive. As a typical example, the laws of France and Germany prohibit abortion after 12 weeks' gestation. See Strafgesetzbuch [StGB] [Penal Code], § 218a(1) (exempting certain abortions from criminal liability as long as they are, among other things, performed before 12 weeks' gestation and a three-day counseling period is observed); Code de la santé publique [Public Health Code], art. L.2212-1 (permitting abortions if they are performed before 12 weeks' gestation). See also Center for Reproductive Rights, European Abortion Laws – A Comparative Overview (2019), available at https://perma.cc/QPK3-S3LW (describing many different European countries that include restrictions based on time from gestation, mandatory waiting periods, mandatory counseling, and other restrictions on abortion). By contrast, because of this Court's decisions, the United States has one of the most permissive abortion regimes in the world, in a class with China and North Korea. See Miss. Br. 31; App.65a.

The difference between the two approaches is apparent from the litigation surrounding religious disputes related to abortion—or rather in the lack of such litigation. In France and Germany, and other European countries with similar abortion regimes, "uneasy legislative compromises over contested ideas about the rights of women and the unborn[,] * * * which intentionally avoided the pro-life and pro-choice dichotomy, proved resilient in disarming European abortion politics." Ofrit Liviatan, *From Abortion to Islam: The Changing Function of Law in Europe's Cultural Debates*, 36 Fordham Int'l L.J. 93, 112 (2013). The ability to address abortion legislatively has resulted in a lack of European cases over religious

objectors to abortion regimes, precisely because religious actors' interests were accounted for in the legislative process, both at an institutional level and via robust conscience exemptions. See *id.* at 112-125. Indeed, one American pro-choice scholar was recently deeply surprised to find that abortion is not much of an issue in Germany:

> What I heard from the Germans I talked to gave me pause, however. No matter what their ideology or level of engagement with abortion questions, all sorts of people, from government officials, scholars, and activists to ordinary citizens, old friends, and relatives, had the same reaction when I told them of my project. "Abortion?" they said. "Why are you looking into abortion? That used to be an interesting question. It's not interesting anymore."

Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, 11 Fla. Int'l Univ. L. Rev. 149, 149 (2015). By allowing legislative action on abortion, German religious disputes over abortion have been turned from disputes *outside* religious organizations into disputes *within* them. See *id.*, 160-162 (describing dispute within Catholic Church).

The difference between the malfunctioning American approach and the better-functioning European approach also manifests in the lower level of social strife surrounding objections to abortion. Physical attacks against abortion providers are "exceedingly rare" in countries like France and Germany where abortion policy is largely set by legislatures, but persist in the United States, where

abortion policy is effectively controlled by the courts.[12] Indeed, "[n]owhere else in the world is abortion such a polarizing issue. * * * [I]n most of the rest of the world, abortion is a 'normal' issue that is decided democratically by legislatures or by referendums." John G. Matsusaka, *Let Voters—Not Judges—Decide Abortion Policy*, The Hill, Oct. 22, 2020, https://perma.cc/F58L-GDVX.

In short, the European experience demonstrates that replacing the *Roe*/*Casey* regime offers the prospect of durable social peace around the issue of religious liberty as it intersects with abortion.

* * *

Institutional sins are often the hardest to repent of, because they require later-arrived institutional actors to make themselves accountable for their predecessors' errors. But spots will not out on their own, and no institution can function properly over the long term if it does not face up to its mistakes. And it ought not take multiple generations to admit to the mistakes. Cf. *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) (58 years); *Korematsu* v. *United States*, 321 U.S. 760 (1944) (76 years). The better course by far is to grasp the nettle and fix the problem as soon as it becomes apparent. Cf. *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586 (1940) (3 years).

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[12] David Francis, *Abortion Clinic Attacks Are Largely Limited to U.S. Shores*, Foreign Policy Magazine, Nov. 30, 2015, https://perma.cc/J58C-Y5CS ("[A]ccording to Gilda Sedgh, a principal research scientist at the Guttmacher Institute * * * attacks on clinics in European peer countries where abortion is legal, like France, Germany, the Netherlands, Sweden and Finland, are exceedingly rare.").

Abortion will of course remain a controversial issue long after *Roe* and *Casey* are gone. But our constitutional structure is built to accommodate vastly different beliefs, even on topics that "touch the heart of the existing order." *Barnette*, 319 U.S. at 642. Rather than continuing to displace societal tensions over abortion into disputes over religious liberty, the Court should instead replace the *Roe*/*Casey* standard.

CONCLUSION

The decision below should be reversed and the *Roe*/*Casey* standard replaced with a standard that hews to the text, structure, history, and tradition of the Constitution.

Respectfully submitted.

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