No. 18-60868

United States Court of Appeals
for the
Fifth Circuit

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (JACKSON)
DISTRICT COURT CASE NO. 3:18-CV-171

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

Appellants have set forth the interested parties in this case at page i-iii of their opening brief. Pursuant to Fifth Circuit Rule 29.2, which requires "a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief," undersigned counsel of record certifies that the following listed persons have an interest in this *amicus* brief. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

i) *Amici curiae* in this case: Leah Litman, Melissa Murray, Jamie R. Abrams, Aziza Ahmed, Susan Frelich Appleton, Khiara M. Bridges, David S. Cohen, Caroline Mala Corbin, Michele Goodwin, Maya Manian, Serena Mayeri, Gillian Metzger, Yvonne Lindgren, Michelle Oberman, Radhika Rao, Rachel Rebouché, Ruthann Robson, Elizabeth Sepper, and Mary Ziegler.

ii) Attorneys for *amici curiae*: Walter Dellinger, Stuart M. Sarnoff, Zhao Liu, Kendall Turner, and Kelly M. Scavone (O'Melveny & Myers LLP).

/s/ Stuart M. Sarnoff
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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are scholars with expertise in constitutional law, including the law with respect to when government regulation impermissibly burdens a woman's constitutionally-protected right to choose to terminate a pregnancy. As such, they have a shared interest in identifying the proper standards applicable to abortion regulations. This brief sets forth *amici*'s considered understanding of the legal framework governing abortion regulation, as established by the decisions of the U.S. Supreme Court.

Amici include the following scholars:[2]

Leah Litman, Assistant Professor of Law at The University of California at Irvine;

Melissa Murray, Professor of Law at New York University;

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Aziza Ahmed, Professor of Law at Northeastern University School of Law;

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[1] This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a). All parties have consented to its filing. Pursuant to Rule 29(a)(4)(E), undersigned counsel certify that this brief was not authored in whole or in part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than *amici* and their counsel have contributed money for this brief.

[2] *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only.

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Mary Ziegler, Stearns Weaver Miller Professor of Law at Florida State University College of Law.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 45 years, the Supreme Court has recognized that the right to privacy, rooted in the Fourteenth Amendment, "encompass[es] a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 153 (1973). The central tenet of *Roe* and its progeny is that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion). This is because "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* at 846. The Supreme Court has never wavered from this essential holding. *See, e.g.*, *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

Notwithstanding this unbroken line of unambiguous precedent, Mississippi enacted House Bill 1510, which prohibits abortions performed at or after fifteen weeks of pregnancy, except in cases of medical emergency or severe fetal abnormalities. It is undisputed that, in prohibiting abortions after only fifteen weeks, this statute prohibits abortions prior to viability. *See* Appellants' Br. 15, 20 (conceding this point). Under controlling Supreme Court precedent, that is the end

of the matter. The district court correctly held as much, and this Court should affirm.

This result is not only consistent with the Supreme Court's controlling precedents concerning a woman's right to choose to terminate her pregnancy, but also with decisions in other contexts holding that categorical bans that eviscerate the core of a constitutional right are impermissible. Like other fundamental rights, the right of a woman to terminate her pregnancy is not unfettered. Nevertheless, the Supreme Court has consistently held that certain restrictions are simply not permitted because of the underlying values that a right protects. In this vein, the Court has consistently concluded that a pre-viability ban is impermissible in light of the underlying values that the abortion right protects. Under the Court's precedents, no State interest can justify such a pre-viability ban.

Nor may Mississippi use either the federal district court or this Court to re-litigate the factual basis of prior precedents confirming the impermissibility of a pre-viability ban. As the State notes, *see* Appellants' Br. 30–35, the district court limited discovery to the issue of viability. That limitation was entirely proper, given that pre-viability bans are flatly unconstitutional. Under controlling Supreme Court precedent, the *only* factual question at issue here is whether a fetus is viable at fifteen weeks. The State was properly allowed to explore just that issue below; there was no reason to explore other facts.

For all these reasons, explained in more detail below, the district court properly held that the Act was unconstitutional. This Court should affirm.

ARGUMENT

I. The Right of Women to Make the Ultimate Decision About Whether to Have an Abortion Before Fetal Viability Is Clearly Established by Supreme Court Precedent and Is the Core of the Abortion Right.

