

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* CAMPAÑA
NACIONAL POR EL ABORTO LIBRE, SEGURO
Y ACCESIBLE AND OTHER PUERTO RICAN
ORGANIZATIONS IN SUPPORT OF
RESPONDENTS**

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QUESTION PRESENTED

Whether all pre-viability prohibitions on elective abortions are unconstitutional.

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**IDENTITY AND INTEREST
OF AMICI CURIAE¹**

Campaña Nacional por el Aborto Libre, Seguro y Accesible (National Campaign for Free, Safe and Accessible Abortion) is a Puerto Rican organization founded in 2018 and is devoted to the development of educational and advocacy strategies to advance sexual and reproductive rights and health. It is composed of individuals and organizations that for decades have worked towards the advancement of sexual and reproductive rights and includes specialists in the areas of medicine, nursing, law, public health, psychology, sociology, social work, education, community organization, research, support service providers and advocacy, among others. This organization was created as a response to the misinformation and legislative initiatives in

¹ All parties have provided written blanket consents to the filing of *Amicus* Briefs. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *Amicus* contributed money intended to fund the brief's preparation. Partial funding for the brief's submission was provided by the University of Puerto Rico Law School Trust as part of its support to educational projects at the University of Puerto Rico Law School, with a grant from nonprofit organization Espacios Abiertos.

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Puerto Rico to limit women's and pregnant persons' right to control their own bodies. The organization's members provide sexual and reproductive health services; develop community education campaigns; conduct research, publish articles and advocate for abortion rights and safe, accessible abortion services. Members of *Campaña Nacional por el Aborto Libre, Seguro y Accesible* include the following organizations: Colectivo Ilé, Las Mingas, Amnistía Internacional Puerto Rico, Proyecto Matria, Inc. and Observatorio de Equidad y Género.

Inter-Mujeres Puerto Rico is a non-profit organization, located at the Law School of the Inter American University of Puerto Rico and dedicated to the defense of human rights and women's rights. It was created by and is composed of women Law professors. It conducts research on the diverse manifestations of sex, gender, sexual orientation and gender identity discrimination; engages in educational activities, discussion and analysis of laws and jurisprudence from a human rights and gender approach; conducts empirical research on related matters and contributes to the preparation of informed proposals for change.

Taller Salud is a feminist grassroots organization focused on enhancing women's access to healthcare, reducing violence in community settings and fostering economic growth and development. Founded in 1979, it is an independent, non-government based, non-profit organization.

Clínicas de Planificación Familiar de Puerto Rico is the group of the five clinics in Puerto Rico that offer integrated abortion and contraceptive services, which are: Women's Medical Pavilion; Centro de

Planificación Familiar; Clínica IELLA; Darlington Medical Associates; and Centro de Planificación Familiar.

Movimiento Amplio de Mujeres de Puerto Rico (MAMPR) is an autonomous group that brings together individual feminists and feminist organizations with a mission to address social problems from a gender perspective and to advance women's issues and welfare. The group works in solidarity and collaboration with other social justice movements that oppose oppression and promote human rights. MAMPR advocates effective implementation of policies that eradicate domestic and sexual violence.

Coalición 8M is a coalition organized in 2009 to commemorate the International Women's Day and is composed of feminist organizations and individuals that organize and conduct activities honoring this day in Puerto Rico.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case tasks the court with answering questions no government branch is suited to address. Assigning legal weight to a pre-viability development, as the State of Mississippi proposes, is also grappling with the "profound moral and spiritual implications" of abortion. *Planned Parenthood v. Casey*, 505 U. S. 833, 850 (1992). Yet the judiciary is no more suited for the task than it was in 1973, when it decided *Roe v. Wade*, 410 U. S. 113 (1973).

Roe left the question to each woman, but also afforded deference to a state's interest in potential life. At some point, that interest becomes compelling enough to support an abortion ban. That point is viability.

And viability should continue to govern. Result-oriented science and what it allegedly reveals about the "morality" of pre-viability abortions, do not warrant a departure from precedent. For if one pre-viability development justifies an abortion ban, many more will compete for the honor. This Court runs the risk of becoming a scientific panel presiding over a constitutional right's deformation. It is hard to imagine a better way to bring back a "jurisprudence of doubt", *Casey*, 505 U. S. at 844, on so important a realm of a woman's life.²

Amici intend to shed light on what a "jurisprudence of doubt" might look like for Puerto Rican women already taxed by poverty, gender inequality and sexual violence. Their situation is not very different from that of other Puerto Rican, Hispanic and poor women living in the mainland.

Amici contend that opening the door to pre-viability abortion bans will substantially burden Puerto Rican women's reproductive autonomy. Even under *Roe* and *Casey*, women in the Island face structural barriers to abortion access. The unstable regulatory terrain that will emerge from a holding favoring Mississippi's law would compound the problem.

