No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an abortion law is necessarily unconstitutional, regardless of the State's interest or the actual burden on women, when it theoretically could prevent a small number of women from obtaining a previability abortion.

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, and West Virginia.[1]

This case implicates Amici States' interests in several ways. First, Amici States regulate previability abortion, and many have laws that prohibit abortions after 20 or 22 weeks LMP. *See infra* p. 17 n.8. The district court's opinion below casts doubt on the lawfulness of any restriction on the right to abortion prior to 23 weeks LMP. *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 539-40 (S.D. Miss. 2018). And in affirming the district court's judgment, the Fifth Circuit applied a test that would invalidate automatically any law that might prevent some previability abortions, without regard to the State's interest and the law's burden. *See Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 273 (5th Cir. 2019). The Fifth Circuit's test is incorrect, as this Court recently confirmed in *June Medical Services LLC v. Russo*, Nos. 18-1323, 18-1460, 2020 WL 3492640 (U.S. June 29, 2020), and if left intact, it calls into question Amici States' ability to enforce their laws.

Second, the decisions below curtail Amici States' ability to put on evidence of new medical and scientific discoveries regarding fetal development and fetal pain. By treating viability as the only relevant consideration, the decisions below depart from this Court's precedents in a

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On July 6, 2020, counsel of record for all parties received notice of amici's intention to file this brief.

way that would effectively prevent Amici States from relying on advances in medicine and science to better craft optimal public policy. The decisions below were wrong to disregard the States' obvious interest in legislating according to the latest scientific knowledge.

Finally, the decisions below wrongly impugn the motives of Mississippi and any other State that values unborn life. The district court tarnished Mississippi's abortion regulation as the product of decades-old racism and sexism. *Jackson Women's*, 349 F. Supp. 3d at 540 n.22, 543 n.40. States should be able to defend their laws before a fair forum that presumes good faith, *see, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), not one quick to condemn state legislators, without any evidence, as bigots. This Court should denounce the district court's baseless aspersions.

SUMMARY OF ARGUMENT

I. By adopting a novel constitutional test that asks only whether some unknown number of women might be prevented from obtaining a previability abortion, the Fifth Circuit's decision conflicts with both *Casey* and *June Medical*, which require courts to assess whether an abortion law is reasonably related to a legitimate state interest, and whether the law presents a substantial obstacle to abortion access. *June Med.*, 2020 WL 3492640, at *23 (Roberts, C.J., concurring in the judgment) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality op.)).[2] The Fifth

[2] As the narrowest ground for the Court's decision to reverse in *June Medical*, Chief Justice Roberts' opinion is controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977). Unless otherwise indicated, all citations to *June Medical* are to the Chief Justice's controlling opinion.

Circuit refused to follow *Casey* and instead applied a novel test that renders irrelevant both the impact of a law and whether the State has an interest in the excruciating pain an unborn child experiences as it is torn limb from limb during an abortion. The Fifth Circuit's test treats the right to previability abortion as absolute such that no state interest could ever justify any limitation of abortion previability. But no other constitutional right enjoys such absolute unquestioning protection, which perhaps is why *Roe* and *Casey* do not elevate the abortion right above all others.

Since the decision below rests on plainly incorrect reasoning, this Court should at a minimum grant, vacate, and remand so that the Fifth Circuit can apply the undue-burden test as reaffirmed in *June Medical*. *See, e.g.*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 18-1019, 2020 WL 3578669 (U.S. July 2, 2020); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 19-816, 2020 WL 3578672 (U.S. July 2, 2020). But the better course is to set this case for plenary review. It is time for this Court to clarify that *all* abortion laws, no matter whether they "ban," "prohibit," or "regulate" previability abortion, are subject to the undue-burden test.

II. The decisions below prevent States from offering scientific evidence that undermines the factual assumptions the Court relied on in *Roe* and *Casey*. Yet *Roe* and *Casey* themselves plainly contemplate that state legislatures may fine-tune regulations in response to evolving medical information. That is the case here: In the 47 years since *Roe*, innumerable advances in science and medicine inform our understanding of fetal development and the capacity to experience pain.