Supreme Court precedent could not be clearer: During the period prior to fetal viability, a woman has the right to make the ultimate decision about whether to continue a pregnancy. The Supreme Court has described the right of each woman to obtain a pre-viability abortion as "the most central principle of *Roe v. Wade*." *Casey*, 505 U.S. at 869–70; *see also Hellerstedt*, 136 S. Ct. at 2320 ("[W]e now use 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health."); *Gonzales v. Carhart*, 550 U.S. at 146 ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" (quoting *Casey*, 505 U.S. at 879)); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declining to "revisit" holding that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870)); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (explaining that, prior to viability, doctors and patients are "free to determine, without regulation by the State" that abortion is the appropriate course of action). And the Court has expressly held that a State may not "proclaim

one of the elements entering into the ascertainment of viability—be it *weeks of gestation* or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point." *Colautti v. Franklin,* 439 U.S. 379, 389 (1979) (emphasis added).

Although States may regulate abortion, they may only impose restrictions that do not unduly burden a woman seeking an abortion, and may not impose any restriction that amounts to a ban on that right prior to viability. Even where the State enacts a restriction on abortion after viability, it cannot ban abortions entirely—it must provide exceptions for a woman's health and life. *See Casey*, 505 U.S. at 846 (confirming "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health"); *see also Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014) ("Pre-viability, a woman has the constitutional right to end her pregnancy . . . ."); *Sojourner T v. Edwards*, 974 F.2d 27, 31 (5th Cir. 1992) (striking down ban on all abortions with only limited exceptions).

In other words, prior to the time when the fetus is viable, the Court has already determined that bans impose an "undue burden," and it has held that no state interest could justify such a ban. *See Casey*, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right

to elect the procedure."); *see also id.* at 860 ("[V]iability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."). During that time period, the State cannot justify taking away women's choice to terminate a pregnancy, one of "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851. The ability to make the ultimate decision to terminate a pregnancy before viability implicates the "liberty in defining the capacity of women to act in society, and to make reproductive decisions[.]" *Id.* at 860.[3] For this reason, a "woman's right to terminate her pregnancy before viability . . . is a rule of law and a component of liberty" that the Supreme Court and this Court "cannot renounce." *Id.* at 871.

Because the State here has already conceded (as it must) that the Act bans pre-viability abortions, *see* Appellants' Br. 15, 20, the case is over. Indeed, the Supreme Court has *never* upheld a pre-viability ban on abortions. And that is

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[3] *See also Casey*, 505 U.S. at 852 ("[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. [. . .] Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role[.] The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

exactly what the challenged Act is: it bans abortions when a woman is fifteen or more weeks pregnant, a point in pregnancy that is unquestionably prior to viability. RE6.

It is inconsequential that the ban does not prohibit *all* pre-viability abortions. By banning abortions at 15 weeks' gestation, the Act prohibits women from making the ultimate decision to terminate a pregnancy at some points—many points—before viability. The Supreme Court has repeatedly made clear that *any* pre-viability restrictions that in practice unduly burden access to abortion, even short of outright bans, are unconstitutional. *See, e.g.*, *Hellerstedt*, 136 S. Ct. at 2300 (concluding that two Texas laws—which required physicians performing abortions to have admitting privileges at a hospital not more than 30 miles from the location at which the abortion is performed, and which required abortion facilities to meet the minimum standards set for ambulatory surgical centers—were unconstitutional because they "place[d] a substantial obstacle in the path of women seeking a pre-viability abortion," "constitute[d] an undue burden on abortion access," and thus "violated the Federal Constitution"); *Casey*, 505 U.S. at 895 (invalidating state law requiring married women seeking abortions to sign statement indicating that they have notified their husbands). That principle precludes a ban on abortions after fifteen weeks of pregnancy, as the challenged Act does, because at fifteen weeks, no fetus is viable.

The State's claim that the Act is *not* a ban on abortions prior to viability is pure sophistry. Mississippi says that that Act "does not 'ban' pre-viability abortions because it does not prevent Mississippi women from ultimately deciding to have an abortion before viability. Instead, it merely regulates the time period during which abortions may be performed." Appellants' Br. 42. These semantic gymnastics demonstrate an impressive level of flexibility, but no truth. Under the State's reasoning, a law that banned abortion at any particular period of pregnancy would not constitute a ban on pre-viability abortions because it "merely regulates the time period during which abortions may be performed." *Id*. Under this logic, a State could enact laws banning abortion every day other than the first day of pregnancy—or any subset of bans on pre-viability abortion (such as Senate Bill 2116, the law signed by Mississippi Governor Phil Bryant on March 21, 2019, which bans abortion as soon as a fetal heartbeat is detectable,[4] or a ban at any set number of weeks). And the State could simply rationalize these actions as regulations of "the time period in which abortions may be performed," even though these hypothetical laws could be used to prohibit a woman from making the ultimate decision whether to terminate her pregnancy before the point of viability. The law does not countenance this absurd result.