² Mississippi first invites the Court to overrule *Roe* and *Casey*. *Amici* wholeheartedly join Respondent's case against Mississippi's invitation.

ARGUMENT

Permitting bans on elective abortions before viability could substantially degrade Puerto Rican women's practical ability to make reproductive decisions.

Government control over reproduction is not unknown to Puerto Ricans. Both the United States and Puerto Rico governments implemented birth control measures during the first half of the 20th century. Those measures included involuntary sterilization of thousands of women.³ See ALICE

³ For a general view of sterilization in Puerto Rico, see CATHARINE A. MACKINNON, *SEX EQUALITY* 1088 (2007) and sources therein cited. By the middle of the 1980s more than a third of Puerto Rican women of child-bearing age were sterilized. *Id.* See also Harriet Presser, *Puerto Rico: Recent Trends in Fertility and Sterilization*, 12-2 *FAMILY PLANNING PERSPECTIVES*, 102 (Mar-Apr. 1980); Charles Warren, et al., *Contraceptive Sterilization in Puerto Rico*, 23-3 *DEMOGRAPHY* 351 (August 1986). The longstanding and brutal female sterilization experience in Puerto Rico is an intricate part of the Island's Twentieth Century colonial history. See Bonnie Mass, *Puerto Rico: A Case Study of Population Control*, 4-4 *LATIN AMERICAN PERSPECTIVES* 66 (Autumn 1977); Michael Lapp, *The Rise and Fall of Puerto Rico as a Social Laboratory, 1945-1965*, 19-2 *SOCIAL SCIENCE HISTORY* 169 (Summer 1995); Lisa Napoli, *The Puerto Rican Independentistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status*, 4 *CARDOZO J. INT'L & COMP. L.* 131, 157-58 (1996) ("The Puerto Rican government, using funds from the U.S. government and privately-funded U.S. foundations, sterilized up to one-third of the women of child-bearing age in Puerto Rico over a twenty-year period ending in 1968").

COLÓN, ANA LUISA DÁVILA, MARÍA DOLORES FERNÓS, ESTHER VICENTE, POLÍTICAS, VISIONES Y VOCES EN TORNO AL ABORTO EN PUERTO RICO 48-62 (1999); FRANCISCO A. SCARANO, PUERTO RICO: CINCO SIGLOS DE HISTORIA 754 (1993).

Even though abortion was prohibited by the Criminal Code, reality was much more permissive with some women. The authorities rarely enforced the abortion statute.⁴ Therefore, Puerto Rico became a haven for American women exercising their right to control their own bodies.⁵ Well trained doctors treated these women at well-equipped clinics. But control over pregnancy, as a dignitary liberty, was not available to most Puerto Ricans.

Instead, what the authorities didn't do to tourists, poverty did to most Puerto Rican women. Not having the economic resources to get safe treatment, they resorted to unsafe back-alley abortions or self-administered quinine at home. COLÓN *et al.*, *supra* at 78. Resort to those venues often resulted in hemorrhagic bleeding, fever, and other septicemia symptoms. *Id.*

Roe and *Casey* gave all women a deeply rooted freedom, a cherished "component of liberty". *Casey*,

⁴ COLÓN ET AL., *supra* at 80. In the twenty-year period from 1950 to 1970, less than a dozen midwives had been prosecuted (mainly for second degree murder when the abortion resulted in the death of the woman) and only one doctor was prosecuted. *Id.* at 80.

⁵ *Id.* at 79. In fact, in 1967 an organization of members of the clergy was created (the Clergy Consultation Service on Abortion) which referred women to safe abortion facilities and legitimate doctors in, among other places, Puerto Rico. See LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 40 (1992).

supra at 871. That liberty is a dam preventing policymakers from officially sending Puerto Rican women to back allies if they wish to plan and control their reproductive lives even during pregnancy.

But legal rules alone do not effectuate social change, as Respondent so ably argues. Resp'ts. Br. 35. For many women facing very concrete barriers to access, *Roe* and *Casey* remain abstract promises. Esther Vicente & Patricia Otón Olivieri, *La legalidad no es suficiente: El impacto del fundamentalismo y las políticas Trump sobre el acceso al aborto en Puerto Rico y otros países*, in EL ABORTO EN AMÉRICA LATINA: ESTRATEGIAS JURÍDICAS PARA LUCHAR POR SU LEGALIZACIÓN Y ENFRENTAR LAS RESISTENCIAS CONSERVADORAS 407 (2018, Bergallo, Jaramillo, Vaggione, Eds). This reality deserves attention.

