Case 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

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

BRIEF OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Defendants-Appellants, Dr. Thomas E. Dobbs and Dr. Kenneth Cleveland, certifies that the following listed persons 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:

1. Plaintiff-Appellee Jackson Women's Health Organization;

2. Plaintiff-Appellee Dr. Sacheen Carr-Ellis;

3. Diane Derzis, owner/operator of the Jackson Women's Health

Organization;

4. Defendant-Appellant Dr. Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health;

5. Defendant-Appellant Dr. Kenneth Cleveland, Executive Director of the Mississippi State Board of Medical Licensure;

6. Mississippi Department of Health;

7. Mississippi State Board of Medical Licensure;

8. Defendant Robert Shuler Smith, District Attorney for Hinds County, Mississippi;

9. Defendant Gerald Mumford, County Attorney for Hinds County, Mississippi;

10. Defendant Wendy Wilson-White, City Prosecutor for the City of Jackson, Mississippi;

11. Phil Bryant, Governor of the State of Mississippi, signed Senate Bill 2116 into law;

12. Honorable Carlton W. Reeves, District Judge;

13. Honorable F. Keith Ball, Magistrate Judge;

14. Paul E. Barnes, Counsel for Defendants-Appellants;

15. Wilson Minor, Counsel for Defendants-Appellants;

16. Julie Rikelman, Counsel for Plaintiffs-Appellees;

17. Hillary Schneller, Counsel for Plaintiffs-Appellees;

18. Robert B. McDuff, Counsel for Plaintiffs-Appellees;

19. Leah Wiederhorn, Counsel for Plaintiffs-Appellees;

20. Aaron S. Delaney, Counsel for Plaintiffs-Appellees;

21. Alexia D. Korberg, Counsel for Plaintiffs-Appellees;

22. Christine Parker, Counsel for Plaintiffs-Appellees;

23. Claudia L. Hammerman, Counsel for Plaintiffs-Appellees;

24. Crystal M. Johnson, Counsel for Plaintiffs-Appellees;

25. Roberto J. Gonzalez, Counsel for Plaintiffs-Appellees;

26. Beth L. Orlansky, Counsel for Plaintiffs-Appellees;

27. Caitlin Grusauskas, Counsel for Plaintiffs-Appellees;

28. Robert E. Sanders, Counsel for Defendant Robert Shuler Smith;

29. Pieter Teeuwissen, Counsel for Defendant Gerald A. Mumford;

30. LeShundra B. Jackson-Winters, Counsel for Defendant Wendy Wilson-White.

This the 28th day of August, 2019.

s/Paul E. Barnes
PAUL E. BARNES

STATEMENT REGARDING ORAL ARGUMENT

The Defendants-Appellants do not think that oral argument would assist the Court in resolving the issues on appeal.

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JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because the original complaint and supplemental amended complaint assert federal constitutional claims for relief under 42 U.S.C. § 1983. ROA.21, ROA.27-28; ROA.1261, ROA.1316-17. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1), as Defendants are appealing the district court's May 24, 2019 order granting Plaintiffs' motion for preliminary injunction and permanently enjoining the enforcement of Mississippi Senate Bill 2116. ROA.1244-51; RE4. Defendants timely filed their notice of appeal on June 21, 2019. ROA.1439-1442; RE5.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that any law which bars doctors from performing some abortions before fetal viability is unconstitutional *per se*;
2. Whether the district court erred in refusing to consider the State's multiple legitimate and substantial interests in barring abortions after a fetal heartbeat is detected;
3. Whether the district court erred in failing to perform undue burden balancing or large fraction analysis.

STATEMENT OF THE CASE

A. Nature of the Case

On March 19, 2019, the Mississippi legislature passed Senate Bill 2116 ("S.B. 2116" or the "fetal heartbeat law"). ROA.1170-77; RE3. Governor Phil Bryant signed the bill into law on March 21, 2019. S.B. 2116 prohibits any person from knowingly performing an abortion after a fetal heartbeat has been detected "using standard medical practice," except when necessary "to prevent the death of a pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." ROA.1171-72; RE3. The law also provides that performing an abortion after the detection of a fetal heartbeat is a misdemeanor and "grounds for the nonissuance, suspension, revocation or restriction of a [medical] license or the denial of reinstatement or renewal of a [medical] license." ROA.1173, ROA.1176; RE3. S.B. 2116 was scheduled to take effect on July 1, 2019. ROA.1177; RE3.