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[4] *See* infra at 22.

Similarly, the State is wrong to equate *regulation* of pre-viability abortions with *bans* on pre-viability abortions. The State writes: "Whether the State's interest in protecting unborn life can ever be sufficient to justify a pre-viability abortion regulation remains an open question under *Gonzales* . . . . There is still room, after *Casey*, *Gonzales*, and *Hellerstedt*, for this Court to factor in the State's legitimate interest in protecting unborn life." Appellants' Br. 21–22. This is a misrepresentation of the law. As explained above, *Casey*, *Gonzales*, and *Hellerstedt* were all clear that States' interests are never sufficient to justify a *ban* on pre-viability abortions. These decisions did, however, indicate that some regulations on the provision of pre-viability abortions could be permissible if they did not unduly burden a woman's right to choose. *Compare Gonzales*, 550 U.S. at 158 (allowing regulation of *one method* of abortion because it did "not impose an undue burden"); *with Hellerstedt*, 136 S. Ct. at 2310–18 (invalidating admitting-privileges and surgical-center requirements for abortion facilities because they unduly burdened a woman's right to choose), *and Casey*, 505 U.S. at 879–901 (invalidating state law requiring married women seeking abortions to certify that they had notified their husbands, while approving other regulations that did not unduly burden the right). But it simply does not follow from these decisions, which invalidated some *regulations* on the provision of pre-viability abortions, that a State may *ban* pre-viability abortions and thereby prohibit a woman from making

the decision about whether to continue her pre-viability pregnancy. The State's attempt to conflate these two types of laws should be rejected for the inept and inapt sleight of hand that it is.

Nor is there any merit to the State's argument that *Gonzales* diminished the importance of viability as a temporal marker in determining when state regulation is constitutional. *See* Appellants' Br. 21–22. *Gonzales* was clear: The government may "use its voice and its regulatory authority to show its profound respect for the life within the woman"—but if and only if such actions do not "strike at the right itself." *Gonzales*, 550 U.S. at 157–58. Consistent with this rule, *Gonzales* upheld a federal law banning a particular procedure used in a small fraction of later abortions. In reaching this result, *Gonzales* relied on the fact that, though Congress banned a specific abortion procedure, other methods of abortion would still be available to women seeking pre-viability abortions. *See Gonzales*, 550 U.S. at 140; *see also Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 542 (S.D. Miss. 2018) ("*Gonzales* upheld the ban of a particular type of abortion procedure when other avenues for pre-viability abortions still existed."). In stark contrast to these precedents, the challenged Act, by its terms, makes all methods of pre-viability abortions unavailable to women who do not fall within the Act's limited exceptions. It accordingly cannot stand.

The district court correctly applied the relevant precedents. Indeed, given the obligation of lower courts to follow Supreme Court rulings, the district court had no alternative but to invalidate the Act. *See* U.S. Const., art. VI, cl. 2; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (holding that lower courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"); *see also, e.g.*, *Davis v. E. Baton Rouge Parish Sch. Bd.*, 214 F. Supp. 624, 625 (E.D. La. 1963) ("[R]egardless of my personal opinions as to the incorrectness and inadvisability of the conclusions reached by the United States Supreme Court in the Brown case, I have no choice, however distasteful it might be, under the 'Supremacy Clause' of the Federal Constitution but to follow the holding in that case . . .").

This Court is bound by the same rule. Indeed, absent the most unusual of circumstances, even the Supreme Court itself is obliged to follow its own precedents under the doctrine of *stare decisis*. *See Casey*, 505 U.S. at 854–61 ("Within the bounds of normal *stare decisis* analysis . . . the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it."). Given that Mississippi has conceded (as it must) that the Act bans abortion at a point in pregnancy long before viability, the district court could reach no other conclusion than that the Act is unconstitutional. The Supreme Court has denominated—and repeatedly

reaffirmed—viability as the critical temporal marker in determining when a State may proscribe abortion. Its precedents compel this Court to affirm the district court's decision invalidating the challenged Act.