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

Yet the district court declared all scientific developments irrelevant and the viability line absolute. Not only is that wrong under this Court's precedents, but it would strip state legislatures of the ability to legislate effectively in light of evolving knowledge. This Court, in turn, will become the Nation's sole "*ex officio* medical board" charged with refereeing the impact of medical advances on the regulation of abortion. The better course is to do what the district court would not: allow States to present scientific evidence to satisfy their end of the undue-burden standard without handcuffing them to an erroneous test that treats viability as the only relevant consideration.

III. Finally, the Court should condemn the district court's commentary that accused the Mississippi Legislature of racism and sexism. District courts are charged with making factfindings that are relied on by appellate courts. District courts cannot proceed from the assumption that abortion regulations are inherently illegitimate. Nor should they disparage the good faith of lawmakers who value unborn life.

ARGUMENT

I. The Fifth Circuit Erroneously Failed to Apply the Undue-Burden Test.

This Court recently reaffirmed that *Casey*'s undue-burden test governs challenges to state abortion regulations. The test is universal: States are free to enact abortion regulations reasonably related to their legitimate interests as long as their laws do not pose an undue burden. *June Med.*, 2020 WL 3492640, at *23. Yet the Fifth Circuit below refused to apply the undue-burden test to Mississippi's 15-week law. The Fifth Circuit joined other courts in holding that the undue-burden inquiry does not apply when a law might "ban" some previability

abortions. *Jackson Women's*, 945 F.3d at 273; *see also, e.g.*, *Isaacson v. Horne*, 716 F.3d 1213, 1222-25 (9th Cir. 2013); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 627-28 (M.D.N.C. 2019), *appeal docketed*, No. 19-1685 (4th Cir. June 26, 2019).

That reasoning is inconsistent with *June Medical* and *Casey*. This Court has never sanctioned a "ban" test that ignores all evidence other than the viability of the unborn child. To be sure, *Roe* and *Casey* generally endorse the State's broad authority to regulate abortion post-viability. But it does not follow from that rule that a State can impose *no* restrictions on abortion *before* viability. The Court should not allow lower courts' confusion to persist any longer.

A. States may enact laws that impact the ability to obtain a previability abortion.

The Fifth Circuit should have applied the undue-burden test. Under that test, an abortion regulation must be upheld if it (1) is reasonably related to a legitimate state interest, and (2) poses no substantial obstacle to abortion. *June Med.*, 2020 WL 3492640, at *23; *Casey*, 505 U.S. at 878. That test applies regardless of the impact of the regulation.

1. Regulations of previability abortion are subject to the undue-burden test.

The Fifth Circuit concluded that, because Mississippi's 15-week law was a "ban" on previability abortion, "the undue-burden balancing test has no place in this case." *Jackson Women's*, 945 F.3d at 273. The panel purported to ground its opinion in *Roe* and *Casey*, *id.* at 271, 273, but those cases did not create a separate test for "bans" that ignores all evidence other than viability. Instead, the language cited describes the scope of the right

to elective abortion and permits States to regulate within it.

After recognizing a right to elective abortion in *Roe*, the Court chose to set the limit of that right at viability. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973). After viability, there is no right to elective abortion. *Id.* *Casey* reiterated the scope of that right when it reaffirmed "the central holding of *Roe*," that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. at 879. But the Court permitted States to place limitations on that right, as long as those limitations do not amount to an undue burden. *Id.* at 878.

The Fifth Circuit misunderstood this language from *Casey* as automatically invalidating any law that might "prohibit" a subset of women from obtaining a previability abortion—here, those seeking an abortion between 15- and 16-weeks' gestation. *Jackson Women's*, 945 F.3d at 273. But that is not how *Casey* applied its own holding. *Casey* subjected every law at issue to the undue-burden test, even though some of the laws may have "banned" or "prohibited" a subset of women from obtaining a previability abortion: women on the cusp of viability (24-hour waiting period), women whose spouses might interfere (spousal-notice provision), and minors without parental consent or judicial bypass. *Casey*, 505 U.S. at 885-87, 895, 899-900. Most recently in *June Medical*, the plurality applied the undue-burden test despite concluding that "thousands of Louisiana women" would have "no practical means of obtaining a safe, legal abortion." 2020 WL 3492640, at *19 (plurality op.).

Thus, *Roe* and *Casey*, while generally defining the right to elective abortion, do not forbid States from enacting laws that might prohibit some previability

abortions. No constitutional right is absolute, and abortion is no exception. Previability abortion—just like free speech, *see Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015)—may be regulated so long as the regulation passes the applicable constitutional test.