Instead of filing a new lawsuit, Plaintiffs Jackson Women's Health Organization("JWHO") and Dr. Sacheen Carr-Ellis, the medical director of JWHO, moved for leave to add claims challenging the constitutionality of S.B. 2116 to the complaint they had filed one year earlier against Defendants. ROA.931-1001. In that action, Plaintiffs challenged, *inter alia*, the constitutionality of Mississippi

House Bill 1510 ("H.B. 1510"), which bars doctors from performing abortions after 15 weeks' gestation, as measured from a woman's last menstrual period. ROA.31-42. The district court granted Plaintiffs summary judgment on that claim and permanently enjoined the enforcement of H.B.1510 on November 20, 2018. ROA.885-901; RE2. Defendants' appeal of the permanent injunction of H.B. 1510, ROA.915-17, remains pending, and this Court has set oral argument on the 15-week law for October 9, 2019. *See Jackson Women's Health Organization v. Dobbs*, No. 18-60868 (Docket Entry Aug. 23, 2019).

Plaintiffs simultaneously filed a motion for preliminary injunction asking the district court to enjoin Defendants from enforcing S.B. 2116. ROA.1086-88. After hearing oral argument from the parties, the district court granted Plaintiffs leave to supplement their complaint and entered a preliminary injunction barring the enforcement of S.B. 2116. ROA.1244-51; RE4.

At the beginning of its preliminary injunction order, the district court made clear that it viewed S.B. 2116 simply as a more restrictive version of H.B. 1510:

> Here we go again. Mississippi has passed another law banning abortions prior to viability. The latest iteration, Senate Bill 2116, bans abortions in Mississippi after a fetal heartbeat is detected, which is as early as 6 weeks lmp.

ROA.1244-45; RE4. In concluding that a preliminary injunction was warranted, the district court relied heavily on its prior ruling that H.B. 1510 was

unconstitutional because it "bans" pre-viability abortions:

> 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 this claim.

ROA.1248-49; RE4.

Defendants now seek appellate review of the district court's order granting a preliminary injunction against the enforcement of S.B. 2116. ROA.1439-42; RE5.

B. Course of Proceedings

Plaintiffs filed this action on March 19, 2018, the day that H.B. 1510 was signed into law by Governor Phil Bryant and went into effect. ROA.21-29, ROA.65. The complaint filed by Plaintiffs only challenged the constitutionality of H.B. 1510. ROA.21-29. On the same day that Plaintiffs filed their complaint, they also filed a motion for temporary restraining order. ROA.53-55. The district court granted a temporary restraining order on March 20, 2019. ROA.99-100. In its temporary restraining order, the district court held that women have a constitutional right "to have an abortion before viability" and that "States cannot prohibit any woman from making the ultimate decision to do so." ROA.99

(internal quotation marks omitted). The district court concluded that Plaintiffs were substantially likely to succeed on their claim that H.B. 1510 is unconstitutional because the law would prohibit some pre-viability abortions. ROA.100.

On March 26, 2018, Plaintiffs filed a motion to limit discovery to what they contended was the only legally relevant issue in the case: "when viability occurs." ROA.129. However, on April 9, 2018, Plaintiffs filed a 56-page amended complaint, which added claims challenging the constitutionality of virtually all of Mississippi's abortion laws and regulations, including the 24-hour waiting period requirement, informed consent provisions, the law providing that only licensed physicians may perform abortions, and the licensing regulations applicable to abortion facilities. ROA.177-235.

The district court subsequently bifurcated the case, *sua sponte*, under Fed. R. Civ. P. 42. ROA.243-44. The district court divided the case into two parts governed by separate discovery schedules and orders. ROA.243. Part I involved only Plaintiffs' challenge to the constitutionality of H.B. 1510, while Part II included all of Plaintiffs' remaining claims. *Id.* The district court then granted Plaintiffs' motion to limit discovery to the issue of viability. ROA.396-99. The district court concluded that under the Supreme Court's "viability framework" the

constitutionality of H.B. 1510 "hinges on a single question: whether the 15-week mark is before or after viability." ROA.397. After limiting the scope discovery of Part I, the district court entered a discovery scheduling order granting the parties 100 days to conduct discovery on the issue of viability. ROA.400-02.

