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.

THOMAS E. DOBBS, M.D., M.P.H., in his official capacity as State Health Officer of the Mississippi State Department of Health, et al.

Defendants.

Case No. 3:18-cv-171-CWR-FKB

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

S.B. 2116 ("the 6 Week Ban") prohibits abortion months before viability, in direct violation of decades of Supreme Court precedent. Defendants concede the most relevant fact: S.B. 2116 bans abortion for some women prior to viability. Defendants also concede that cardiac activity is detectable at approximately 6 weeks, 0 days of pregnancy, as measured from the first day of a woman's last menstrual period ("LMP"), when S.B. 2116 begins to operate. Accordingly, S.B. 2116 would ban abortion—except in extremely limited circumstances—for every patient seeking abortion after approximately 6 weeks LMP.

In defense of the 6 Week Ban, Defendants recycle arguments this Court rejected less than six months ago in striking down the 15 Week Ban as an unconstitutional ban on pre-viability abortion. Plaintiffs do not agree with Defendants' assertions regarding how many women

might be able to obtain abortion if the 6 Week Ban should take effect, or that abortion has detrimental effects on women—but those facts are irrelevant here. Because the State cannot bar any woman from making the decision whether to continue a pre-viability pregnancy, Plaintiffs have established a strong likelihood of success on the merits of their claim that the 6 Week Ban is unconstitutional and will irreparably harm their patients seeking pre-viability abortion care. Accordingly, Plaintiffs' preliminary injunction motion should be granted.[1]

ARGUMENT

It is well-settled that the government cannot prevent any woman from making the decision whether to continue a pre-viability pregnancy because it 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." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 852 (1992). The 6 Week Ban—like the 15 Week Ban before it—plainly violates that controlling law. A preliminary injunction is warranted here to, once again, prevent the State from stripping from pregnant women their constitutionally protected freedom to decide whether or not to continue a pregnancy prior to viability.

I. Plaintiffs Have Established a Strong Likelihood of Success on the Merits

As stated, Defendants "necessarily concede" that the 6 Week Ban prohibits some abortions before viability. (*See* Defs.' Mem. In Opp'n to Mot. for Prelim. Inj. ("Defs.' Opp'n") at 6, 11 (acknowledging that cardiac activity is detectable as early as 6 weeks LMP and conceding

[1] Defendants' attempt to undermine Dr. Carr-Ellis's declaration only distracts from the facts necessary to decide this motion—that S.B. 2116 prohibits abortion for some women before viability. To undo the confusion Defendants have sown in their opposition, Plaintiffs submit a supplemental declaration further making clear that cardiac activity is detectable at approximately 6 weeks LMP using standard medical practice, including the practice employed by the Clinic. (*See* Decl. Sacheen Carr-Ellis, M.D., M.P.H., Supp. Pls.' Mot. for Prelim. Inj. ("Carr-Ellis Decl.") ¶¶ 8-9, 11-12, ECF No. 101-2; Suppl. Decl. of Sacheen Carr-Ellis Decl. ("Suppl. Carr-Ellis Decl.") ¶¶ 3, 6-7.)

that Defendants "have been unable to identify any medical research or data that show a fetus has reached the 'point of viability'" by 6 weeks); *see also id*. at 8-9 (conceding that S.B. 2116 would prohibit abortion for *some* women).) Based on binding Supreme Court precedent holding that a state cannot ban abortion prior to viability, there is nothing else the Court needs to consider to find that Plaintiffs will succeed on their claim that the 6 Week Ban is unconstitutional. *See 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); *Jackson Women's Health Org.* v. *Currier*, 349 F. Supp. 3d. 536, 539-40 (S.D. Miss. 2018), *appeal filed*, No. 18-60868 (5th Cir. Dec. 17, 2018)

Unable to contest the issue of viability, Defendants advance three primary arguments, each of which this Court considered and rejected in striking down the 15 Week Ban less than six months ago and none of which render the 6 Week Ban constitutional. First, Defendants invite this Court to abandon the viability line established in *Roe* and reaffirmed in *Casey*, based on the unsupported claim that it is "vague and constantly shifting." (Defs.' Opp'n at 4.) As this Court has already acknowledged, however, it "follows the commands of the Supreme Court and the dictates of the United States Constitution," and is bound to hold unconstitutional any ban on abortion prior to viability, which is precisely what the 6 Week Ban is. *Jackson Women's Health Org.*, 349 F. Supp. 3d. at 542. Moreover, far from being "vague," the viability standard that the Supreme Court has repeatedly reaffirmed, and which binds this Court, 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 also has proved enduringly "workable" and there remains "no line other than viability which is more" so. *Id.* at 870; *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).

