

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

February 20, 2020

Lyle W. Cayce
Clerk

No. 19-60455

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients; SACHEEN CARR-ELLIS, M.D., M.P.H., on behalf of herself and her patients,

Plaintiffs-Appellees

v.

THOMAS E. DOBBS, M.D., M.P.H., in his official capacity as State Health Officer of the Mississippi Department of Health; KENNETH CLEVELAND, M.D., in his official capacity as Executive Director of the Mississippi State Board of Medical Licensure,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Mississippi

Before KING, COSTA, and HO, Circuit Judges.

PER CURIAM:

In 2018, Mississippi enacted a law prohibiting abortions, with limited exceptions, after 15 weeks' gestational age. A district court enjoined the law, and we recently upheld that injunction. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 274, 277 (5th Cir. 2019) (*Dobbs I*). The 15-week law, we concluded, is not a mere regulation of previability abortions subject to the "undue burden" test of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Dobbs I*, 945 F.3d at 273–74. Instead, the law is a

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ban on abortion after 15 weeks, “which *Casey* does not tolerate.” *Id.* at 274. Such a ban is unconstitutional under Supreme Court precedent without resort to the undue burden balancing test. *Id.*; *see also Casey*, 505 U.S. at 879 (holding that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability”).

In 2019, Mississippi enacted another abortion law—the one this case is about. Senate Bill 2116 makes it a crime to perform an abortion, with exceptions only to prevent the death of, or serious risk of “substantial and irreversible” bodily injury to, the patient, after a “fetal heartbeat has been detected.” “Fetal heartbeat’ means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.” The parties disagree about when that activity occurs during a pregnancy. The clinic contends it occurs at six weeks. Mississippi argues it can occur anywhere between six and twelve weeks. But all agree that cardiac activity can be detected well before the fetus is viable. That dooms the law. If a ban on abortion after 15 weeks is unconstitutional, then it follows that a ban on abortion at an earlier stage of pregnancy is also unconstitutional.

Indeed, after we held that the 15-week ban is unconstitutional, Mississippi conceded that the fetal heartbeat law must also be. As our earlier decision explained, a ban on abortion is different from a law prohibiting certain methods of abortion. *See Dobbs I*, 945 F.3d at 273–74 (distinguishing *Gonzales v. Carhart*, 550 U.S. 124 (2007)). And although Mississippi analogizes its law to ones that prohibit abortions sought for certain reasons, *see, e.g., Preterm-Cleveland v. Himes*, 944 F.3d 630 (6th Cir. 2019) (granting rehearing en banc to address constitutionality of an Ohio law that criminalizes abortion if the provider knows the woman is seeking an abortion because there are indications the child might have Down Syndrome), Senate Bill 2116 bans abortions at a

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previability stage of pregnancy regardless of the reason the abortion is sought. This case thus does not require us to assess the constitutionality of abortion laws that prohibit abortions performed using certain procedures or sought for a particular reason.

The preliminary injunction the district court granted is **AFFIRMED**.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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CLERK

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February 20, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 19-60455 Jackson Women's Health Orgn, et al v. Thomas
Dobbs, et al
USDC No. 3:18-CV-171

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that defendants-appellants pay to plaintiffs-appellees the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk



By: Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Paul Eldridge Barnes
Mr. Stephen James Carmody
Ms. Alexis Casamassima
Mr. Aaron Sean Delaney
Ms. Karli Eisenberg
Ms. Alexis Fallon
Ms. Crystal Johnson Geise
Ms. Caitlin Grusauskas
Ms. Claudia Hammerman
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Ms. Janice Mac Avoy
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Mr. Christian Janet Strickland
Mr. Claude Szyfer