Plaintiffs subsequently filed a motion for summary judgment in Part I of the case, arguing that they were entitled to a declaratory judgment that H.B. 1510 is unconstitutional and a permanent injunction prohibiting Defendants from enforcing H.B. 1510. ROA.689-91. On November 20, 2018, the district court granted summary judgment to Plaintiffs' on their constitutional challenge to H.B. 1510 and permanently enjoined the enforcement of the law. ROA.885-901; RE2. The district court summed up its holding in the following manner:

> The record is clear: States may not ban abortions prior to viability; 15 weeks lmp is prior to viability; and plaintiffs provide abortion services to Mississippi residents after 15 weeks lmp. As the facts establish, the Act is unlawful.

ROA.891; RE2. Defendants have appealed the district court's permanent injunction, and that appeal is currently pending before this Court. ROA.915-17.

After Governor Bryant signed S.B. 2116 into law on March 21, 2019, Plaintiffs filed a motion for leave to file a supplemental amended complaint, in order to add claims challenging the constitutionality of S.B. 2116 to their amended complaint. ROA.931-33, ROA.1062-71, ROA.1076-77. Plaintiffs also filed a

motion for preliminary injunction to prevent S.B. 2116 from going into effect on July 1, 2019. ROA.1086-88. Defendants filed responsive pleadings in opposition to both motions. ROA.1152-68, ROA.1193-1202.

After hearing oral argument on both motions on May 21, 2019, ROA.1475-1540, the district court entered an order on May 24, 2019, granting Plaintiffs leave to file a supplemental amended complaint and granting a preliminary injunction barring Defendants from enforcing S.B. 2116.[1] ROA.1244-51; RE4. Defendants

[1] At the preliminary injunction hearing, the district court expressed concern that if new abortion-related laws were passed in the future, the Mississippi legislature might be improperly challenging the authority of the court or possibly violating the court's prior injunctions. For example, the court asked opposing counsel: "What stops them from—if the Court enjoins this six-week ban, what stops the State, the Governor, from calling a special session for the purpose of enacting a four-week ban or a two-week ban? What stops them?" ROA.1512. Plaintiffs' counsel admitted to the court that passing a new law would not violate an existing injunction, but would require Plaintiffs to challenge the new law on its merits. ROA.1512.

The Supreme Court emphatically addressed this issue in *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471 (1896), holding that the courts cannot prospectively enjoin legislative enactments. In that case, the plaintiff sought an order that would prevent the city council from passing future ordinances that would conflict with the plaintiff's contract rights. The Court instructed:

> If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council . . . and will, therefore, tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly . . . But the courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption. *The passage of ordinances by such bodies are legislative acts, which a court of equity will not enjoin.*

timely filed their notice of appeal from that order. ROA.1439-42; RE5.

SUMMARY OF THE ARGUMENT

From the outset, Plaintiffs' primary argument has been that because S.B. 2116 necessarily may bar some, but not all, pre-viability abortions, the district court should simply strike it down without considering any other issues. ROA.1119, ROA.1502-03. Just as with H.B. 1510, the 15-week law, Defendants disagree.[2] This district court should have considered the State's legitimate interests in protecting the life of the unborn, maternal health and safety, as well as the ethics and integrity of the medical profession, in determining the constitutionality of a law which reduces the time period during which a woman may terminate a pregnancy. Since the district court did not, it falls to this Court to correct this egregious error.

Like each of the several States, the State of Mississippi has a right to define

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New Orleans Water Works Co., 164 U.S. at 480-81. The Court explained that if a new law was passed that was in conflict with prior court rulings, the proper procedure would be to invoke the jurisdiction of the court and have the new law enjoined. *Id.* at 481.

[2] Defendants acknowledge the district court's prior ruling on the 15-week law, *JWHO v. Currier*, 349 F. Supp. 3d 536 (S.D. Miss. Nov. 20, 2018), but respectfully disagree with that decision and therefore have appealed. ROA.915. This Court has set oral argument on the 15-week law appeal for October 9, 2019. *Jackson Women's Health Organization v. Dobbs*, No. 18-60868 (Docket Entry Aug. 23, 2019). Considering how much of the district court's analysis concerning the fetal heartbeat law is founded on the court's prior ruling striking down the 15-week law, if this Court reverses that case, then reversal of the order enjoining the fetal heartbeat law is also warranted.

its interests in the national abortion debate. *Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting) ("*Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate"). The State is not required to remain neutral, and may take sides, promoting a preference for protecting life and its potential, and showing profound respect for the life within the woman. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). Thus, states are not foreclosed from enacting laws to further their interests in the life of the unborn, as well as ensuring respect for all human life.