Taking the Court's "may not prohibit" language literally would require courts to enjoin any state law that stands between a woman and a previability abortion, whether it be a health-and-safety standard that would shut down a filthy clinic or a prohibition on government-funded abortions. The Court has never endorsed this view. Yet many courts have misread the Court's precedent to automatically invalidate laws that might prevent some women from obtaining previability abortions. *Isaacson*, 716 F.3d at 1222-25; *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 1:19-CV-02973-SCJ, 2020 WL 3958227, at *10-*11 (N.D. Ga. July 13, 2020); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1266-68 (E.D. Ark. 2019), *appeal docketed*, No. 19-2690 (8th Cir. Aug. 9, 2019); *Bryant*, 363 F. Supp. 3d at 627-28. Given that the right to elective abortion derives only from this Court's precedent, this Court is the only body that can correct this error, and it should grant the petition to do so.

2. Applying the undue-burden test would have made a difference in this case.

a. By refusing to apply the undue-burden test here, the lower courts prevented Mississippi from adequately defending its law. As *June Medical* reaffirmed, the first step in the undue-burden test is the "threshold requirement" that the State have a "legitimate purpose and that the law be reasonably related to that goal." 2020 WL 3492640, at *25 (cleaned up).

The Mississippi Legislature made multiple findings supporting its 15-week gestational limit including fetal development, integrity of the medical profession, and maternal health. Miss. Code § 41-41-191(2). Mississippi also sought to present evidence to the district court of an interest in preventing fetal pain, given the scientific evidence that a 15-week-old fetus has developed the brain structures necessary to feel pain. Pet. App. 75a-100a. These interests are legitimate, *see Gonzales v. Carhart*, 550 U.S. 124, 157-60 (2007); *Roe*, 410 U.S. at 163; and the 15-week law is reasonably related to them.

Yet the district court refused to let Mississippi defend its law with evidence of fetal pain. Order, *Jackson Women's Health Org. v. Dobbs*, No. 3:18-CV-00171-CWR-FKB (S.D. Miss. Aug. 15, 2018) (excluding fetal-pain testimony). The district court then went one step further, opining that the Mississippi Legislature was "gaslighting" and that its true purpose was malicious—to control women and minorities. *Jackson Women's*, 349 F. Supp. 3d at 540 n.22.

Mississippi was entitled to defend its law with evidence supporting its interests, especially when those interests are disputed. Such evidence is relevant to the undue-burden test's "threshold requirement" of a legitimate purpose. *June Med.*, 2020 WL 3492640, at *25. Yet the district court and Fifth Circuit gave Mississippi no opportunity to defend its interests.

b. The Fifth Circuit also improperly relieved the plaintiffs of their burden to prove the second element of the undue-burden test: the law places a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* (quoting *Casey*, 505 U.S. at 877).

Currently, Mississippi has one abortion clinic, and it performs abortions only up to 16-weeks' gestation.

Jackson Women's, 945 F.3d at 273. The record shows that, in 2017, 90 women obtained abortions between 15 and 16 weeks. *Id.* at 273 n.31. The plaintiffs introduced no evidence to explain why these women could not schedule their abortions one week earlier. There is, therefore, no summary-judgment evidence that Mississippi's law would pose a substantial obstacle to any woman's ability to obtain a previability abortion, much less a large fraction or significant number of women.[3] *See June Med.*, 2020 WL 3492640, at *25 (noting *Casey*'s spousal-notice requirement impacted a "significant number" of women). Instead, the law still gives Mississippi women a reasonable opportunity—nearly four months—to make their choice.

The lower courts' failure to apply the undue-burden test warrants reversal. The Court should either grant, vacate, and remand in light of *June Medical*'s affirmation of the undue-burden test, or grant and reverse after holding that the undue-burden test applies in these circumstances.

B. *Casey*'s viability framework does not preclude consideration of other important state interests.

Even if Mississippi's law would prevent some previability abortions, the analysis does not stop there. The Fifth Circuit erred in assuming that the viability of the unborn child is the only state interest that can justify limiting abortion rights. *Jackson Women's*, 945 F.3d at 274 (holding that "the Supreme Court's viability framework has already balanced the State's asserted interests

[3] And if there were a true obstacle to access for any actual woman, the proper means of adjudication is an as-applied challenge, not wholesale facial invalidation. *Gonzales*, 550 U.S. at 167.

and found them wanting"). But as described above, the Court's "viability framework" was just that—a framework. The Court did not purport to rule on all possible interests that would justify a limitation on abortion. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring) (noting that *Casey* did not address eugenic abortions, but only five provisions of Pennsylvania law); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of rehearing en banc) ("Judicial opinions are not statutes; they resolve only the situations presented for decision.").

