No. 19-60455

In the 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

Appeal from the United States District Court for the Southern District of Mississippi, Case No. 3:18-cv-00171, Hon. Carlton W. Reeves

BRIEF FOR PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees

Sacheen Carr-Ellis, M.D., M.P.H.
All Women's Healthcare of Jackson d/b/a Jackson Women's Health Organization

This corporation has no parent corporation and no publicly owned corporation owns 10% or more of its stock.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that oral argument would assist the Court in addressing the important constitutional questions of law raised in this case.

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STATEMENT OF ISSUES

1. The U.S. Supreme Court has repeatedly reaffirmed that the Constitution guarantees each woman the right to decide whether to have an abortion before viability, the State has conceded that no fetus is viable as early as 6 weeks, when the ban begins to operate, and the District Court accordingly entered a preliminary injunction against the 6-week ban; did the District Court err by applying controlling Supreme Court precedent?

STATEMENT OF THE CASE

On March 21, 2019, and in the face of the District Court's ruling months earlier that Mississippi's ban on abortion after 15 weeks was unconstitutional, Governor Phil Bryant signed an even more restrictive abortion ban. S.B. 2116 ("the 6-week ban") prohibits abortion in Mississippi after detection of "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac," except in extremely limited circumstances. ROA.1090.[1] The ban includes substantial penalties and provides that a physician who violates the ban "is subject to license revocation or disciplinary action." *See* ROA.1090, 1096-97.

Based on standard medical practice, detection of embryonic cardiac activity in a still-forming embryo occurs as early as 6 weeks, 0 days of pregnancy, as

[1] The 6-week ban's only exceptions are to prevent the death of the patient or a "serious risk of the substantial and irreversible impairment of a major bodily function" of the patient. ROA.1090.

measured from the first day of a woman's last menstrual period (LMP). ROA.1101. While the State has referred to this activity as a "fetal heartbeat," that is medically inaccurate. ROA.1101. At this early point in pregnancy, the embryo is tiny, and cardiac activity can be seen on ultrasound as a flicker on the screen; it cannot be heard. ROA.1101. What is undisputed is that at 6 weeks, no embryo is capable of surviving for a sustained period outside the womb, with or without medical assistance. ROA.1103, 1157, 1249. That is to say, at the point the 6-week ban prohibits abortions in Mississippi, no embryo is viable.

Plaintiffs-Appellees—Jackson Women's Health Organization, the only licensed abortion facility in the State of Mississippi, and the Clinic's medical director, Sacheen Carr-Ellis, M.D., M.P.H. (collectively, "the Clinic")—sued to block the 6-week ban so that they could continue providing abortion services to their patients. Had the ban been allowed to take effect on July 1, 2019, it would have barred nearly all abortions in Mississippi, before many women may even know they are pregnant. ROA.1101-03. Until they miss a period, many women have no reason to suspect that they may be pregnant. ROA.1101. To put the ban in perspective, for a woman with an average menstrual cycle (e.g., a period every 28 days), 6 weeks LMP is just two weeks after a missed period. ROA.1101. However, many women do not menstruate at regular intervals, or may go long stretches without experiencing a menstrual period, and therefore may not realize at 6 weeks LMP that they may be

pregnant. ROA.1102. Even for women who do know they are pregnant early, many women do not make their first trip to the Clinic by 6 weeks, and thus the ban would prohibit abortion before many women access pregnancy care. ROA.1101-02.

At the time the legislature enacted the 6-week ban, the District Court had already permanently enjoined the State's last unconstitutional attempt to ban abortion. On March 19, 2018, the State enacted H.B. 1510, 2018 Leg., Reg. Sess. (Miss. 2018) ("the 15-week ban"), which prohibits abortion after 15 weeks of pregnancy. *See* ROA.31-42. The Clinic challenged the law on behalf of itself and its patients as applied to pre-viability abortions and filed a motion for a temporary restraining order, which the District Court granted. ROA.21, 53, 61, 99-100. The Clinic then ultimately moved for summary judgment, on the basis of uncontested evidence that viability is medically impossible at 15 weeks. ROA.693, 704, 727; *see also* ROA.724-25. The District Court granted the motion, holding that the 15-week ban violated the due process rights of women seeking pre-viability abortions in Mississippi. ROA.885. In its decision, the District Court held that the 15-week ban "could not be construed or applied without violating precedent" and enjoined the law on its face. ROA.898.