Defendants attempt to evade that precedent by suggesting the State can ban abortion based on its assertion that detection of embryonic cardiac activity is an indicator of potential future survival. (*See* Defs.' Opp'n at 4.) But the Supreme Court has been clear: viability—the point at which there is a reasonable likelihood of sustained survival outside the womb,[2] 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 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 389. Nor can the State set a line other than viability—as the 6 Week Ban attempts to do here—as the point at which it can override that decision. "Viability is the critical point." *Id*. Indeed, the Supreme Court rejected an effort to depart from the viability line similar to the one Defendants advance here. *Compare* Defs.' Opp'n at 4 (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.* v. *Edwards*, 488 F. Supp. 181, 197-98 (E.D. La. 1980) (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").

Second, Defendants contend that the State's interests can override a woman's decision whether to continue her pregnancy before viability. (*See* Defs.' Opp'n at 4-5.) As this

[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).

Court recognized, this argument is "wrong on the law." *Jackson Women's Health Org.*, 349 F. Supp. 3d at 541. The State's interest in potential life and maternal health may 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. *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2309 (2016); *Gonzales* v. *Carhart*, 550 U.S. 124, 146, 157, 164 (2007). But "[t]here is *no* legitimate state interest strong enough, prior to viability, to justify a ban on abortions." *Jackson Women's Health Org.*, 349 F. Supp. 3d at 541 (emphasis added) (citing *Whole Woman's Health*, 136 S. Ct. at 2309).

Arguments about the State's interests ignore that, before viability, the Constitution guarantees a woman's liberty to weigh all possible interests—including interests related to potential life, health risks, and other factors—and ultimately to decide for herself whether to carry a pregnancy to term. *Casey*, 505 U.S. 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, 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. *Casey*, 505 U.S. at 852. Similarly, as to the State's interest in potential life, before viability, the decision to continue a pregnancy, which involves "personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it," must be left to women to make based on their own values and beliefs. *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").

Finally, Defendants engage the same act of misdirection they attempted in defense of the 15 Week Ban: recasting the 6 Week Ban as a regulation, rather than the outright ban that it

is. (*See* Defs.' Opp'n at 7-8.) Defendants assert that S.B. 2116 is not a ban because it does not apply before embryonic cardiac activity is detectable (i.e., before approximately 6 weeks of pregnancy) and therefore merely "regulates the time period in which abortions may be performed" and because it contains narrow exceptions allowing abortion after embryonic cardiac activity is detectable. (Defs.' Opp'n at 9.) This argument ignores the facts and—again—relies on a misreading of the caselaw Defendants cite; *Gonzales* in particular.[3]

As this Court recognized in its decision striking down the 15 Week Ban, the question before the Court in *Gonzales* was not the validity of a ban on abortion; it was the validity of a regulation prohibiting one method of abortion. 550 U.S. at 146-47; *see also Jackson Women's Health Org.*, 349 F. Supp. 3d at 542. The Supreme Court upheld the regulation because it affected only that single method of abortion and specifically did "not *proscribe*" the most common procedure used at that stage of pregnancy. *Gonzales*, 550 U.S. at 164 (emphasis added).[4] As this Court stated when Defendants made this argument in defense of the 15 Week Ban: "Wrong again. To be absolutely clear, *Gonzales* does not replace *Casey* with a new standard. *Gonzales* upheld the ban of a particular type of abortion procedure when other avenues for pre-viability abortions still existed." *Jackson Women's Health Org.*, 349 F. Supp. 3d at 542. "In contrast," after detection of embryonic cardiac activity—at approximately 6 weeks of pregnancy—"women in Mississippi would be left with no other options." *Id*.

[3] As they did when making the same argument in defense of the 15 Week Ban, Defendants also ignore 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 this Court observed: "'Ban'" and 'prohibit' are synonyms. This Act is a ban. It is not a regulation." *Jackson Women's Health Org.*, 349 F. Supp. 3d at 541.

[4] Contrary to Defendants' implication by their citation to *Gonzales*, that case includes no discussion of embryonic or fetal cardiac activity. *Compare* Defs.' Opp'n at 4 *with Gonzales*, 550 U.S. at 160 (discussing state's interests in measures designed to inform woman's abortion decision).

