No. 18-60868

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.

On Appeal from the United States District Court
for the Southern District of Mississippi, Jackson Division

BRIEF FOR THE STATES OF TEXAS AND LOUISIANA AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

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STATEMENT REGARDING AMICI CURIAE

The amici States are Texas and Louisiana.[1] Both States generally prohibit abortion after 22 weeks' gestation (20 weeks' post-fertilization), with life and health exceptions. La. Stat. § 40:1061.1(E); Tex. Health & Safety Code § 171.044.[2] The amici States set this limit because scientific evidence demonstrates that fetuses at that gestational age feel pain and would experience excruciating pain during the abortion procedure. La. Stat. § 40:1061.1(B); Act of July 12, 2013, 83d Leg., 2d C.S., ch. 1, § 1(a), 2013 Tex. Gen. Laws 5013.[3] The district court in this case held that States cannot ban abortion prior to viability, which it found was at 23 or 24 weeks' gestation. *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 539-40 (S.D. Miss. 2018). But babies born at 22 and even 21 weeks' gestation have survived and thrived,

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a), the States of Texas and Louisiana are not required to obtain the consent of the parties or leave of courts before filing this brief. Counsel for the States authored this brief in whole. No party or any party's counsel authored any part of this brief, and no person or entity, other than the States, made a monetary contribution for the preparation and submission of this brief.

[2] The gestational age of a fetus is typically two weeks greater than the post-fertilization age.

[3] Louisiana has also adopted a 15-week limit that would take effect only if Mississippi's law 15-week law is upheld in this case. La. Stat. § 14:87.

and scientific advancement in treating these children born prematurely has been rapidly progressing, meaning babies born early have far greater chances of survival than they did just a few years ago.[4]

Further, the amici States also have enacted laws designed to protect unborn life. *See, e.g.*, La. Stat. §§ 40:1061.10 (ultrasound requirement), 40:1061.17 (informed consent), 40:1061.28 (partial-birth abortion ban); Tex. Health & Safety Code §§ 171.012 (informed consent and ultrasound requirement), 171.102 (partial-birth abortion ban). The district court in this case suggested that the Mississippi Legislature's desire to protect unborn life through its 15-week law was linked with racism, sexism, and homophobia. *See, e.g.*, *Jackson Women's*, 349 F. Supp. 3d at 540 n.22, 543 n.40. The amici States also have an interest in demonstrating that it is legally improper for a federal district court to make unwarranted and unsupported conclusions about the motives of legislative bodies that seek to protect unborn life as they are permitted to do under Supreme Court precedent.

The district court in this case also prevented Mississippi from conducting discovery to obtain evidence to support its asserted interests and declined to consider evidence that did not pertain to viability. The district court also refused to consider

[4] *See, e.g.,* Appellants' Br. 29 n.8; Kaashif A. Ahmad, M.D., et al., *Two-Year Neurodevelopmental Outcome of an Infant Born at 21 Weeks' 4 Days' Gestation* 1, Pediatrics Vol. 140, No. 6 (December 2017) https://pediatrics.aappublications.org/content/pediatrics/140/6/e20170103.full.pdf (survival rate for babies born at 22 weeks is 23%).

Mississippi's evidence regarding fetal pain, which is relevant to Mississippi's defenses. Because the amici States have faced similarly sweeping challenges to reasonable abortion regulations, they have an interest in defending their ability to put in sufficient evidence to defend their duly enacted laws.[5] The amici States urge the Court to reverse the district court's unjustified refusal to allow such discovery here.

SUMMARY OF THE ARGUMENT

This case does not turn on whether the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), correctly decided that the United States Constitution protects the right to elective abortion. Instead, the question is whether the right to elective abortion must receive unconditional, unlimited, and absolute constitutional protection all the way up to "viability"—which the Supreme Court has never held—or instead whether States may limit abortion by gestational age for scientific and ethical reasons—as the Supreme Court contemplated in *Gonzales v. Carhart*, 550 U.S. 124 (2007), and as Mississippi has done with its 15-week law. The district court ignored these additional reasons for Mississippi's law and impermissibly restricted Mississippi's ability to engage in discovery and admit evidence to support its interests in the regulation at issue.