II. Categorical Bans That Eviscerate the Core of a Constitutional Right Are Impermissible in Other Contexts.

Following the unbroken line of Supreme Court precedent establishing bright-line protection for a woman's right to terminate her pregnancy prior to viability, the district court correctly invalidated the Act's categorical pre-viability ban on abortions performed after only 15 weeks. The State nevertheless argues that the Supreme Court could not have intended "to make the point of viability a bright-line test" because it would be "totally out of sync with [the Supreme Court's] approach to other constitutional rights." Appellants' Br. 28. The State also argues that the bright-line rule "elevates a woman's right to choose to have a pre-viability abortion to be sacrosanct, surpassing constitutional protections for life, liberty, due process, freedom of religion, and speech." *Id.*

Such claims are hyperbolic and inaccurate. A bright-line rule on the constitutionality of categorical bans is not unique to abortions. The Supreme Court has, in other contexts, invalidated categorical bans that eviscerate the core of a constitutional right. For example, under the Second Amendment, the Court struck down a prohibition of handguns held and used for self-defense in the home, noting that "the enshrinement of constitutional rights necessarily takes certain policy

choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). Similarly, the Supreme Court struck down bans on certain categories of speech after finding that no government interests are sufficient to justify such bans on speech. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating prohibition on flag-burning); *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (striking down a ban on pharmacist advertising of prescription drug prices); *Buckley v. Valeo*, 424 U.S. 1 (1976) (striking down certain bans on above-ceiling campaign expenditures).

Many constitutional rights under the Fourteenth Amendment are likewise subject to a bright-line rule against categorical bans. For example, in the context of the constitutional right to marriage, the Court invalidated categorical bans on interracial marriages, prisoner marriages, and same-sex marriages. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating bans on interracial marriage because there is "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies [racial] classification"); *Turner v. Safley*, 482 U.S. 78, 99 (1987) (invalidating bans on prisoner marriages because the "almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives"); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (invalidating same-sex marriage ban after determining that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another

State on the ground of its same-sex character"). The Court also struck down a Texas statute prohibiting consensual same-sex sexual intercourse, holding that no legitimate state interest could justify the statute's intrusion into individuals' "vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment." *Lawrence v. Texas*, 539 U.S. 558, 564, 578 (2003).

Consistent with these precedents, and recognizing the importance of a woman's right to choose to have a pre-viability abortion, the Supreme Court decided that no government interest could justify a restriction on that right that amounts to a categorical ban. *See supra* Part I. The prohibition on categorical pre-viability abortion bans, like the prohibitions on categorical bans on interracial marriages, prisoner marriages, same-sex marriages, and same-sex sexual intercourse, is a bright-line rule that lower courts are compelled to follow.

Mississippi suggests that this bright-line rule takes away the State's power to impose "reasonable government regulation" on pre-viability abortions, and thus gives the abortion right an "exalted, inviolable status" that no other constitutional right enjoys. Appellants' Br. 28–29. Not so. No reasonable government regulation on pre-viability abortion was held unconstitutional in this case—only a categorical ban on abortions at a point in pregnancy long before viability. *See supra* Part I. In the context of many other constitutional rights, the Supreme Court has consistently distinguished between bans and regulations, and has struck down

limitations on constitutional rights that exceeded the proper bounds of regulations. For example, in *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976), the Court struck down Virginia's ban on prescription drug price advertising under the First Amendment because the ban "plainly exceeded" "the proper bounds of time, place, and manner restriction on commercial speech." Similarly, in *Turner*, the Court prohibited prison officials from imposing bans on an inmate's decision to marry, even as it noted that prison officials "may regulate the time and circumstances under which the marriage ceremony itself takes place." 482 U.S. at 99. In *Heller*, the Court indicated that while the Constitution allows the State to impose measures regulating handguns to combat gun violence, it cannot countenance an absolute ban on the possession of handguns held and used for self-defense in the home. 554 U.S. at 636.

A woman's right to make the ultimate decision to terminate her pregnancy before fetal viability implicates this same principle. Although the State is permitted to regulate that right if the regulation does not impose an undue burden, a ban on abortions at a point in pregnancy before fetal viability plainly exceeds the proper bounds of permitted regulation and is *per se* unconstitutional under unambiguous Supreme Court precedent. Distinguishing between bans and regulations, and applying a bright-line rule to bans, in no way renders abortion a "sacrosanct" right that has an "exalted, inviolable status." Appellants' Br. 28–29.

Indeed, as discussed above, many other constitutional protections are subject to the same rule: while states may regulate rights, they cannot do so in a manner that flatly prohibits the exercise of those rights. The Act unquestionably crosses the line of government regulation and imposes an outright ban that strikes at the core of a woman's pre-viability abortion right. Accordingly, the Act must be struck down.