Mississippi's claims about women's progress, Pet'rs. Br. 29, are in square conflict with statistics and *Amici's* experience. Statistically, women are still poorer than men. This is so because of a gender income gap, women's segregation into low-paying jobs and the general lack of supportive work-family policies. Robin Bleweis, et al., *The Basic Facts About Women in Poverty*, CENTER FOR AMERICAN PROGRESS, August 3, 2020, <https://www.americanprogress.org/issues/women/reports/2020/08/03/488536/basic-facts-women-poverty/>. Furthermore, it is beyond dispute that women's experience is one of deep inequality in significant domains of social life. Resp'ts. Br. 35. See also, INSTITUTO CARIBEÑO DE DERECHOS HUMANOS (ICADH), PUERTO RICO: TERRITORIO HOSTIL PARA LAS MUJERES, REPORT TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 38-39 (2015). Thus,

for example, the latest Census data shows that “by each major age category examined [by the Census Bureau], women had higher poverty rates than men in 2020.” EMILY A. SHRIDER, ET AL., INCOME POVERTY IN THE UNITED STATES: 2020, U.S. CENSUS BUREAU (SEPTEMBER 2021).

Puerto Rico is no exception. According to the 2018 economic report of the Puerto Rico Planning Board, from 2012 to 2016 fifty eight point six percent (58.6%) of single mothers lived in poverty. PUERTO RICO PLANNING BOARD, RESUMEN ECONÓMICO DE PUERTO RICO, VOL. II, NUM. 3 8 (2018). Moreover, sixty-nine point six percent (69.6%) of single mothers with children lived under poverty levels. *Id.* Meanwhile, only forty percent (40%) of single mothers living under poverty levels were employed, and about half of them had full-time jobs. *Id.* In that same period (2012-2016) 24% of households (296,865 out of 1,237,180) were headed by single women, with an average family size of 3.62 persons per family. *Id.* at 3.

A total of seventy-eight point five percent (78.5%) of single mothers living under poverty levels received supplemental security income (SSI) or other public assistance income; forty-four point eight percent (44.8%) received social security (SSA) benefits. *Id.* at 9.

Furthermore, women in Puerto Rico experience alarming levels of gender violence. Because of the rise in gender violence cases, the Government of Puerto Rico recently took the extraordinary step of declaring a state of emergency, marshalling government resources to address the issue. Executive Order Num. 2021-013, *Orden Ejecutiva del Gobernador de Puerto*

Rico, Hon. Pedro Pierluisi, Declarando un Estado de Emergencia ante el Aumento de Casos de Violencia de Género en Puerto Rico (January 25, 2021) Boletín Administrativo.⁶ In 2019 alone, there were 7,021 reported cases of domestic violence, 5,896 of which were against women. *Id.*⁷ Given that women in Puerto Rico experience substantial levels of poverty and inequality, these social conditions are default structural barriers to women's self-determination and reproductive freedom.

And even though abortion is legal in Puerto Rico even after viability,⁸ many additional barriers delay access to abortion. These obstacles include abortion's cost, lack of facilities and personnel to perform abortions and misinformation. *Amici* have observed these barriers play out on the ground, while helping women as they navigate their reproductive options.

Availability is a significant barrier to abortion access. Aside from the extremely limited circumstances in which abortions are covered by federal programs, women must rely on private services to perform the procedure. INSTITUTO

⁶ Available at <https://www.estado.pr.gov/es/ordenes-ejecutivas/>

⁷ For additional statistics on gender violence in Puerto Rico see Comité de Prevención, Apoyo, Rescate y Educación de la Violencia de Género (Comité PARE), <https://parelaviolencia.pr.gov/estadisticas>.

⁸ See *Pueblo v. Duarte*, 109 D.P.R. 596 (1980) (interpreting the statutory prohibition on abortion to have an exception for women's physical and emotional health throughout pregnancy). See also Hiram Meléndez Juarbe, *Privacy in Puerto Rico and The Madman's Plight: Decisions*, IX GEORGETOWN J. GEN. & L. 1 (2008).

CARIBEÑO DE DERECHOS HUMANOS (ICADH), DEUDA PÚBLICA, POLÍTICA FISCAL Y POBREZA EN PUERTO RICO, REPORT TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (2016).