Regardless of the merits of this case, this Court should explicitly disapprove of portions of the district court's opinion that suggest Mississippi was motivated by

[5] *See June Med. Servs., LLC v. Gee*, No. 3:17-cv-00404-BAJ-RLB (M.D. La. Filed June 27, 2017); *June Med. Servs. LLC v. Gee*, No. 3:16-cv-00444-BAJ-RLB (M.D. La. Filed July 1, 2016); *Whole Woman's Health Alliance v. Paxton*, No. 1:18-cv-00500-LY (W.D. Tex. filed June 14, 2018).

racism and sexism based on the State's 20th century history. The district court had no legal or factual basis for this *sua sponte* conclusion. The Mississippi Legislature was motivated by a desire to protect unborn life, and the Supreme Court has held that States have an interest in protecting unborn life throughout pregnancy. The Court should reject the district court's unwarranted conclusions about Mississippi's legislative purpose.

ARGUMENT

The question presented by this case is whether the right to elective abortion up to the point of viability is absolute, unconditional, and beyond permissible state regulation. Both *Roe*, 410 U.S. 113, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality op.), state that there is a constitutional right to elective abortion until viability, but that after viability, States may prohibit abortion with exceptions for maternal life and health, *Casey*, 505 U.S. at 878[6]; *Roe*, 410 U.S. at 163-64. And the Court in *Gonzales*, 550 U.S. at 157, has permitted banning certain inhumane and gruesome abortion procedures even before viability, in the interest of respecting unborn life. *Gonzales* thus confirms that factors other than viability are relevant to the constitutional analysis. Accordingly, Mississippi should have been allowed to conduct discovery and put on evidence relevant to those factors.

In any event, the district court wrongly ascribed animus to the Mississippi Legislature based on suppositions drawn from unrelated periods in the State's history.

[6] Unless otherwise indicated, all citations to *Casey* are to the plurality opinion.

The Court should disavow this improper reasoning, which tainted the district court's analysis.

I. The District Court Erred by Unduly Limiting Discovery.

At the plaintiffs' request, the district court here prohibited discovery with respect to Mississippi's 15-week law on any issue other than viability. Order on Disc., *Jackson Women's Health Org. v. Dobbs*, No. 3:18-cv-00171-CWR-FKB (S.D. Miss. Sept. 7, 2018), ECF No. 41.[7] The court incorrectly read *Roe* and *Casey* to make viability the *sole* relevant issue. Order on Disc. at 2-3, ECF No. 41. That legal error is necessarily an abuse of discretion. *See Benavides v. Chi. Title Ins. Co.*, 636 F.3d 699, 701 (5th Cir. 2011) (district court necessarily abuses its discretion when it applies the wrong law). And that abuse prejudiced Mississippi's defense.

Mississippi sought to present evidence on fetal pain, including scientific evidence showing that a fetus may feel pain as early as 15-weeks' gestation. Dec. of Maureen L. Condic, Ph.D., Mem. in Opp. to Pls.' Mot. for Summ. J. Ex. 2, ECF No. 85-2. Although neither the *Roe* nor *Casey* Courts were presented with the question of fetal pain, such evidence is plainly relevant to the "balance" *Casey* identified as "central" to the viability standard. 505 U.S. at 860-61. Nevertheless, the district court expressly refused to consider evidence of fetal pain. *Jackson Women's*, 349 F. Supp. 3d at 542; Order of Aug. 15, 2018, ECF No. 77. Instead, the district court announced that evidence about any issue other than viability, "like whether Mississippi

[7] All ECF references in this brief refer to documents filed in the district court proceedings in this case.

has any interests that could outweigh a woman's right to control her body and destiny[,]" was irrelevant. Order on Disc. at 2-3, ECF No. 41.