When setting the limit of the right to elective abortion at viability, *Roe* weighed only the bare interest in unborn life—the belief that unborn life has value and should not be aborted—against a complete prohibition on elective abortions. 410 U.S. at 163-64. When reconsidering *Roe*, *Casey* again balanced only the States' interest in potential life against the woman's interests in terminating her pregnancy. 505 U.S. at 870-71. Neither case claimed to have considered all possible state interests that might warrant limitations on abortion.

Thus, even if Mississippi's law arguably prevented some previability abortions, that is not the end of the analysis. State interests other than the viability of the unborn child are sufficiently important to justify limiting the right to previability abortion, as some Justices have previously indicated.

Fetal pain is one such compelling interest. Justice Blackmun, the author of *Roe*, found it "obvious" that "the State's interest in the protection of an embryo . . . increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive,

and to react to its surroundings increases day by day." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 552 (1989) (Blackmun, J., joined by Brennen and Marshall, JJ., concurring in part) (cleaned up); *see also id.* at 569 (Stevens, J., concurring in part) (stating that the interest in protecting a "developed fetus" from "physical pain or mental anguish" is "valid"). Thus, multiple Justices that joined *Roe* agree that fetal pain and development are important considerations in measuring the State's interests. If so, then States can enact measures to prevent developed unborn children from suffering the pain of being dismembered during an abortion.

The Court has recognized other state interests that justify regulation of previability abortion: preventing the coarsening of society to the humanity of newborns, *Gonzales*, 550 U.S. at 157; the integrity and ethics of the medical profession, *id.*; protection of minors, *Casey*, 505 U.S. at 899-900; and maternal health, *Roe*, 410 U.S. at 154. Justice Thomas has also identified a "compelling interest in preventing abortion from becoming a tool of modern-day eugenics," and indicated that there could be "other compelling interests in adopting . . . other abortion-related laws." *Box*, 139 S. Ct. at 1783 & n.2 (Thomas, J., concurring).

Reading *Roe* and *Casey* to conclude, as the Fifth Circuit did, that no state interest other than viability can justify preventing a previability abortion, makes that right absolute. But *Roe* was clear that it is not: A woman does not have a right to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses." 410 U.S. at 153-54; *see also Doe v. Bolton*, 410 U.S. 179, 189 (1973) (stating that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand").

Treating the right to previability abortion—a right found only in the precedent of the Court, not the text of the Constitution—as absolute would endow it with greater protection than enumerated constitutional rights that may be limited when the State's interest is strong enough. *See, e.g.*, *Reed*, 576 U.S. at 163-64 (free speech); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (equal protection). And *June Medical* affirms that the substantial-obstacle analysis is similar to the analysis used in other types of claims that consider the State's interest. *See* 2020 WL 3492640, at *24 (citing religious-freedom and free-speech cases). Abortion should not be an exception to the normal rules.

The Fifth Circuit's assumption that there is no state interest strong enough to justify a limitation on previability abortion was incorrect. The Court should grant the petition, require the plaintiffs to prove an undue burden, and allow Mississippi the full opportunity to defend its law.

C. Abortion providers are attempting to avoid scrutiny by claiming laws are "bans."

If the Fifth Circuit's judgment stands, and all laws that might prohibit some previability abortions are unconstitutional, then abortion providers will claim that abortion laws are effectively "bans" in order to cut off debate, prevent the State from introducing evidence of its interests, and avoid their obligation to prove an undue burden.

This concern is not theoretical. The COVID-19 pandemic caused multiple States to temporarily postpone elective medical procedures, including abortion, in order to preserve personal protective equipment, ensure sufficient hospital capacity, and maintain social distancing. *See, e.g.*, *In re Rutledge*, 956 F.3d 1018, 1023 (8th Cir.