Mississippi then enacted an even more restrictive ban—the 6-week ban at issue here, which prohibits abortion beginning at approximately 6 weeks of pregnancy. Seven days after the 6-week ban was signed, the Clinic moved to

supplement its complaint to include a challenge to the 6-week ban, ROA.931, 1076, which the District Court later granted, ROA.1245-48. On the same day, the Clinic filed a motion for a preliminary injunction requesting that the District Court bar the State from enforcing the 6-week ban as the litigation proceeded. ROA.1086.

On May 24, 2019, the District Court issued a preliminary injunction against the 6-week ban, holding that:

> This Court previously found the 15-week ban to be an unconstitutional violation of substantive due process because the Supreme Court has repeatedly held that women have the right to choose an abortion prior to viability, and a fetus is not viable at 15 weeks lmp. If a fetus is not viable at 15 weeks lmp, it is not viable at 6 weeks lmp. The State conceded this point. The State also conceded at oral argument that this Court must follow Supreme Court precedent. Under Supreme Court precedent, plaintiffs are substantially likely to succeed on the merits of their claim.

ROA.1248-49 (footnotes omitted). The District Court further held that by "prevent[ing] a woman's free choice, which is central to personal autonomy and dignity," the injury imposed by the 6-week ban "outweighs any interest the State might have in banning abortion" before viability. ROA.1250. The balance of equities and public interest also favored enjoining the 6-week ban "by protecting this established right and the rule of law." ROA.1250.

Accordingly, the District Court preliminarily enjoined the State from enforcing the 6-week ban. ROA.1250. The State now appeals.

SUMMARY OF THE ARGUMENT

For nearly 50 years, the Supreme Court has repeatedly held that, prior to viability, states lack the power to ban abortion. *Casey*, and *Roe* before it, guarantee that it is a woman—and not the State—who makes the ultimate decision whether or not to continue a pre-viability pregnancy. This is the law regardless of when a pre-viability ban begins to operate, regardless of the interests asserted by the State, and regardless of the exceptions provided in the ban. The District Court and this Court are bound by this precedent.

Applying this precedent, this case can be resolved based on one undisputed fact—the same fact that has resolved every constitutional challenge to similar bans on abortion that has reached the merits—namely, whether the law bans abortion before or after viability. The State concedes that no fetus is viable as early as 6 weeks LMP, when the ban begins to operate, but contends that state interests should override a woman's right to choose to terminate her pre-viability pregnancy after cardiac activity is detectable. These arguments are foreclosed by Supreme Court precedent and are inconsistent with the decisions of every circuit—including this Court—that has considered the constitutionality of such a ban. As with the 15-week ban, the State is again urging this Court to defy decades of Supreme Court precedent and uphold its newest, more restrictive ban. Because only the Supreme Court can

revisit its own precedent, the Court should reject this invitation and should instead affirm the District Court's decision to preliminarily enjoin the ban.

STANDARD OF REVIEW

A party appealing a preliminary injunction bears the heavy burden of showing that the lower court has abused its discretion in granting such relief in light of all of the relevant factors. *Janvey v. Alguire*, 647 F.3d 585, 591-92 (5th Cir. 2011) ("[T]he standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975))). The Court reviews findings of fact for clear error, and conclusions of law de novo. *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001); *accord Janvey*, 647 F.3d at 592. A factual finding is not clearly erroneous so long as it is plausible in the light of the record viewed in its entirety. *See Jackson v. Franklin Cty. Sch. Bd.*, 765 F.2d 535, 539 & n.8 (5th Cir. 1985), *abrogated on other grounds by Honig v. Doe*, 484 U.S. 305 (1988).

