IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients,

and

SACHEEN CARR-ELLIS, M.D., M.P.H., on behalf of herself and her patients,

Plaintiffs,

v.

MARY CURRIER, M.D., M.P.H., in her official capacity as State Health Officer of the Mississippi Department of Health, et al.

Defendants.

Case No. 3:18cv171-CWR-FKB

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (PHASE I)

H.B. 1510 ("the Act") bans abortion many weeks before viability, in direct violation of decades of Supreme Court precedent. Defendants concede that viability is not possible at 15 weeks, when the Act begins to operate. Because there is no genuine dispute that the Act denies women the right to make the ultimate decision to terminate a pregnancy many weeks before viability, it is unconstitutional as applied to abortions prior to viability.

Defendants attempt to avoid this result by mischaracterizing the Act as a regulation and not a ban. But the Act does not "regulate" pre-viability abortions, it prohibits them. Accordingly, based on decades of controlling Supreme Court precedent, regardless of what interests the State asserts to justify it, the Act cannot stand. Defendants also urge this Court not to grant the relief Plaintiffs request. In making this argument, Defendants improperly conflate principles of standing

and relief. Here, where the Act is unconstitutional as applied to pre-viability abortions, the appropriate remedy is declaratory and permanent injunctive relief against the Act as applied to pre-viability abortions.

ARGUMENT

I. The Act is an Unconstitutional Ban on Abortion Prior to Viability.

Defendants concede the critical issues in this case—that viability is not possible at 15 weeks, and that the Act prohibits some abortions prior to viability. Mem. Opp'n Pls.' Mot. Summ. J., ECF No. 85 ("Defs.' Resp.") 1-2, 14 (viability is not possible at 15 weeks); *see id.* at 4 (the Act prohibits abortions after 15 weeks for women who do not fall within narrow exceptions). As a result, based on binding Supreme Court precedent holding that a state cannot ban abortion prior to viability, the Act is unconstitutional. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (reaffirming that a law is invalid if it bans abortion "before the fetus attains viability" (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992))); *Casey*, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion . . . ."); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

Unable to contest the issue of viability, Defendants attempt to cast the Act as a regulation, rather than the outright ban at 15 weeks that it plainly is. Defendants arguments fail because they ignore both the facts and well-established law.

Defendants assert that the Act is not a ban because it does not apply before 15 weeks and is therefore merely a "time limitation," and because it contains narrow exceptions after 15 weeks. Defs.' Resp. 4-5. Defendants' efforts to redefine the ban as a "time limitation" ignores the fact that the Act would prevent women from obtaining an abortion in Mississippi after 15 weeks. No matter how Defendants choose to describe it, this is a pre-viability ban on abortion and as such it violates

Supreme Court precedent clearly holding that viability is the *earliest* point at which the State may impose any such prohibition. *See Casey*, 505 U.S. at 860. Tellingly, Defendants' only support for this argument is a district court decision that was overturned on appeal. *See* Defs.' Resp. 5 (citing *Isaacson v. Horne*, 884 F. Supp. 2d 961, 969 (D. Ariz. 2012), *rev'd*, 716 F.3d 1213 (9th Cir. 2013)). Like the 20-week ban that the Ninth Circuit held unconstitutional in *Isaacson*, "the availability of abortions earlier in pregnancy does not . . . alter the nature of the burden that [the 15-week ban] imposes on a woman once her pregnancy is at or after [fifteen] weeks but prior to viability." *Isaacson*, 716 F.3d at 1227. Under the Act, "a woman who seeks to terminate her pregnancy must do so before [fifteen] weeks gestational age or forfeit her right to choose whether to carry her pregnancy to term." *Id.* But "[u]nder controlling Supreme Court precedent, a woman has a right to choose to terminate her pregnancy *at any point* before viability—not just before [fifteen] weeks gestational age—and the State may not proscribe that choice." *Id*. Before that point, it is the woman—not the State of Mississippi—who decides whether she will terminate her pregnancy.

Likewise, the Act's limited exception for abortions sought in the case of a medical emergency or a severe fetal abnormality "does not transform it from a ban into a limitation" on abortion. *Id*. As the Supreme Court held in *Casey* "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879. Here, because the exception "will not cover all women who seek pre-viability abortions at or after [fifteen] weeks, the [Act] continues to operate as a complete bar to the rights of some women to choose to terminate their pregnancies before the fetus is viable." *Isaacson*, 716 F.3d at 1228; *see also* Mem. Law Supp. Pls.' Mot. Summ. J. (Phase I) ("Pls.' Mem.") 7-8, ECF No. 82 (citing cases holding unconstitutional pre-viability bans with exceptions).