III. States Are Not Entitled to Use Federal Courts to Re-Litigate the Factual Basis of Settled Supreme Court Precedent.

The State is not entitled to engage in discovery for the sole purpose of developing a record of irrelevant evidence based on its mere hope of later overturning established Supreme Court precedent.

The district court correctly limited discovery in this action to the issue of fetal viability. ROA.395. Because the Act is "effectively a ban on all elective abortions after 15 weeks" and the government cannot "support a prohibition of abortion," *Casey*, 505 U.S. at 846, before viability, the district court correctly noted that the Act's lawfulness hinges only on "whether the 15-week mark is before or after viability." ROA.394 (citing *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 n.4 (8th Cir. 2015); *accord Isaacson v. Horne,* 716 F.3d 1213, 1229 (9th Cir. 2013)). Thus, as the district court held, evidence about any other issue is "irrelevant." ROA.395.

On appeal, the State argues that the district court "excessively and unreasonably" limited discovery to the issue of viability, thus preventing the State from "developing a full and complete evidentiary record reflecting the legitimacy, strength, and breadth of the State interests furthered by [the Act]." Appellants' Br. 31. The State concedes that the point of viability occurs *after* 15 weeks, but nevertheless contends that federal courts should not "simply ignore evidence of fetal development and pain" thereby "rendering themselves willfully blind to developments in scientific and medical research and changes in circumstances." *Id.* 32–23.

The Fifth Circuit's review of a trial court's discovery order is "deferential." *Doe v. Am. Airlines*, 283 F. App'x 289, 291 (5th Cir. 2008). A district court's discretion regarding discovery orders "will be sustained absent a finding of abuse of discretion to the prejudice of a party." *Hastings v. N. E. Indep. Sch. Dist.*, 615 F.2d 628, 631 (5th Cir. 1980). Because the district court limited discovery to the only material issue under *Roe* and *Casey*—viability—the district court did not abuse its discretion to the prejudice of Mississippi.

Under controlling Supreme Court precedent, the district court's decision limiting discovery to the issue of viability was appropriate. The Court has made clear that the only legally material issue in reviewing a ban on abortions is whether the law bans abortions before viability. *See supra* Part I. The *Roe* Court expressly

held that viability is the relevant point before which States may not ban abortion, even though arguments regarding fetal pain and "respon[ses] to [] stimuli," Appellants' Br. 36, were before the Court at that time.[5] Because *Roe* and *Casey* established that viability remains the operative legal standard, Appellants' quest to alter that standard is an issue of law that is not advanced by factual discovery.

The State argues, without any supporting authority, that "the mootness doctrine is not a bar to the consideration of new evidence when a live case or controversy exists." Appellants' Br. 34. But there was no "live case or controversy" regarding fetal pain and the State's "other interests" which would require development of a factual record outside the issue of viability. Indeed, the

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[5] *See, e.g.*, Br. of Ass'n of Texas Diocesan Attorneys as *Amicus Curiae* in Support of Appellee, *Roe v. Wade*, No. 70-18, 1971 WL 134282 (arguing that a fetus "experiences pain and protests it just as violently as a baby in a crib and for this reason must be given sedation and pain relieving medication"); Br. of Appellee, *Roe v. Wade*, No. 70-18, 1971 WL 134281 (arguing that by 12 weeks gestation, the fetus "is active and the reflexes are becoming more vigorous"); Br. of The National Right to Life Committee as *Amicus Curiae* in Support of Appellee, *Roe v. Wade*, No. 70-108, 1971 WL 134285 ("[E]ven though [a fetus] may be only two weeks old, . . . *he reacts*.") (emphasis added). *See also Casey*, 505 U.S. at 860 ("[D]ivergences from the factual premises of [*Roe*] have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban."); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 307 (7th Cir. 2018) (weighing "the State's interests against a woman's privacy right to terminate her pregnancy prior to viability" and concluding that before viability, no state interest is strong enough to support a ban).

only issue before the district court was whether the Act banned abortions pre-viability, and the State *conceded* that it could not identify any medical research showing that a fetus has reached viability at 15 weeks LMP. ROA.887. Accordingly, the district court permanently enjoined the Act as a "facially unconstitutional ban on abortions prior to viability" as a matter of law. ROA.898.