ARGUMENT

I. Mississippi Cannot Ban Abortion Prior to Viability.

In granting preliminary injunctive relief against the 6-week ban, the District Court properly applied controlling Supreme Court precedent holding that states cannot ban abortion before viability. The State concedes that no fetus is viable as

early as 6 weeks, which is, in fact, many months before viability. ROA.1103, 1157; *see also* Br. of Defs.-Appellants ("App. Br.") 10. Based on this undisputed fact, the District Court correctly concluded that the ban prohibits abortion prior to viability and is unconstitutional. ROA.1248-50. Reaching a contrary result would require defying decades of Supreme Court precedent and departing from numerous decisions by circuit courts, including precedent from this Court.

An unbroken line of Supreme Court precedent leaves no doubt that the Due Process Clause of the Fourteenth Amendment guarantees every woman "a right to choose to terminate her pregnancy" before viability. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992); *see also Roe v. Wade*, 410 U.S. 113, 163 (1973).[2] The Supreme Court has affirmed time and again this "central holding of *Roe v. Wade*"—that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879; *see also Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (applying precedent that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 879)); *Roe*, 410 U.S. at 163-64. In other words, "*Roe*'s essential holding" is that "[b]efore viability,

[2] Viability is the point in pregnancy "when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." *Colautti v. Franklin*, 439 U.S. 379, 388 (1979).

the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846. This core principle of constitutional law was reaffirmed just three years ago. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (stating that a law is invalid if it prohibits abortion "before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)).

Every circuit court that has considered a pre-viability ban on abortion has applied this precedent and reached the same conclusion as the District Court in this case. Indeed, no attempt to ban abortion based on the detection of embryonic or fetal cardiac activity has survived a court challenge. The Eighth Circuit found that two such abortion bans, which operated at 6 and 12 weeks, were unconstitutional based on the undisputed fact that both laws prohibited abortion months before viability. *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (affirming district court's grant of summary judgment because 6-week ban "generally prohibits abortions before viability"), *cert. denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) ("By banning abortions after 12 weeks' gestation, the Act prohibits women from making the ultimate decision to terminate a pregnancy at a point before viability."), *cert. denied*, 136 S. Ct. 895 (2016).

Additionally, in recent months, other courts have struck down laws that are virtually identical to the 6-week ban. *Preterm-Cleveland v. Yost*, No. 1:19-cv-00360, 2019 WL 2869640, at *3-6 (S.D. Ohio July 3, 2019) (preliminarily enjoining ban on

abortion based on detection of embryonic cardiac activity); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-cv-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019) (finding plaintiffs have a "strong likelihood of success" in establishing Kentucky ban on abortion after detection of embryonic cardiac activity is an unconstitutional ban on pre-viability abortion); *see also* Mem. Conference & Order, *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-cv-178-DJH (W.D. Ky. Mar. 27, 2019), ECF No. 32 (by agreement of the parties, extending TRO through final ruling).[3]

Bans on abortion at other pre-viability points in pregnancy have likewise failed. In *Isaacson v. Horne*, for example, the Ninth Circuit invalidated a 20-week ban with limited exceptions, where the State of Arizona did not dispute that the ban prohibited some women from obtaining abortions prior to viability. 716 F.3d 1213, 1225 (9th Cir. 2013), *cert. denied*, 571 U.S. 1127 (2014). The Ninth Circuit held that because the ban deprived some women of the ultimate decision to terminate their pregnancies before viability, it was unconstitutional "under a long line of invariant Supreme Court precedents." *Id.* at 1217; *see also id.* (The Supreme Court has been "unalterably clear regarding one basic point": "a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable."); *McCormack v.*

[3] *See also Planned Parenthood of the Heartland, Inc.* v. *Reynolds*, No. EQCE 83074, 2019 WL 312072, at *4 (Iowa Dist. Ct. Jan. 22, 2019) (holding that a ban on abortions after detection embryonic cardiac activity, which operated as a 6-week ban, violated the Iowa Constitution).