Not only did that approach severely prejudice Mississippi's ability to defend its law, but it contravened Supreme Court authority. In *Gonzales*, the Supreme Court plainly recognized that the government has an interest in regulating abortion beyond the limited question of viability. 550 U.S. at 156-60. *Gonzales* upheld a ban on certain inhumane and gruesome abortion procedures even before viability. *Id.* at 132. It did so in recognition of the government's compelling interest in respecting unborn life—an interest that exists outside the narrow confines of the viability analysis. *Id.* at 157-58. The upshot of *Gonzales* is that viability is not the sole relevant consideration when assessing a state law that restricts elective abortions; States, in turn, must be allowed to present evidence relevant to those other interests. *See id.* at 156-60.

By construing the viability standard as the be-all, end-all, the district court violated the principle of *Gonzales*. It wrongly refused to give any deference to the Legislature's findings. *See Jackson Women's*, 349 F. Supp. 3d at 540 n.22 (discussing and rejecting only one finding). And rather than permitting Mississippi to develop and admit evidence into the record to support the veracity of those findings, the district court dismissed them as "pure gaslighting" and went on to disprove them itself, relying on other facts in its opinion which are inadmissible and outside the record. *Id.*

II. The District Court Impermissibly Ascribed Discriminatory Animus to the Mississippi Legislature Based on the State's 20th-Century History.

Not only did the district court refuse to permit Mississippi to propound discovery and present evidence supporting its interests in the 15-week regulation. It then went on to impugn the Legislature's subjective motives, drawing on decades-old allegations of discrimination based on race, sex, and sexual orientation. To the district court, the fact that the 20th-century history of the State of Mississippi involves instances of unlawful discrimination was evidence that the 15-week restriction on elective abortions is unconstitutional. That impermissible reasoning taints the district court's opinion and judgment, and it requires remand to conduct an analysis that does not indict the Mississippi Legislature for the unrelated acts of its forebears.

In particular, the district court went out of its way to suggest that Mississippi and its Legislature acted with discriminatory intent. *Id.* at 543 n.40 (stating that "[t]he Mississippi Legislature has a history of disregarding the constitutional rights of its citizens" and listing examples). But attributing bad faith to the Mississippi Legislature is inconsistent with *Casey*, which recognized that States have "a substantial state interest in potential life throughout pregnancy." 505 U.S. at 876. *Casey* addressed, without condemnation, the viewpoints of those who believe that abortion is "nothing short of an act of violence against innocent human life." *Id.* at 852. Ultimately, the *Casey* Court acknowledged that "[m]en and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy." *Id.* at 850. Rather than heed that directive, the district court readily and credulously concluded that the Mississippi Legislature acted out of animus

based on race, sex, and sexual orientation. *See Jackson Women's*, 349 F. Supp. 3d at 540 n.22, 543 n.40.

Courts have long presumed that governmental actions are taken for good faith, legitimate purposes. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918). Constitutional analysis of a law's purpose is thus highly deferential. *E.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (where "there [are] legitimate reasons" for a law, courts "will not infer a discriminatory purpose"). Courts must exercise "extraordinary caution" when considering a claim that a Legislature enacted a law with an unconstitutional purpose. *Miller*, 515 U.S. at 916. The district court exercised none of that caution here.

The Mississippi Legislature set forth its legislative purpose by making multiple legislative findings. Miss. Code § 41-41-191(2). Most of the findings related to the humanity of the unborn child and the inhumanity of tearing that child into pieces after 15-weeks' gestation. *Id.* § 41-41-191(2)(b). The district court ignored those findings and statement of purpose. The Mississippi Legislature did not hide the ball. It explicitly stated that it was motivated by a desire to protect unborn life—a viewpoint considered valid and worthy of respect by the Supreme Court. The district court should have presumed Mississippi's interest was legitimate and that its actions were in good faith. *See Casey*, 505 U.S. at 850, 852, 876. It failed to do so.