The State then argues that S.B. 2116 is constitutional because it "does not ban women from obtaining abortions" but rather "*would* require many women to make the decision to have an abortion earlier in pregnancy." (Defs.' Opp'n at 9.) Preventing any woman from making that decision at *any* point prior to viability is *precisely* what the Constitution forbids. *See, e.g.*, *Casey*, 505 U.S. at 879. Labeling the 6 Week Ban a "time limitation" is therefore 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.").

Under the State's reasoning, any law banning abortion at a particular period of pregnancy would not constitute a ban on pre-viability abortions because it "require[s] many women to make the decision to have an abortion earlier in pregnancy," (Defs.' Opp'n at 9), which would in turn justify laws banning abortion at any point after the first day of a woman's pregnancy. Although this may be a path Mississippi is on, given the pace at which it passed the 15 Week Ban and the 6 Week Ban, well-settled Supreme Court precedent clearly forecloses that result.

In defending what is plainly an unconstitutional law, Defendants have no interest in having this Court abide by the Constitution and apply well-settled precedent. Instead, they seek to be part of the "national abortion debate." (Defs.' Opp'n at 5.)[5] Regardless of Defendants' intent, their efforts must fail: no law banning abortion after detection of embryonic cardiac activity has

[5] Defendants rely on legislative testimony submitted in support of a similar ban in another state, further demonstrating their primary interest is not in defending Mississippi's ban, but rather, being part of a "decades-long campaign, fueled by national interest groups, to ask the Supreme Court to overturn *Roe* v. *Wade*." *Jackson Women's Health Org.*, 349 F. Supp. 3d at 542. (*See also* Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. ("Pls.' Mem.") at 2-3, ECF No. 101.)

survived a court challenge. *See, e.g.*, *MKB Management Corp.* v. *Stenehjem*, 795 F.3d 768, 772-73 (8th Cir. 2015) (striking down North Dakota ban on abortion following detectable embryonic heartbeat, which banned abortion at approximately 6 weeks, as unconstitutional), *cert. denied*, 136 S. Ct. 981 (2016); Mem. of Conference & Order at 2, *ENW Women's Surgical Center* v. *Beshear*, No. 3:19-cv-178-DJH (W.D. Ky. Mar. 27, 2019), ECF No. 32 (extending through final ruling in the case temporary restraining order against Kentucky's ban on abortion at approximately 6 weeks based on detection of embryonic cardiac activity). There is no reason for this Court to come to a different result here.

II. Plaintiffs Have Established Irreparable Harm

In addition to failing to undermine Plaintiffs' showing of likelihood of success on the merits, Defendants fail to refute Plaintiffs' showing of irreparable harm. (*See* Pls.' Mem. at 11.) Defendants wrongly suggest that Plaintiffs must specify "exactly how many women may be potentially affected by S.B. 2116" to demonstrate irreparable harm. (Defs.' Opp'n at 12.) However, the undisputed fact that S.B. 2116 bans abortion for some women before viability is all that is necessary to render it unconstitutional, and, accordingly, to support Plaintiffs' showing of irreparable harm. (*See supra* at pp. 2-7; Pls.' Mem. at 8-11.) The Supreme Court could not have been more clear: "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*"). Because S.B. 2116 prohibits a woman from choosing abortion after embryonic cardiac activity is detectable (i.e., at approximately 6 weeks LMP), it wrests from each woman who does not fall within the ban's limited exceptions the right to decide whether to continue a pre-viability pregnancy and imposes irreparable harm on each of them.

Nonetheless—and despite Defendants' assertions otherwise—Plaintiffs have established that, using standard medical practice, which is standard practice for Plaintiffs, cardiac activity is detectable with transvaginal ultrasound at approximately 6 weeks LMP. (Carr-Ellis Decl. ¶¶ 8-9, 11-12; Suppl. Carr-Ellis Decl. ¶¶ 3, 6.)[6] Plaintiffs have also established that, as a prohibition on abortion at 6 weeks, S.B. 2116 would ban abortion for nearly all of Plaintiffs' patients. (Carr-Ellis Decl. ¶ 18; Suppl. Carr-Ellis Decl. ¶ 7.)