Herzog, 788 F.3d 1017, 1029 (9th Cir. 2015) (striking down 20-week ban). The Tenth Circuit, too, struck down a ban on abortion at 22 weeks, holding that it is "indisputable that [the ban], which effectively defines viability as occurring at [22 weeks LMP], is directly contrary to the Supreme Court authority." *Jane L. v. Bangerter*, 102 F.3d 1112, 1115 (10th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997); *see also Bryant* v. *Woodall*, 363 F. Supp. 3d 611, 630 (M.D.N.C. 2019) (holding unconstitutional North Carolina's 20-week ban), *appeal docketed*, No. 19-1685 (4th Cir. June 26, 2019) (appeal on other grounds); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631, 640 (W.D. Mo. 2019) (preliminarily enjoining 8-, 14-, 18-, and 20-week "pre-viability bans"), *appeal docketed*, No. 19-2882 (8th Cir. Sept. 3, 2019); *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-cv-04490-KBG, 2019 WL 3679623, at *48 (E.D. Ark. Aug. 6, 2019) (preliminarily enjoining 18-week ban), *appeal docketed*, No. 19-2690 (8th Cir. Aug. 9, 2019). And, just months before the State passed the 6-week ban, the District Court here permanently enjoined Mississippi's 15-week ban. *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 (S.D. Miss. 2018), *appeal docketed*, No. 18-60868 (5th Cir. Dec. 17, 2018).

This Court also has applied controlling Supreme Court precedent to strike down a pre-viability abortion ban. In *Sojourner T v. Edwards*, this Court considered a Louisiana law banning pre-viability abortions except in limited circumstances. 974

F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993). The Court explained: "The [Supreme] Court held that before viability, a State's interests are not strong enough to support a prohibition of abortion." *Id.* at 30. It accordingly ruled that Louisiana's ban was "on its face, . . . plainly unconstitutional under *Casey*." *Id.* at 31; *see also, e.g.*, *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 614 (E.D. La. 1999) (striking down ban on "virtually all" pre-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); *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); *accord Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 453 (5th Cir. 2014) ("[F]or more than forty years, it has been settled constitutional law that the Fourteenth Amendment protects a woman's basic right to choose an abortion."), *cert. denied*, 136 S. Ct. 2536 (2016).

This directly applicable precedent foreclosed the District Court from upholding the 6-week ban, which indisputably bans abortion prior to viability. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of th[e Supreme] Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *United States v. Fields*, 483 F.3d 313,

345 (5th Cir. 2007) ("[I]t is the Supreme Court's prerogative, not ours, to consider revisiting its precedent."); *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.").[4]

The State's suggestion that the Supreme Court has not spoken on the issue posed by this case is meritless: Given the Supreme Court's clear and repeated pronouncements, there can be no question that the Supreme Court has "squarely addressed," App. Br. 18, whether a state can prohibit a woman from making the decision to terminate her pre-viability pregnancy—and thereby force her to carry a pregnancy to term—and concluded that it cannot. The State's assertion that there is no "on point" precedent, App. Br. 18, directly conflicts with the Supreme Court's re-affirmation 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." *Casey*, 505 U.S. at 860. None of the

[4] The State makes note of the statement in the *Gonzales* opinion "assum[ing]" the principle that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" App. Br. 10. Nothing in *Gonzales*, however, suggests that the Supreme Court no longer intends to follow *Casey*; indeed, the Court reaffirmed *Casey*'s holding just three years ago. *Whole Woman's Health*, 136 S. Ct. at 2299. In any event, it is not for this Court to predict what the Supreme Court might do, but rather to abide by what it has held. *See Rodriguez de Quijas*, 490 U.S. at 484; *accord Cannon*, 750 F.3d at 505 (this Court is bound by the Supreme Court's prior precedents and "may not blaze a new constitutional trail" (internal quotation marks and citation omitted)).

cases the State cites suggest otherwise. *See* App. Br. 18.[5] And, while the State claims that applying Supreme Court precedent here is "difficult," every circuit that has considered a pre-viability ban—including this Court—has had little difficulty in applying this precedent to find such bans unconstitutional. *See supra* pp. 8-11. Further, in re-affirming "*Roe*'s essential holding," *Casey* observed that the principles underlying it "do not contradict one another." 505 U.S. at 846; *see also Bryant*, 363 F. Supp. 3d at 628 ("[The Supreme Court's] directives are neither complex nor contradictory: a state is never allowed to prohibit any swath of pre-viability abortions outright, no matter how strenuously it may believe that such a ban is in the best interests of its citizens or how minimal it may find the burden to women seeking an abortion.").