The only legal justification the district court gave for setting aside the Mississippi Legislature's expressly stated intent is that it believed the Supreme Court did the same thing in *Shelby County v. Holder*, 570 U.S. 529 (2013). *Jackson Women's*, 349 F. Supp. 3d at 540 n.22. The district court was wrong. The Supreme Court did

not ignore the legislative history of the Voting Rights Act in *Shelby County*, but rather concluded that it was not sufficient to uphold the unique intrusion into state sovereignty imposed by the VRA. 570 U.S. at 547-55. And it did so based on relevant evidence in the record. *Id. Shelby County* is not license for federal courts to *sua sponte* reweigh legislative motives based on their own non-record research.

The Supreme Court has previously rejected a court's finding that an abortion regulation had an improper legislative purpose where there was no evidence of unlawful motives. *See Mazurek v. Armstrong*, 520 U.S. 968, 972, 976 (1997) (per curiam). Likewise, the district court here cited no evidence whatsoever to contradict Mississippi's stated purpose of protecting unborn life, much less to suggest it was to "control[] women and minorities." *Jackson Women's*, 349 F. Supp. 3d at 540 n.22.[8] Instead, it cited unrelated laws enacted decades earlier in order to condemn the 2018 Mississippi Legislature. *Id.* at 540 n.22, 543 n.40. Even when two laws are closely related, this Court has held that it is error to presume, without proof, that any invidious intent behind one law "necessarily carried over to and fatally infected" a subsequent law. *Veasey v. Abbott*, 888 F.3d 792, 801 (5th Cir. 2018) (discussing successive versions of Texas's voter-identification law); *see also June Med. Servs., LLC v. Gee*, 905 F.3d 787, 810 n.60 (5th Cir. 2018), mandate stayed pending cert., 139 S. Ct. 661

[8] The *Mazurek* Court also held that it was legally irrelevant that "an anti-abortion group drafted the . . . law," 520 U.S. at 973, something for which the district court faulted Mississippi, *Jackson Women's*, 349 F. Supp. 3d at 542 n.39.

(2019) (holding that a district court should not consider the existence of other abortion regulations, when determining the constitutionality of an unrelated abortion law).

The district court here made no attempt to link the unconstitutional laws from the 1960s to the 15-week law at issue, but simply concluded that Mississippi, generally, was a bad actor. The district court did not explain how the 15-week regulation discriminates against minorities, and only 90 women had post 15-week abortions at Jackson Women's in 2017, *see* Pls.' Resps. to Interrog., Mem. in Opp. to Pls.' Mot. for Summ. J. Ex. 5, ECF No. 85-5, so the argument that this law seeks to "control women" falls flat. Finally, the suggestion that Mississippi's previous ban on same-sex marriage somehow demonstrates that Mississippi has a uniquely discriminatory history is simply false, *Jackson Women's*, 349 F. Supp. 3d at 543 n.40, given that over half the States banned same-sex marriage at the time of *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Robert, C.J. dissenting).

The district court was required to presume that Mississippi's law was enacted in good faith and for the reasons stated. It failed to do so, and tarring the 2018 Mississippi Legislature with decades-old unconstitutional acts meets no legal standard of relevance. Courts should not presume, without evidence, that the State is acting in bad faith when it regulates abortion pursuant to its recognized authority. Regardless of what the Court decides on the merits, it should reject the district court's conclusions about Mississippi's legislative purpose.

Conclusion

The district court impermissibly prejudiced Mississippi's ability to defend its law, and it wrongly accused the Legislature of improper animus based on the 20th century history of the State of Mississippi. At minimum, this Court should vacate the judgment below and remand so that Mississippi has a full opportunity to conduct discovery and present evidence free from the district court's unjustified assumptions about its motivations.

Respectfully submitted.

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Certificate of Service

On March 13, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,704 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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