Nor does Defendants' assertion that the Act impacts, in their view, "an extremely small" number of women, Defs.' Resp. 4, "have any relevance to the law's constitutional validity." *Isaacson*, 716 at 1228. As the Supreme Court has held, "a State may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879 (emphasis added) (affirming the "central holding of *Roe v. Wade*[, 410 U.S. 113, 163–64 (1973)]"). A ban on abortion prior to viability is therefore unconstitutional regardless of the absolute number of women impacted. *See Whole Woman's Health*, 136 S. Ct. at 2320 (courts must consider "those [women] for whom [the provision] is an actual rather than an irrelevant restriction"); *Casey*, 505 U.S. at 894 ("The analysis does not end with the one percent of women upon whom the statute operates; it begins there."). The Act here prohibits all women who seek an abortion after 15 weeks from accessing abortion, and is unconstitutional for one hundred percent of the women for whom it is relevant. *See, e.g.*, *Isaacson*, 716 F.3d at 1230-31; *see also, e.g.*, Pls.' Mem. 5 (undisputed evidence shows that on average, at least one woman a week will be denied the right to terminate her pregnancy if the Act takes effect).

Defendants' attempt to rely on *Gonzales v. Carhart* to depart from the straightforward rule of law is unavailing.[1] *Gonzales* upheld a regulation prohibiting one type of abortion procedure, but not banning abortion prior to viability. 550 U.S. 124 (2007).[2] That regulation determined how, not

[1] Defendants' attempt to cast as open the question of whether the State's interest in potential life can "ever be sufficient to justify a pre-viability abortion regulation," Defs.' Resp. 6, misperceives both the Act and the question at issue here. The Supreme Court has held that the State's interest in potential life, like its interest in maternal health, can support a *regulation* on abortion before viability, so long as the regulation confers benefits that outweigh its burdens and does not impose an undue burden. *See Whole Woman's Health*, 136 S. Ct. at 2299, 2309 (striking down abortion regulation related to state's interest in women's health under undue burden standard); *Gonzales v. Carhart*, 550 U.S. 124, 146, 157, 164 (2007) (upholding abortion regulation related to state's interest in potential life under undue burden standard). But no state interest is sufficient to justify a pre-viability *ban* on abortion such as the Act. *See infra* section III.

[2] Defendants are also incorrect to the extent they suggest that *Gonzales* applied a standard that differs from the undue burden standard applied in *Casey* and *Whole Woman's Health*. *See, e.g.*, Defs.' Resp. 13-14. The

whether, a woman could obtain an abortion. *See id*. at 156. But under the Act here, "[d]uring the period between the [fifteen]-week mark and viability, the pregnant woman 'lacks all choice in the matter' of whether to carry her pregnancy to term." *Isaacson*, 716 F.3d at 1226 (quoting *Casey*, 505 U.S. at 850). Under clear Supreme Court law, "that distinction makes all the difference to the validity" of the Act. *Id*. *Gonzales* thus confirms that the Act, which does not regulate but outright bans all abortions after 15 weeks, cannot stand.

Simply put, up until the point of viability, the State has no power to decide which women—for example, only those women who receive a diagnosis of a severe fetal abnormality or are experiencing a medical emergency—may exercise their right to terminate a pregnancy. The Constitution protects the right of *each* individual woman, based on her autonomy and liberty interests, to terminate her pregnancy before viability. Defendants cannot escape the Act's clear meaning by attempting to recharacterize it as a "regulation" or "limit," and cannot make valid that which the Constitution plainly prohibits.