In short, to reverse the District Court's ruling and uphold the ban, this Court would have to ignore nearly five decades of Supreme Court precedent, as well as the guidance provided by every other circuit court that has confronted a pre-viability abortion ban. This Court should decline the State's invitation and should instead affirm the District Court's preliminary injunction against the ban.

[5] In *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993), the Supreme Court was considering its *own* prior cases, and rejected the reasoning of a prior case without engaging in stare decisis analysis because that case had not squarely addressed the issue. Here, as if there were any doubt that *Roe* squarely foreclosed a state can from banning abortion prior to viability, *Casey* reaffirmed this "central holding" of *Roe* after a lengthy stare decisis analysis. *See Casey*, 505 U.S. at 854-69. And, unlike in *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952), the question at issue here—whether the state can prohibit abortion before viability—has been repeatedly "discussed in . . . opinion[s] of the Court" and is "binding precedent on this point."

II. The State's Arguments are Contrary to Supreme Court Precedent.

Unable to contest the issue of viability, Defendants advance three primary arguments, each of which the District Court properly rejected and none of which renders the 6-week ban constitutional.

A. The 6-Week Ban is a Prohibition of Abortion, Not a Regulation.

The State engages in an act of misdirection by attempting to characterize the 6-week ban as a regulation, rather than the outright ban that it is. *See* App. Br. 27-30. This argument ignores the facts and relies on a misreading of controlling law.[6]

The argument that a pre-viability ban is a regulation that merely "require[s] many women to make the decision to have an abortion earlier," App. Br. 29, has been resoundingly rejected. The Supreme Court has explicitly rejected efforts to evade the viability line by placing an earlier limit on a woman's right to decide whether to continue her pregnancy. *See Colautti v. Franklin*, 439 U.S. 379, 389 (1979). "[A] prohibition on abortion at and after [a certain point in a pre-viability pregnancy] does not merely 'encourage' women to make a decision regarding abortion earlier than Supreme Court cases require; it forces them to do so." *Isaacson*,

[6] As it did when making the same argument in defense of the 15-week ban, the State also ignores the law's text. S.B. 2116 is entitled: "An Act . . . To *Prohibit* An Abortion Of An Unborn Human Individual With A Detectable Fetal Heartbeat." S.B. 2116 § 1(2)(a), 2019 Leg., Reg. Sess. (Miss. 2019) (emphasis added). As the District Court observed: "'Ban'" and 'prohibit' are synonyms. This Act is a ban. It is not a regulation." ROA.893 (footnotes omitted) (*Jackson Women's Health Org.*, 349 F. Supp. 3d at 541 (footnotes omitted)).

716 F.3d at 1227; *see also id*. ("The availability of abortions earlier in pregnancy does not, however, alter the nature of the burden that [the 20 week LMP ban] imposes on a woman once her pregnancy is at or after twenty weeks but prior to viability."); *Jane L.*, 102 F.3d at 1118 (finding the State's arguments in defense of pre-viability ban at 22 weeks LMP "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).

Comparing the 6-week ban to a "time limitation," App. Br. 29, is not only nonsensical, but also misperceives the core of the right protected by the Constitution, which is the right of *each* woman, throughout the *entire* period of her pre-viability pregnancy, to decide for herself whether she will continue her pregnancy. *See, e.g.*, *Casey*, 505 U.S. at 879 (reaffirming *Roe*'s "central holding" that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability"). Prohibiting any woman from making that decision at *any* point prior to viability is precisely what the Constitution forbids. *See, e.g.*, *id*. Further, under the State's reasoning, any law prohibiting abortion at a particular period of pregnancy would not constitute a ban on pre-viability abortions because it "require[s]" women to decide "to have an abortion earlier in pregnancy," App. Br. 29, which would in turn justify laws banning abortion at essentially any point in a

pre-viability pregnancy. Well-settled Supreme Court precedent clearly forecloses that result.[7]

Likewise, the 6-week ban's limited exception for abortions sought in the case of a medical emergency "does not transform it from a ban into a limitation" on abortion. *Isaacson*, 716 F.3d at 1227. 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 (emphasis added). Here, because the exception "will not cover all women who seek pre-viability abortions at or after [detection of embryonic cardiac activity, the ban] 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 supra* pp. 8-11 (citing cases holding unconstitutional pre-viability bans with exceptions).