2020); *Adams & Boyle, PC v. Slatery*, 956 F.3d 913, 921 (6th Cir. 2020); *In re Abbott*, 954 F.3d 772, 787 (5th Cir. 2020). These temporary limits were challenged by abortion providers who cited *Jackson Women's* for the proposition that the postponements were "bans" on previability abortion, and that evidence of the pandemic was irrelevant.[4]

Abortion providers have also relied on this misunderstanding to obtain injunctions of anti-discrimination laws that seek to prevent racist, sexist, and ableist abortions. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 305-07 (7th Cir. 2018), *cert. granted in part, judgment rev'd in part sub nom. Box*, 139 S. Ct. 1780; *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 754 (S.D. Ohio 2018), *en banc review granted*, 944 F.3d 630 (6th Cir. 2019). But the constitutionality of such laws is an open question. *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring).

The Court has never countenanced a constitutional test for abortion that fails to account for the State's interest. Indeed, *Casey*'s undue-burden standard was adopted because the Court had not adequately considered the State's interest in previous cases. 505 U.S. at 873. Abortion providers should not be permitted to escape their burden by claiming the law might "ban" an

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[4] Mem. of Law in Support of Plfs.' Emergency Mot. for TRO & Prelim. Injunctive Relief at 19-22, *Robinson v. Marshall*, No. 2:19-cv-00365-MHT-JTA, (M.D. Ala. Mar. 30, 2020); Mem. of Law Supporting Ex Parte TRO or Prelim. Inj. at 24-26, *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-CV-00449-KGB (E.D. Ark. Apr. 13, 2020); Mot. for & Br. in Support of TRO and/or Prelim. Inj. at 15-18, *Preterm-Cleveland, Inc. v. Yost*, No. 1:19-cv-00360 (S.D. Ohio Mar. 30, 2020); Mot. for TRO and/or Prelim. Inj. at 17-20, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 1:20-cv-00323-LY (W.D. Tex. Mar. 25, 2020).

abortion. The Fifth Circuit erred in refusing to apply the undue-burden test.

II. Medical and Scientific Advances Require Reconsideration of the Viability Framework.

When creating the right to abortion in *Roe*, the Court explained that allowing States to prohibit abortions after viability was "logical" and "biological." 410 U.S. at 163. But the understanding of biology did not stop in 1973. As more is learned about fetal development and pain, and as new "brutal" techniques for abortion emerge, what is "logical" and "biological" changes as well. Thus, even if the Court believes, as did the Fifth Circuit, that its holdings create a strict "viability line" that is dispositive here, it is time to reevaluate that line, and States are entitled to present evidence to support that argument.

The difficult questions of fetal development, pain, and abortion techniques belong with the people's elected officials, who can handle evolving science more nimbly, and who are accountable to the electorate if they strike the wrong balance. But if this Court has adopted a bright viability line, only this Court can weigh that new evidence against "the woman's liberty interest in defining her 'own concept of existence, of meaning, of the universe, and of the mystery of human life.'" *June Med.*, 2020 WL 3492640, at *23.

A. Changed circumstances require the Court to reevaluate its viability precedent.

Much has changed since *Roe*. "[N]eonatal and medical science . . . now graphically portrays, as science was unable to do [at the time of *Roe*], how a baby develops sensitivity to external stimuli and to pain much earlier than was then believed." *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring) (footnote

omitted). In 1973, viability meant 28 weeks' gestation. By 1992, the gestation line was 23 or 24 weeks. *Casey*, 505 U.S. at 860. Babies born at only 21 weeks have now survived.[5] Multiple Justices have observed that the "*Roe* framework . . . is clearly on a collision course with itself," due in part to the moving viability line. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). Several years later, the Court in *Casey* concluded that its precedents had "undervalue[d] the State's interest in potential life" and gave States greater ability to protect it. 505 U.S. at 873.

Circuit-court judges have also noted that changed circumstances call for reevaluation of the viability framework. The Eighth Circuit has criticized that framework for limiting States' ability to consider evidence of developments in obstetrics, viability, and maternal health. *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773-75 (8th Cir. 2015). In the Fifth Circuit, Judge Jones has noted that "if courts were to delve into the facts underlying *Roe*'s balancing scheme with present-day knowledge, they might conclude that the woman's 'choice' is far more risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew." *McCorvey*, 385 F.3d at 852 (Jones, J., concurring); *see also Planned Parenthood of Ind. & Ky., Inc.*, 888 F.3d at 311-14 (Manion J., dissenting in part) (calling for a reevaluation of *Roe* and *Casey*).