II. No Material Facts Exist as to Whether the Act Bans Abortion Prior to Viability.

Despite Defendants' apparent disagreement with over four decades of Supreme Court precedent, the viability line has proved workable, "representing as it does a simple limitation beyond which a state law is unenforceable." *Casey*, 505 U.S. at 855. This is evidenced by the consistency with which lower courts have applied the viability standard. *See* Pls.' Mem. 6-10

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same undue burden test applies to abortion restrictions regardless of the interests on which the state attempts to justify them. *See supra* note 1; *see also Casey*, 505 U.S. at 877, 886-87, 900-01 (applying undue burden standard to all abortion regulations under review, some of which were related to state's interest in potential life and some its interest in maternal health); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 817 (7th Cir. 2018) (rejecting argument that undue burden test "differs depending on the State's asserted interest or that there are even two different tests"). And the Supreme Court has, under that test, balanced the State's legitimate interests and the woman's liberty interest in making the ultimate decision to terminate or continue a pregnancy and concluded that, prior to viability, it is the woman's decision. *See Casey*, 505 U.S. at 871.

(citing cases). The Supreme Court has upheld the viability standard precisely because it presents a "clear" line that helps ensure a woman's right to "retain the ultimate control over her destiny and her body" is not "extinguished." *Casey*, 505 U.S. at 869.

Contrary to the State's argument that viability is "a moving target," Defs.' Resp. 13, the undisputed evidence in this case shows that viability has not moved—and instead has remained the same—since 1992, when the Supreme Court decided *Casey*. At that time, the Court noted that viability occurred at approximately 23 to 24 weeks, *Casey*, 505 U.S. at 860, and that is where it continues to remain today. *See* Decl. Martina Badell, M.D., Supp. Pls.' Mot. Summ. J. (Phase I) ("Badell Decl.") ¶ 4, ECF No. 81-2; Decl. Sacheen Carr-Ellis, M.D., M.P.H., Supp. Pls.' Mot. Summ. J. (Phase I) ¶ 11, ECF No. 81-1.[3]

Defendants' suggestion that neither the Supreme Court nor the Fifth Circuit has considered the constitutionality of a law like the Act is also wrong. *Roe* itself addressed a law that banned abortion except in limited circumstances such as to "sav[e] the life of the mother." 410 U.S. at 117-18. In recognizing the constitutional dimension of a woman's fundamental right to decide whether to continue or terminate a pregnancy, the Court held that a state could not ban abortion prior to viability, and *Casey* reaffirmed that core holding. *See Roe*, 410 U.S. at 163-64 (holding that only "after viability, [the State] may go so far as to proscribe abortion" except when necessary to preserve the woman's life or health); *see also Casey*, 505 U.S. at 846. The Fifth Circuit has also considered and held unconstitutional pre-viability abortion bans. *See, e.g.*, *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 614 (E.D. La. 1999) (striking down ban on "virtually all" pre-

[3] While a very small percentage of babies born at 22 weeks may survive to hospital discharge under optimal circumstances and inpatient treatment for many months in a high-level neonatal intensive care unit immediately following birth, *see* Badell Decl. ¶ 10, the undisputed evidence shows that no baby born before 22 weeks has ever survived to hospital discharge in Mississippi. *See* Dr. Mary Currier's Resps. to Pls.' First Set Reqs. Admis. Defs., No. 5, ECF No. 81-3.

viability abortions because it "prohibits a woman from making the ultimate decision to terminate her pregnancy before viability, and is therefore unconstitutional" (citing *Casey*, 505 U.S. at 879)), *aff'd*, 221 F.3d 811 (5th Cir. 2000); *see also, e.g.*, *Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992) (striking down ban on all abortions with exceptions as "clearly unconstitutional under *Casey*"), *cert. denied*, 507 U.S. 972 (1993); *cf. Margaret S. v. Edwards*, 488 F. Supp. 181, 198-99 (E.D. La. 1980) (statute setting presumption of viability after 24 weeks unconstitutional), *aff'd*, 794 F.2d 994 (5th Cir. 1986).

A finding that the Act is unconstitutional here would therefore be consistent with the uniform application of Supreme Court law by every federal appellate court considering state laws that ban abortion at a specific point in a pre-viability pregnancy and thereby deny women the ultimate decision whether to terminate or continue a pregnancy prior to viability. *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson*, 716 F.3d at 1217, 1231, *cert. denied*, 571 U.S. 1127 (2014); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1118 (10th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997); *see also* Pls.' Mem. 8 (citing cases). Defendants' claim that "some lower courts," Defs.' Resp. 6, have interpreted controlling Supreme Court precedent to bar pre-viability bans is thus misleading.