B. Controlling Supreme Court Precedent Holds that Viability is the Earliest Point at Which the State May Prohibit Abortion.

The State's effort to evade precedent by attempting to differentiate the 6-week ban from other pre-viability bans also fails. *See* App. Br. 18, 23. It is not relevant

[7] The State's citation to cases about laws that regulate—but do not ban—the exercise of constitutional rights in other contexts is therefore misplaced. Indeed, the Supreme Court has struck down laws that prohibit, as opposed to regulate, the exercise of constitutional rights under the First, Second, and Fourteenth Amendments. *See* Brief of Constitutional Law Scholars as Amici Curiae in Support of Appellees at 14-18, Jackson Women's Health Org. v. Dobbs, No. 18-60868 (5th Cir. Apr. 12, 2019) (collecting cases).

that the ban prohibits abortion based on detection of embryonic cardiac activity—as early as 6 weeks—rather than at a different point prior to viability. The State may not "proclaim one of the elements entering into the ascertainment of viability," such as "weeks of gestation"—as the State attempted to do with the 15-week ban—"or *any other* single factor" as the point at which it can override a woman's ultimate decision to terminate a pregnancy. *Colautti*, 439 U.S. at 388-89 (emphasis added).

The State's suggestion that it can ban abortion based on its claim that detection of embryonic cardiac activity is an indicator of potential future survival is likewise incorrect. *See* App. Br 18, 23. The Supreme Court has been clear: viability—the point at which there is a reasonable likelihood of sustained survival outside the womb, as determined in each individual case by a physician—"marks the *earliest* point" at which the State can constitutionally proscribe abortion. *Casey*, 505 U.S. at 860 (emphasis added). The State cannot set a line other than viability—as the ban attempts to do here—as the point at which it can override the decision as to whether to continue or end a pregnancy. "Viability is the critical point." *Colautti*, 439 U.S. at 389. Indeed, the Supreme Court rejected a similar effort to depart from the viability line as the one the State advances here. *Compare* App. Br. 23 (discussing potential for survival) *with Colautti*, 439 at 392-94 (striking down provision limiting abortion when a fetus "may be viable," as opposed to "viable," noting that the former differs from the definition of viability adopted by the Court in *Roe*); *cf. Margaret S.*,

488 F. Supp. at 198 (holding unconstitutional statute that set "presumption of viability" at certain point in pregnancy, "effectively tak[ing] the determination of viability out of the hands of the physician").[8]

The State also makes the unsupported claim that viability is "vague and constantly shifting." App. Br. 23. As this Court has already acknowledged, however, it is "bound by prior precedents" of the Supreme Court, *Cannon*, 750 F.3d at 505, and therefore is bound to hold unconstitutional any ban on abortion prior to viability, which is exactly what the 6-week ban is. Moreover, far from being "vague," the viability standard 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. It "represent[s] . . . a simple limitation beyond which a state law is unenforceable." *Id.* at 855. It has also proved enduringly "workable," and there remains "no line other than viability which is more" so. *Id.* at 870. Indeed, contrary to the State's assertion, the undisputed evidence here 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 in a normally progressing pregnancy occurred at approximately 23 to 24 weeks, *Casey*, 505 U.S. at 860, and

[8] For the same reason, it is irrelevant whether the ban begins to operate as early as 6 weeks (as the Clinic's unrebutted evidence demonstrates, ROA.1101) or at 9 or 12 weeks (as the State asserts, *see* ROA.1159, App. Br. 28) because, as the State concedes, it applies prior to viability, App. Br. 10.

that is where it remains today. ROA.1103; *see also Jackson Women's Health Org.*, 349 F. Supp. 3d at 540 (established medical consensus holds viability is at the earliest 23-24 weeks).

C. The Supreme Court Has Repeatedly Held that the State's Interests Cannot Justify a Ban Before Viability.

The Supreme Court has repeatedly held that state interests are not strong enough to justify a pre-viability ban on abortion. Despite decades of precedent reaffirming this principle, the State suggests that its interest in banning abortion are somehow different and could warrant a different result here. This argument fails because the Supreme Court has determined that viability is the earliest point at which state interests may be strong enough to support a prohibition on abortion.