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[5] Fox Television, *Extreme Preemie, 'About the Size of a Hand,' Goes Home in Georgia* (July 2020), https://fox6now.com/2020/07/01/extreme-preemie-comes-home-for-first-time/; A. Pawlowski, *'Miracle baby': Born at 21 Weeks, She May Be the Most Premature Surviving Infant* (Nov. 2017), https://www.today.com/health/born-21-weeks-she-may-be-most-premature-surviving-baby-t118610.

B. New medical and scientific developments undermine the viability framework.

1. States' interests in protecting unborn life exist "from the inception of the pregnancy." *Gonzales*, 550 U.S. at 158. Those interests, which exist prior to viability, have been strengthened by new evidence of the fetus's development and her capacity to feel pain.[6] Dr. Condic's unrebutted declaration traces much of this developing evidence. Pet. App. 75a-100a. And recently, two researchers who have "very different views on the morality of abortion" reviewed the relevant literature and concluded that "neuroscience cannot definitively rule out fetal pain before 24 weeks." Stuart W.G. Derbyshire & John C. Bockmann, *Reconsidering Fetal Pain*, 46 J. of Med. Ethics, no. 1 (2019).[7]

When enacting the Partial-Birth Abortion Ban Act of 2003, Congress cited the "medical fact" that "unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli." Pub. L. No. 108-105, § 2(14)(M), 117 Stat. 1201 (2003) (noting that "during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain").

State legislatures have increasingly sought to give effect to this new evidence by enacting previability limitations on abortion. *See, e.g.*, Ark. Code § 20-16-2002 (findings on fetal development and fetal pain); Idaho Code § 18-503 (findings on fetal pain); Neb. Rev. Stat. § 28-

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[6] Amici States agree with Mississippi's discussion of the impact of abortion on maternal health but focus their analysis here on the impact of abortion on the unborn child.

[7] Available at https://jme.bmj.com/content/46/1/3.

3,104 (findings on fetal pain). In total, at least twenty-two States have determined that abortion should be prohibited at some point prior to the district court's determination of viability in this case.[8] *Cf. Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002) (finding a "national consensus" of only eighteen States sufficient to prohibit the execution of individuals with intellectual disabilities). The evidence is mounting, and the States are noticing. The viability framework should be reconsidered.

2. Relevant advances have not been limited to fetal pain and development. Abortion providers have also discovered new, brutal ways to abort unborn children since *Roe*. The dilation and evacuation (D&E) procedure currently used after 15-weeks' gestation was not used for second trimester abortions at the time of *Roe*. *City of Akron*, 462 U.S. at 436 & n.23.; *see also Stenberg v. Carhart*, 530 U.S. 914, 924 (2000). A D&E abortion involves ripping a fetus apart with forceps and removing it piece-by-piece from the womb, *Gonzales*, 550 U.S. at 135-36, a procedure some on the Court have characterized as "brutal" and "gruesome," *id.* at 181-82 (Ginsburg, J. dissenting).

The Court has never contemplated whether the State can limit abortions involving the dismemberment of a living, pain-capable unborn child. The closest the Court has come was in upholding the partial-birth abortion ban in

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[8] Ala. Code § 26-23B-5(a); Ariz. Rev. Stat. § 36-2159(B); Ark. Code § 20-16-1405(a)(1); Ga. Code § 16-12-141(b); Idaho Code § 18-505; Ind. Code § 16-34-2-1(a)(3); Iowa Code § 146B.2(2)(a); Kan. Stat. §§ 65-6723(f) & 6724(a); Ky. Rev. Stat. § 311.782(1); La. Stat. § 40:1061.1(E); Miss. Code § 41-41-137; Mo. Rev. Stat. § 188.058(1); Neb. Rev. Stat. § 28-3,106; N.C. Gen. Stat. § 14-45.1(a); N.D. Cent. Code § 14-02.1-05.3(3); Ohio Rev. Code § 2919.201(A); Okla. Stat. tit. 63, § 1-745.5(A); S.C. Code § 44-41-450(A); S.D. Codified Laws § 34-23A-70; Tex. Health & Safety Code § 171.044; Utah Code § 76-7-302.5; W. Va. Code §§ 16-2M-2 & 4(a).