III. Defendants' Remaining Assertions are Immaterial.

Defendants' remaining assertions are immaterial to determining the constitutionality of the Act. As an initial matter, in asserting that there is "nothing in the record to dispute" Dr. Condic's testimony, Defs.' Resp. 15, Defendants fail to distinguish between facts that are material to this Court's ruling on summary judgment and facts that are legally immaterial. For the reasons this Court has already set out in its prior orders, material regarding fetal pain is irrelevant and

inadmissible. *See* Order, ECF No. 77; Order on Disc., ECF No. 41; *see also* Fed. R. Civ. P. 56(c). Plaintiffs therefore object to its consideration here.[4]

Further, Defendants' arguments rest on the faulty proposition that there is no line drawn at viability and thus no constitutional limit on the State's power to wrest from women the decision of whether to continue or to end a pregnancy. The notion Defendants advance—that the State can impose its own interests in banning abortion ahead of women's individual decisions about whether to bear children—fundamentally misconstrues the right protected by the Court's decisions. The Constitution guarantees that it is for the woman—not the State—to weigh the health risks and other factors to determine whether or not to continue a pre-viability pregnancy. *See Casey*, 505 U.S. at 846. The State may not "insist . . . upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture," but rather must allow each woman to shape her own destiny based "on her own conception of her spiritual imperatives and her place in society." *Id.* at 852. Defendants fail to consider the harm the Act would impose on women by forcing them to remain pregnant for months and experience labor and delivery against their will, which involves substantial pain to the woman and medical risk. This lack of consideration for women is precisely what the Supreme Court has rejected in recognizing and reaffirming the viability line as the core of its abortion jurisprudence. *Id*. (the State cannot "insist [a woman] make the sacrifice" to undergo the "anxieties, [] physical constraints, [and] pain that only she must bear" in pregnancy and childbirth).

[4] Additionally, Plaintiffs would contest these "facts" should the Court's discovery orders be overruled, or should this motion be denied. Plaintiffs thus reserve the right to contest Defendants' evidence, including Dr. Condic's testimony, and to request that the Court exclude any evidence or "expert" opinions due to lack of foundation, relevance, or any other applicable ground.

Accordingly, Defendants gain nothing by insisting that the State's interests justify the Act,[5] or that they have "new" evidence that empowers the State to override a woman's constitutional right to end her pregnancy. In holding that each woman has the right to make this decision until viability, the Supreme Court considered arguments about the fetus and potential life and also, among other things, the pain and risk of childbirth that women would face if forced to continue a pregnancy against their will. *See id.* at 852, 870-71. Having considered the same interests Defendants advance and balancing them, the Court concluded before viability the State's interests "are not strong enough to support a prohibition of abortion," because doing so would undermine the basic autonomy and dignity of women. *Id.* at 846; *see also, e.g., Jane L.*, 102 F.3d at 1118 (state's arguments in defense of pre-viability ban at 22 weeks "are disingenuous and unpersuasive because they are grounded on its continued refusal to accept governing Supreme Court authority holding that . . . until viability is actually present the State may not prevent a woman" from making the decision about whether to have an abortion). The principles of *stare decisis* thus foreclose this Court from considering the State's alleged interests in a pre-viability abortion ban. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (The Supreme Court alone has "the prerogative of overruling its own decisions."); *United States v. Cannon*, 750 F.3d 492, 505 (5th Cir. 2014) ("[A]bsent a clear directive from the Supreme Court, we are bound by prior precedents.").

Indeed, Defendants' justifications for the Act rest on the same interests that motivated

[5] While the State's interests—and the legislative findings related to them—are immaterial here, *Gonzales* flatly contradicts Defendants' suggestion that, in the context of an abortion regulation, courts may uncritically defer to the State's legislative findings. *Compare* Defs.' Resp. 11-12 (citing *Gonzales* for the proposition that courts must defer to legislative findings) *with Gonzales*, 550 U.S. at 165-66 (the "Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake," and "[u]ncritical deference to Congress' factual findings . . . is inappropriate"); *accord Whole Woman's Health*, 136 S. Ct. at 2310.