The State's argument has been considered—and rejected—by the Supreme Court because it is contrary to the values underlying the constitutional protections for a woman's right to have an abortion before viability. To hold otherwise would repudiate a fundamental constitutional principle that before viability, the interests of a state, whatever they may be, cannot override a woman's interests in her liberty and autonomy over her own body.

In *Roe*, the Supreme Court recognized that the right "founded in the Fourteenth Amendment's concept of personal liberty . . . encompass[es] a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153; *see also Casey*, 505 U.S. at 871 (holding that a "woman's right to terminate her pregnancy before

viability . . . is a rule of law and a component of liberty [the Court] cannot renounce"). *Casey* reaffirmed *Roe*'s "central holding" that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. at 879; *see also Whole Woman's Health*, 136 S. Ct. at 2299. The Supreme Court has reaffirmed this principle because 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." *Casey*, 505 U.S. at 852. Accordingly, while "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Id.* at 846.

The State's argument ignores that, before viability, the Constitution guarantees a woman's liberty to weigh all possible interests—including interests related to potential life, the woman's health, and other factors—and ultimately to decide for herself whether to carry a pregnancy to term. *Id.* at 879 ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."). Thus, as to the State's interest in maternal health, the Supreme Court has held that, until viability, it is for a woman, and not the State, to

compare the risks of pregnancy and childbirth, and abortion, among other factors, in deciding whether to terminate or continue a pregnancy. *See id.* at 846, 852.[9] Before viability, 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. *Id.* at 852.

Similarly, as to the State's interest in potential life, the Supreme Court has already carefully balanced a woman's interests in autonomy and liberty against this interest. *See Roe*, 410 U.S. at 164-65; *see also Casey*, 505 U.S. at 852, 870-71. The Supreme Court concluded that, until viability, the decision to continue or end a pregnancy must be left to women to make based on their own values and beliefs as it involves "personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it." *Casey*, 505 U.S. at 853; *see also id*. (recognizing that individuals hold competing views with some believing that "the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent"). Thus, while the Supreme Court has recognized and emphasized that states have an interest in potential life "from the outset of pregnancy," the Supreme Court has nevertheless held that, before viability, this

[9] The "facts" that the State asserts about abortion safety and its other alleged interests in a 6-week ban, *see* App. Br. 22-27, are irrelevant to the outcome of this case. However, the Clinic strongly disagrees with these "facts," *see, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2315 (stating that childbirth is fourteen times more dangerous than abortion) and does not waive any right to contest them.

interest is "not strong enough to support a prohibition on abortion." *Id.* at 846; *see also Gonzales*, 550 U.S. at 157-58 (observing that while the state "maintains its own regulatory interest in protecting the life of the fetus," it nonetheless may "not impose an undue burden").

The State also argues that *Gonzales* undermines *Roe* and *Casey* because it recognized the State's "interest in protecting the integrity and ethics of the medical profession" and upheld an abortion regulation. App. Br. 25-26. But *Gonzales* held that while a state may "use its voice and its regulatory authority to show its profound respect for the life within the woman," it may only do so if its actions do not "strike at the right itself." 550 U.S. at 157-58 (quoting *Casey*, 505 U.S. at 874). A pre-viability abortion *ban* exceeds that clear constitutional limit, in direct conflict with *Gonzales* and the Court's other precedents. *See id*.; *see also Isaacson*, 716 F.3d at 1222 ("*Casey* reaffirmed—and *Gonzales v. Carhart*[] has since reiterated—*Roe*'s central holding: 'Before viability, the State's interests are not strong enough to support a prohibition of abortion . . . .' That principle is binding upon us and decides this case." (quoting *Casey*, 505 U.S. at 846)); *accord Edwards*, 786 F.3d at 1117; *MKB Mgmt.*, 795 F.3d at 772.