Unless the ban is enjoined, Plaintiffs risk prosecution for facilitating their patients' constitutional rights by providing pre-viability abortion care, and patients will suffer both a loss of their constitutional rights and the harm that results from abortion care wrongfully denied. (*See* Pls.' Mem. at 11.) Because the ban prevents pregnant women from exercising their fundamental constitutional right to decide whether to continue a pre-viability pregnancy, no further showing of injury is required. *See, e.g.*, *Deerfield Med. Ctr.* v. *City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981) ("We have already determined that the constitutional right of privacy is 'either threatened or in fact being impaired,' and this conclusion mandates a finding of irreparable injury."); *accord Women's Med. Ctr. of Nw. Houston* v. *Bell*, 248 F.3d 411, 422 (5th Cir. 2001) (affirming district court's finding of irreparable harm based on threat to women's constitutional right to privacy); *Causeway Med. Suite* v. *Foster*, 43 F. Supp. 2d 604, 614, 619 (E.D. La. 1999) (holding that failure to grant an injunction against law that would ban "virtually all" pre-viability abortions would "result in irreparable injury because the constitutional right to privacy is threatened and impaired"), *aff'd*, 221 F.3d 811 (5th Cir. 2000).

[6] Current Mississippi law requires that, prior to an abortion, "the physician who is to perform the abortion, or a qualified person assisting the physician," must perform an ultrasound. Miss. Code. Ann. § 41-41-34(1).

III. Plaintiffs Have Established that the Balance of Harms and the Public Interest Support a Preliminary Injunction.

Plaintiffs have satisfied the remaining requirements for obtaining preliminary injunctive relief—namely, that the balance of harms and the public interest both favor an injunction.

Plaintiffs and their patients will face far greater irreparable injuries should the 6 Week Ban take effect than Defendants would face if its enforcement is enjoined and the status quo is maintained. If the ban takes effect, abortion care will be virtually unavailable in Mississippi, causing Mississippi women immeasurable irreparable harm. Defendants are wrong to suggest they suffer harm any time a statute is enjoined. (*See* Defs.' Opp'n at 13.) Any hardship purportedly suffered by the State is substantially lessened when it seeks to enforce a law that plainly violates the Constitution. *See Deerfield Med. Ctr.*, 661 F.2d at 338-39; *see also KH Outdoor, LLC* v. *City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (The government "has no legitimate interest in enforcing an unconstitutional [law]," and suffers no injury from its injunction."). It is particularly absurd for Defendants to claim they would be harmed by a preliminary injunction here, where the State's elected representatives enacted a law *knowing* it was unconstitutional and in clear conflict with this Court's decision of less than six months ago. *See generally Jackson Women's Health Org.*, 349 F. Supp. 3d 536; *see also id.* at 542 (noting with reference to the 15 Week Ban that "[t]he State chose to pass a law it knew was unconstitutional"). Indeed, the State's elected representatives have not been shy in acknowledging they passed S.B. 2116 despite knowing that it is invalid under controlling precedent. (*See* Pls.' Mem. at 2-3.)[7]

[7] *See also* Giacomo Bologna & Jimmie E. Gates, *Mississippi lawmakers just passed one of the most restrictive abortion bans in the U.S.*, Mississippi Clarion Ledger (Feb. 14, 2019), https://www.clarionledger.com/story/news/politics/2019/02/13/restrictive-abortion-ban-bill-passed-by-mississippi-senate-ms-leg/2858914002/ (noting bill sponsor "[Senator] Fillingane said that with the appointment of Justice Brett Kavanaugh, the U.S. Supreme Court could rule

The public interest is also served when the court applies well-settled precedent and protects individuals' constitutional rights, as a preliminary injunction here would. *Jackson Women's Health Org. v. Currier*, 760 F.3d at 458 n.9 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 2536 (2016) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (internal quotation marks and citation omitted)); *Causeway Med. Suite*, 43 F. Supp. 2d at 619 (stating an injunction against abortion restriction "serves the public well in that this Court follows well-established precedent").

The balance of harms thus tips clearly in Plaintiffs' favor and the public interest is served by an injunction, further demonstrating that preliminary injunctive relief is warranted.

CONCLUSION

For the reasons set forth above and in Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, Plaintiffs respectfully request that the Court issue a preliminary injunction prohibiting Defendants from enforcing S.B. 2116 as applied to pre-viability abortions and for such further relief that the Court deems warranted.

Dated: April 25, 2019

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differently on abortion than it traditionally has. 'These decisions may swing in a very different decision now,' Fillingane told [Senator] Simmons.").

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2019, I caused the foregoing Reply Memorandum of Law in Further Support of Plaintiffs' Motion for a Preliminary Injunction to be electronically filed 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.

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