Gonzales, and the Court had little difficulty identifying numerous state interests justifying prohibition of that brutal and inhumane procedure. *Id.* at 156-60; *see also Casey*, 505 U.S. at 882 (noting that "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision"). But under the circuit courts' interpretation of this Court's precedent, States cannot act on these new developments.

C. If the viability line is absolute, only this Court can move it.

State legislatures are best positioned to evaluate and weigh this new evidence, as they can hold hearings each session and react quickly to scientific developments. But as it stands now, they must wait years for a legal issue surrounding abortion to sufficiently "percolat[e]" and make its way to this Court. *Box*, 139 S. Ct. at 1784 (Thomas, J., concurring). And even then, if lower courts follow the logic of the Fifth Circuit, States will be unable to submit evidence of these advances in support of their interests. Not only will this Court be required to act as "the country's *ex officio* medical board," *Gonzales*, 550 U.S. at 164 (quoting *Webster*, 492 U.S. at 518-19 (plurality op.)), it will be forced to do so on records devoid of the relevant evidence.

The practical results of the Court's viability jurisprudence have been one-sided. Abortion providers routinely sue to try and take advantage of new medical technology, such as telemedicine and medication abortion, to expand the right to abortion. *See, e.g.*, Compl. at 20-25 (¶¶ 90-121), *Whole Woman's Health Alliance v. Hill*, No. 1:18-CV-1904 (S.D. Ind. June 21, 2018) (challenging "Laws That Deny Abortion Patients the Benefits of Scientific Progress") (emphasis omitted); Compl. at 18-23 (¶¶ 83-110), *Whole Woman's Health Alliance v. Paxton*, No.

1:18-CV-00500 (W.D. Tex. June 14, 2018) (same). But States cannot do the same to limit previability abortion without this Court's approval.

Weighing the evidence of fetal development, fetal pain, women's health, society's values, and women's liberty may require the members of the Court to "act as legislators, not judges," *June Med.*, 2020 WL 3492640, at *23, but it is a task the Court has removed from the States and taken for itself. The States' only recourse is to seek relief from the Court.

III. The Court Should Condemn the District Court's Rhetoric.

After declaring evidence of Mississippi's interests in its 15-week law to be irrelevant, the district court performed its own non-record research and opined that the law reflected Mississippi's general oppression of women, racial minorities, and homosexuals. *Jackson Women's*, 349 F. Supp. 3d at 540 n.22, 543 n.40. The court asserted that Mississippi had a "history of disregarding the constitutional rights of its citizens" and concluded that Mississippi's interest in women's health was "pure gaslighting." *Id.* The court concluded that the law represented the "old Mississippi" that was "bent on controlling women and minorities." *Id.* at 540 n.22.

As did Judge Ho in concurrence, *Jackson Women's*, 945 F.3d at 282-86 (Ho, J. concurring in the judgment), this Court should condemn the district court's rhetoric. A district court is required to presume good faith, not the opposite. *Abbott*, 138 S. Ct. at 2324. The district court turned that rule on its head and reached into Mississippi's past to ascribe aspersions on today's legislators for doing their jobs.

The district court's behavior is part of a broader and troubling trend. In the last year, the Fifth Circuit has

had to admonish (1) a Texas district court for "adopt[ing] all 30 of [plaintiff abortion clinics'] proposed findings without citing or discussing a single declaration submitted by [the State]," *In re Abbott*, 956 F.3d 696, 718-19 (5th Cir. 2020), and (2) a Louisiana district court for its conclusion that it was "'untenable' to make [abortion] Plaintiffs establish standing because doing so would make it harder for them to succeed on the merits," *In re Gee*, 941 F.3d 153, 159 (5th Cir. 2019) (per curiam). Other district courts around the country have suggested that reasonable, commonsense abortion regulations are the products of invidious paternalism. *See, e.g., Bernard v. Individual Members of Ind. Med. Licensing Bd.*, 392 F. Supp. 3d 935, 958-59 (S.D. Ind. 2019) (live-dismemberment ban); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at *2 (W.D. Tex. Feb. 6, 2012) (informed-consent provision).

This is far from harmless error; *June Medical* treated the district court's factfinding as all but dispositive. 2020 WL 3492640, at *6-*7 (plurality op.). If appellate courts are to rely on district-court findings, district courts cannot be allowed to treat abortion regulations as per se the product of intolerable animus. Whatever else it does, the Court should make clear that the district court's bias will not be tolerated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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