The State's claim that it has an interest that could support banning abortion before viability is based on the argument that there is effectively no constitutional limit on the State's power to prohibit a woman from making the decision about

whether to continue a pre-viability pregnancy. Directly applicable Supreme Court precedent forecloses this argument. The Supreme Court has held that states can promote their "profound interest in potential life[] throughout pregnancy" by "tak[ing] measures to ensure that the woman's choice is informed," and "may enact regulations to further the health or safety of a woman seeking an abortion." *Casey*, 505 U.S. at 878. What Mississippi cannot do is "resolve the[] philosophic questions in such a definitive way that a woman lacks all choice in the matter" before viability, *id*. at 850-51, nor can it force a woman to remain pregnant for months and experience labor and delivery against her will, including the substantial pain to the woman and medical risk that entails, *see id*. at 852. Until viability, the Constitution guarantees that it is for the woman, not the State, to weigh information about her pregnancy, the risks to her health, and any other factors, and determine whether or not to continue a pre-viability pregnancy. *See id.* at 846. [10]

The State's reliance on cases about abortion regulations in support of the relevance of its interests in this case is misplaced. *See* App. Br. 16-22. The Supreme Court has affirmed that a *ban* on abortion prior to viability is unconstitutional because it imposes a complete and insurmountable obstacle that can be supported by

[10] Nor can the State skirt this precedent by asserting that "some combination" of its interests is sufficient to justify a prohibition of abortion for any woman. *See* App. Br. 21. The Supreme Court could not have been more clear: "Before viability, *the State's interests* are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846 (emphasis added).

no state interest. *See, e.g.*, *Casey*. 505 at 877-79. The cases the State cites address abortion *regulations*, each of which could conceivably be justified by an important state interest—so long as the regulation confers benefits that outweigh its burdens and does not impose an undue burden.[11] They "do[] not disturb the central holding of *Roe*"—that there is no state interest strong enough to justify a ban, which controls the outcome here. *Id.* at 879.

Finally, the State criticizes the District Court for failing to "even try[] to perform the analysis that supposedly governs [the] constitutional challenge" here, App. Br. 27, and for apparently relying on *dicta* in *Whole Woman's Health* in reaching its decision, *see* App. Br. 20. The State is wrong on both counts. In reaching its decision, the District Court analyzed the undisputed evidence that no fetus is viable at 6 weeks and concluded, based on controlling Supreme Court precedent, that the Clinic was likely to succeed on the merits of its claim that the ban is unconstitutional. ROA.1249 ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." (quoting *Casey*,

[11] The State's account of *Stenberg* and *Gonzales* is incorrect. The outcomes in those cases were based primarily on differences in the statutory language of the laws challenged in each case—not, as the State suggests, any change in governing law. *Compare* App. Br. 17-18 *with Gonzales*, 550 U.S. at 133 ("Compared to the state statute at issue in *Stenberg* [*v. Carhart*, 530 U.S. 914 (2000)], the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage.").

505 U.S. at 837)).[12] The District Court also did not rely on *dicta*, but instead cited the Supreme Court's holding that viability is the earliest point at which the State can constitutionally prohibit abortion for any woman. ROA.1248 (citing *Whole Woman's Health*, 136 S. Ct. at 2320).[13]

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's entry of preliminary injunctive relief against the 6-week ban.

Respectfully submitted this 27th day of September, 2019.

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[12] The State's characterization of the large fraction test is also wrong. *See* App. Br. 19-20. Here, the 6-week ban is relevant for every woman seeking abortion after embryonic cardiac activity is detectable—as early as 6 weeks of pregnancy—who does not fall within the ban's narrow exceptions. For every woman in that group, the 6-week ban places an absolute and insurmountable obstacle in her path to a pre-viability abortion, contrary to binding Supreme Court precedent.

[13] The State's suggestion that, because *Whole Woman's Health* discussed the State's interest in maternal health, the Supreme Court has not considered states' interest in protecting potential life is simply false. *See* App. Br. 21. The Supreme Court has previously considered this interest and held that it cannot justify a ban on abortion pre-viability. *See supra* pp. 21-23.

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2019, 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 CM/ECF system. I certify that counsel for the Defendants-Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 27, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,602 words, excluding the items exempted by Fed. R. App. P. 32(f), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman, 14-point font) using Microsoft Word.

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