Casey's holding that viability is the relevant point before which the State cannot ban abortion.[6] While recognizing and emphasizing that states have an interest in potential life "from the outset of the pregnancy," the Supreme Court nonetheless held that this interest is not sufficient to deprive a woman of her "effective right" to choose abortion at any point before viability. *Casey*, 505 U.S. at 846; *see also Isaacson*, 716 F.3d at 1229 (alleged facts about capacity of fetus to feel pain does not "expand legislative power" to ban abortion "beyond constitutional bounds"). Likewise, the Court considered the State's interest in maternal health in holding that before viability, it is for the woman, and not the State, to take account of the risks of pregnancy and childbirth, among other factors, in deciding whether to terminate or continue a pregnancy. *See Casey*, 505 U.S. at 846, 852; *see also Isaacson*, 716 F.3d at 1228-29 (rejecting State's asserted interest in maternal health as adequate justification for banning pre-viability abortions at twenty weeks).

In sum, binding Supreme Court law makes clear that the State's asserted interests are legally immaterial to deciding the constitutionality of the Act. *See Casey*, 505 U.S. at 860 (concluding that advances in maternal health and neonatal care "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 on nontherapeutic abortions" (emphasis

[6] Arguments about the State's interest in potential life, in ethics, and in maternal health were all before the Court in *Casey*. *See, e.g.*, Brief of the American Ass'n of Prolife Obstetricians & Gynecologists (AAPLOG), et al., as Amici Curiae in Support of Respondents, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006428 (discussing medical ethics); Brief Amicus Curiae of the United States Catholic Conference, et al., in Support of Respondents & Cross-Petitioners, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006414 (arguing that state has interest in applying health and medical standards to "unborn life"); Brief of Feminists for Life of America, et al., as Amici Curiae in Support of Respondents & Cross Petitioners, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006409 (urging Court to consider medical risks allegedly associated with abortion); Brief of the American Academy of Medical Ethics as Amicus Curiae in Support of Respondents & Cross-Petitioners Robert P. Casey et al., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006419 (urging Court to reconsider abortion jurisprudence in light of advancements in medical technology).

added)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment," and Defendants have presented none here. *Tiblier v. Dlabal*, 743 F.3d 1004, 1007 (5th Cir. 2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[7]

IV. Declaratory and Injunctive Relief as Applied to Pre-viability Abortion is the Appropriate Remedy.

The relief Plaintiffs seek—declaratory and permanent injunctive relief as applied to pre-viability abortions—is appropriately tailored to the constitutional violation Plaintiffs establish here. Defendants, however, urge this Court to limit any relief to 16 weeks on the ground that Plaintiffs lack standing to seek any further relief. Defendants' argument conflates principles of Article III standing and relief, including the district court's power to tailor appropriate relief to fit the constitutional violation established, and should be rejected. *See e.g.*, *Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 984-85 (9th Cir. 1994) (agreeing with district court that "defendants had confused the standing requirements of injury in fact and redressability with the ultimate scope of the court's remedy," and entering statewide relief).

The requirements of Article III standing ensure that the parties before the court can sufficiently present the legal questions at issue, so that the court adjudicates actual cases or controversies. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (requirements for standing are injury in fact, traceable to defendants, and is redressable by the relief sought). A plaintiff must "demonstrate standing for each *claim* he seeks to press" and "each *form* of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332,

[7] For the same reason, where, as here, Defendants' position is foreclosed by binding Supreme Court precedent, it was not entitled to discovery from Plaintiffs to adduce evidence that has no bearing on the ultimate legal question presented in the case. *See* Order on Disc., ECF No. 41. Limiting discovery to the only legally material issue did not prejudice Defendants, who were restricted in seeking discovery from Plaintiffs only on issues that are, by definition, immaterial. *See id.*

352 (2006) (emphasis added); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (affirming plaintiff likely had standing to seek damages, but not injunctive relief). Here, Plaintiffs have standing to pursue the claim and the declaratory and injunctive relief they seek: The Act prevents Plaintiffs' patients from accessing abortion after 15 weeks (an injury in fact), and the relief Plaintiffs seek on behalf of their patients—declaratory and injunctive relief as applied to pre-viability abortions—would redress that injury. Once the threshold standing requirements are met, Article III imposes no additional constraint on the scope of relief a court may order.

Rather, the "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *accord ODonnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018); *see also Whole Woman's Health*, 136 S. Ct. at 2307 (court must tailor its remedy to the scope of a constitutional violation established); *Missouri v. Jenkins*, 515 U.S. 70, 88, 89 (1995) ("[T]he nature of the [] remedy is to be determined by the nature and scope of the constitutional violation."); Fed. R. Civ. P. 54(c) (A "final judgment should grant the relief to which each party is entitled."). In other words, in crafting a remedy, "[t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971).