Currently, there are in Puerto Rico only five private clinics performing abortions. Four of these clinics are in the metropolitan area of Puerto Rico. Women's Medical Pavilion is located in Carolina, and Centro de Planificación Familiar is in Bayamón. Clínica IELLA and Darlington Medical Associates are both situated in San Juan. There is only one clinic, Centro de Planificación Familiar located in Ponce, which is in the south of the Island. As a result, physical access to abortion facilities is limited for women living in other parts of the Island. This is the case, for example, of residents of Vieques and Culebra which are island-municipalities located off the main island's east shore and lack a reliable maritime transportation system. SANTA CLARA LAW SCHOOL INTERNATIONAL HUMAN RIGHTS CLINIC, STRANDED: HUMAN RIGHTS IMPLICATIONS OF AN INADEQUATE TRANSPORTATION SYSTEM BETWEEN THE ISLANDS OF CULEBRA, VIEQUES, AND PUERTO RICO (2020). The scarcity of medical professionals qualified to perform the procedure aggravates the situation: only a handful of around 365 obstetricians in the Island perform abortions, according to journalistic reports. Glorimar Velázquez Carrasquillo, *Desinformación, inaccesibilidad y otras formas de abortar un derecho*, ONCE Nov. 19, 2019, <https://oncepr.com/once/2019/11/19/reportajes/aborto-derecho-ps-950-nayda-venegas-brown>.

Misinformation, in addition to social stigma, is another factor diluting the constitutional right to

have an abortion. Since abortion is still tabu in our culture, large numbers of women are uneducated on their rights. According to a report by Puerto Rican community-based organization *Taller Salud*, about 50% of the individuals who reach out to them and one out of three women in Puerto Rico surveyed by grassroots organizations believe abortion is illegal or have doubts about the legality of the procedure. INSTITUTO CARIBEÑO DE DERECHOS HUMANOS (ICADH), PUERTO RICO: TERRITORIO HOSTIL PARA LAS MUJERES, *supra*.

Now take the *Casey* viability test out of the picture. Too many questions would lurk behind such a holding, clouding the already fragile practical terrain for women's decision-making autonomy. What would be next? Is a six week ban also constitutional? How many weeks would a woman have? Would she even have what they used to call "a right to choose"?

The foregoing is no hyperbole. Legislative majorities could impose their views about the beginning of life. They would only need to find new pre-viability instances at which their interest in potential life trumps a woman's right to govern the fate of her pregnancy. After all, that is what Mississippi did. And Puerto Rico has seen its share of anti-choice efforts.

For example, in 2018 and 2019, a legislative bill would have required an ultrasound offer prior to performing an abortion, a 48-hour waiting period, and consent from parents in cases of minors. It would have also prohibited procedures after 20 weeks, with few exceptions. Protection of Women and Preservation of Life Act, S.950, 18th Leg., 3rd Ordinary Sess. (PR 2018). This bill was vetoed by then Governor Ricardo

Rosselló. Despite early setbacks, new efforts to curtail women’s reproductive rights are the predictable result of a major decision allowing some pre-viability abortion bans.

In Puerto Rico, a “jurisprudence of doubt”, added to the existing socio-economic barriers to abortion access, would thwart women’s constitutional right to control their own bodies. This in turn will have a dramatic impact on many areas of a woman’s life. According to a study evaluating empirical research addressing the relationship between induced abortion and women’s mental health, reducing access to abortion could change the profile of women giving birth such that “new mental health problems ... might develop from stresses associated with raising a child a woman feels unable to care for or may not want or from relinquishing a child for adoption.” Brenda Major, et al. *Abortion and Mental Health: Evaluating the Evidence*, in 64 AMERICAN PSYCHOLOGIST NO. 9 863, 886 (2009). Therefore “reducing access to abortion could result in poorer mental health among the population of women who deliver”. *Id.* An analysis of the Turnaway Study⁹ found that women who had access to abortion fared better than women who were denied access, in terms of mental well-being. Antonia Biggs, et al. *Women’s Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion A Prospective, Longitudinal Cohort Study*, in 74 JAMA PSYCHIATRY NO. 2 169, 174 (2017). That is, women who were denied abortion access experienced high

⁹ The Turnaway Study is a five-year, longitudinal project, which evaluated the health and socio-economic consequences of receiving or being denied abortion in the United States.

levels of anxiety and low self-esteem, although they improved within a year. *Id.* Factors such as insufficient financial resources, “partner issues, bad timing, needing to focus on existing children, and not being emotionally or mentally prepared” are reported as important indicators for mental health problems. *Id.* at 174.

These findings are extremely concerning. A world with pre-viability bans would more than likely curtail women’s chances of accessing the healthcare they need, and compound current barriers such as the absence of facilities, personnel, and widespread misinformation. Puerto Rican women cannot and should not face more burdens on their lives.

CONCLUSION

Roe and *Casey* established a principled and workable balance between both sides to a national debate. A race for the past would only put a cruel burden on millions of lives taxed by enough hardships. That burden would cause a major disruption in American life and for Puerto Rican women.

Nothing stands behind Mississippi’s proposition to allow government invasion of a personal realm protected by long-standing law. Therefore, if liberty means anything, it means that the judgment below should be affirmed. That is how you make good, enduring constitutional law.

Respectfully submitted,

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