Gonzales and *June Medical Services v. Gee*, 905 F.3d 787 (5th Cir. 2018), *mandate stayed by* 139 S. Ct. 663 (2019), do not help Defendants. In *Gonzales*, the Court upheld a ban on a particular, rarely-used abortion procedure used in later-term abortions—not a ban on pre-viability abortion after a certain point in pregnancy. *See supra* Part I. In so doing, the Court distinguished its decision from its earlier decision in *Stenberg* based primarily on the differences in statutory language at issue in each case, and not, as the State contends, "in large part on new legislative findings and the additional evidentiary record" developed after the Court's decision in *Stenberg*. *See Gonzales*, 550 U.S. at 133 ("Compared to the state statute at issue in *Stenberg*, the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage."). In short, *Gonzales* provides the Defendants no foothold to seek legally irrelevant discovery.

Similarly, *June Medical Services* addressed a Louisiana law that required physicians performing abortions to have admitting privileges at nearby hospitals, not a pre-viability abortion ban. 905 F.3d at 791. Thus, *June Medical Services*,

like *Gonzales*, does not support the State's proposition that litigants in abortion rights cases should be permitted to engage in discovery on what the applicable legal standard should be. And the State's extensive discussion of its expert report on fetal pain and legislative findings on the State's interest in women's health is irrelevant, as *Roe*, *Casey*, and their progeny resolved those issues when the cases decided that pre-viability abortion bans are not constitutional.

The State's motive for seeking discovery on irrelevant issues is clear: to make a record based on which it would argue that the Supreme Court should overturn established precedent on the issue of viability. As the district court aptly noted in its order limiting discovery, "[the State]'s request for expanded discovery is not about defending the Act within the viability framework. The evidence [the State] seek[s], about things like pre-viability 'fetal pain' aims to persuade courts to reject the [viability] framework itself." ROA.395. Indeed, the State is aggressively defying the Supreme Court's clear viability precedent in an attempt to ask the Supreme Court to overturn *Roe*. Despite the district court's ruling that the Act is unconstitutional, on March 21, 2019, Mississippi Governor Phil Bryant signed into law Senate Bill 2116, which prohibits abortion "of an unborn human individual with a detectable fetal heartbeat."[6] Such laws that prohibit abortions as

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[6] *See* S.B. 2116, 2019 Sess. (Miss. Mar. 21, 2019), http://billstatus.ls.state.ms.us/documents/2019/pdf/SB/2100-2199/SB2116SG.pdf.

early as six weeks into a pregnancy unquestionably are unconstitutional. *See MKB Mgmt. Corp. v. Burdick*, 16 F. Supp. 3d 1059, 1061 (D.N.D. 2014), *aff'd sub nom. MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015) (holding unconstitutional a North Dakota law that would "would prohibit abortions after a heartbeat is detected, which all agree can occur as early as six weeks after a woman's last menstrual period").

The State's approach contradicts principles of *stare decisis*, including *Casey*'s instruction that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it." 505 U.S. at 854. If this case reaches the Supreme Court, the State is free to argue that it should overturn over four decades of unwavering precedent. But the State is not entitled to waste judicial resources and engage in discovery from the opposing party to establish a record on issues, including "fetal pain," that are irrelevant under controlling law.

Abortion rights, and the women who depend upon them, should not be the subject of this perpetual re-litigation. Indeed, "a respect for precedent is, by definition, indispensable" to the rule of law. *Casey*, 505 U.S. at 854. Courts need not make themselves a party to this misuse of the judiciary. The district court correctly limited discovery to viability, the only material issue in cases concerning pre-viability abortion bans, and the State is not entitled to discovery on irrelevant issues to further its crusade to overturn *Roe*.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the judgment of the district court.

Dated: April 12, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the attached brief complies with the type-volume limitations in Federal Rule of Appellate Procedure 29(d) because this brief contains 5,418 words, less than half the amount allowed for a party's principal brief under Federal Rule of Appellate Procedure 32(a)(7)(B)(i), excluding the parts of the brief exempted by Rule 32(f).

Undersigned counsel further certifies that this brief complies with the typeface and type style requirements of Fifth Circuit Rules 32(a)(5) and 32(a)(6), as required by Fifth Circuit Rule 29.2, because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2010.

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USDC No. 3:18-CV-171

Dear Mr. Sarnoff,

The following pertains to your brief electronically filed on April 12, 2019.

You must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see FED. R. APP. P. 12(b) and 5TH CIR. R. 12 & 46.3. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, the brief will be stricken and returned unfiled.

Sincerely,

LYLE W. CAYCE, Clerk

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