These principles make clear that the scope of relief Plaintiffs seek is appropriate and permissible. In this case, Plaintiffs have established that the Act bans abortion prior to viability, in direct violation of decades of Supreme Court precedent. Therefore, the remedy appropriately tailored to this constitutional violation is a declaration that the Act is unconstitutional and a permanent injunction of enforcement of the Act with respect to all pre-viability abortions.

Other courts addressing bans on abortion prior to viability have entered the very relief Plaintiffs seek here. In *MKB Management*, the plaintiff clinic, like the plaintiff clinic here, was the

only clinic providing abortion services in the state and provided abortions up to 16 weeks. *See MKB Mgmt. Corp. v. Burdick*, 16 F. Supp. 3d 1059, 1063-66 (D.N.D. 2014), *aff'd*, 795 F.3d 768 (8th Cir. 2015). The court granted the relief plaintiffs sought there: a declaration that North Dakota's 6-week ban was unconstitutional, and a permanent injunction against implementation of the statute. *See id*. at 1075. The court did not limit relief to pre-viability abortions up to 16 weeks, as Defendants would have the Court do here. The court in *Edwards* likewise declared unconstitutional and permanently enjoined Arkansas's 12-week ban, without limiting relief to the point in pregnancy at which the plaintiff physicians provided abortion services. *See Edwards v. Beck*, 8 F. Supp. 3d 1091, 1101 (E.D. Ark. 2014), *aff'd*, 786 F.3d 1113 (8th Cir. 2015).

In sum, Plaintiffs have standing to assert the claim they make and the relief they seek on behalf of their patients. Having established that the Act is unconstitutional as applied to pre-viability abortions, they are entitled to declaratory and injunctive relief as applied to pre-viability abortions.

CONCLUSION

For the reasons set forth in their Memorandum of Law in Support of Summary Judgment (Phase I), ECF No. 82, and herein, Plaintiffs are entitled to judgment as a matter of law on their claim that the Act violates the Due Process Clause of the Fourteenth Amendment, and respectfully request this Court enter an order declaring the Act unconstitutional and permanently enjoining its application to pre-viability abortions.

Respectfully submitted this 14th day of September, 2018.

/s/ Hillary Schneller
Julie Rikelman,* NY Bar # 3011426
Christine Parker,* CA Bar # 315529
Hillary Schneller,* NY Bar # 5151154

Robert B. McDuff, MS Bar # 2532
767 North Congress Street
Jackson, MS 39202

Leah Wiederhorn,* NY Bar # 4502845
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3777 (Phone)
(917) 637-3666 (Fax)
jrikelman@reprorights.org
cparker@reprorights.org
hschneller@reprorights.org
lwiederhorn@reprorights.org
**Pro Hac Vice*

(601) 969-0802 (Phone)
(601) 969-0804 (Fax)
rbm@mcdufflaw.com

Beth L. Orlansky, MS Bar # 3938
Mississippi Center for Justice
P.O. Box 1023
Jackson, MS 39205
(601) 352-2269 (phone)
borlansky@mscenterforjustice.org

Roberto J. Gonzalez,* D.C. Bar # 501406
Paul, Weiss, Rifkind, Wharton &
Garrison, LLP
2001 K Street, NW
Washington, D.C. 20006
(202) 223-7316 (Phone)
(202) 204-7344 (Fax)
rgonzalez@paulweiss.com
**Pro Hac Vice*

Claudia Hammerman,* NY Bar # 2574333
Aaron S. Delaney,* NY Bar # 4321642
Caitlin Grusauskas,* NY Bar # 4846788
Paul, Weiss, Rifkind, Wharton &
Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000 (Phone)
(212) 492-0364 (Fax)
chammerman@paulweiss.com
adelaney@paulweiss.com
cgrusauskas@paulweiss.com
cjohnson@paulweiss.com
**Pro Hac Vice*

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I electronically filed the foregoing Reply in Further Support of Plaintiffs' Motion for Summary Judgment (Phase I) with the Clerk of the Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all counsel of record.

s/ *Hillary Schneller*
Hillary Schneller,* NY Bar # 5151154
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Ph: (917) 637-3777
Fax: (917) 637-3666
hschneller@reprorights.org
*Admitted *pro hac vice*