S.B. 2116, Mississippi's fetal heartbeat law, advances three of the State's legitimate and substantial interests long recognized by the Supreme Court: (1) protection of maternal health, (2) protection of unborn life, and (3) regulation of the medical profession. The district court declined to consider any evidence concerning the State's interests, but instead considered one issue and one issue only: the point of fetal viability. ROA.1249-50; RE4. The district court relied heavily on its prior decision holding Mississippi's 15-week law unconstitutional in concluding that the fetal heartbeat law was also unconstitutional. ROA.1248; ROA.885-901; RE2,4. Just as with the 15-week law, the court did not apply the undue burden test that supposedly applies to all pre-viability abortion regulations. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

It is true that the Supreme Court has held that a state may not "ban" abortion prior to the point of viability: "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 879). Just as Defendants conceded in previous filings that they were unable to identify any medical research or data that shows a fetus has reached the "point of viability" at 15 weeks LMP, Defendants have necessarily conceded here that they have been unable to identify any medical research or data that show a fetus has reached the "point of viability" during the 6-12 week LMP time period in which S.B. 2116 would operate. ROA.1249; RE4. However, S.B. 2116 is not an abortion "ban," and Defendants dispute that viability is the only proper consideration in determining its constitutionality.

Since *Casey*, the Court has emphasized that viability is a central issue, but has not squarely held that viability is the *only* consideration. In *Gonzales*, the Court merely "assume[d] for the purposes of this opinion" that viability was still the deciding line, but did not hold that viability was an absolute black-and-white demarcation. *Gonzales*, 550 U.S. at 146. Therefore, the district court's single-minded focus on the point of viability was reversible error.

Further, the Supreme Court's abortion decisions are impossible to totally harmonize or reconcile. For example, the Court has never explained how new

medical and scientific evidence and information fits into the existing undue burden framework, how such evidence must be handled by the lower courts, or how a court is supposed to mechanically "balance" benefits and burdens that are by their very nature incommensurable. Therefore, existing Supreme Court decisions do not foreclose the possibility that S.B. 2116 might be constitutional, and those decisions should be read narrowly, not expansively. However, it is undeniable that the Supreme Court has never held that a law restricting abortion based on the existence of a fetal heartbeat is unconstitutional, and neither has this Court. Therefore, this remains an unresolved issue of first impression in this Circuit.

ARGUMENT

Standard of Review

To justify the extraordinary relief of a preliminary injunction, Plaintiffs must show: (1) a substantial likelihood of success on the merits; (2) substantial threat of an irreparable injury without the relief; (3) threatened injury that outweighs the potential harm to the party enjoined; and (4) that granting the preliminary relief will not disserve the public interest. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012).

The decision to grant a preliminary injunction is the exception rather than the rule. *Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618,

620 (5th Cir. 1985). This Court has "cautioned repeatedly" that a preliminary injunction is an "extraordinary remedy" to be granted only if the party seeking it has "clearly carried the burden of persuasion" on all four elements. *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005); *see also DSC Commc'n . Corp. v. DGI Tech., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996) (A movant must "clearly establish each of the traditional four preliminary injunction elements"); *Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974) (preliminary injunction is "an extraordinary and drastic remedy").

A district court's grant of a preliminary injunction is reviewed for an abuse of discretion. *ODonnell v. Harris Cty.*, 892 F.3d 147, 155 (5th Cir. 2018) (citing *Women's Med. Ctr. of NW. Hous. v. Bell*, 248 F.3d 411, 418-19 (5th Cir. 2001)). "Findings of fact are reviewed only for clear error; legal conclusions are subject to de novo review." *Bell*, 248 F.3d at 419.

I. The District Court Erred in Concluding that Any Partial Prohibition of Abortion Prior to Viability is Unconstitutional *Per Se.*

A. The Supreme Court has Recognized the State's Important and Legitimate Interest in Protecting Unborn Life Since *Roe v. Wade.*

In *Roe v. Wade*, the Supreme Court acknowledged that the states "have an important and legitimate interest . . . in protecting the potentiality of human life." 410 U.S. 113, 162 (1973). In *Casey*, 505 U.S. at 846, the Court stated flatly "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." *Gonzales* agreed: the states have "a legitimate and substantial interest in preserving and promoting fetal life" that exists from the moment of conception. *Gonzales*, 550 U.S. at 145, 158 ("[T]he State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child."). By enacting the fetal heartbeat bill, the State sought to prohibit procedures that destroy the life of a whole, separate, unique, living human being, thus furthering the State's "legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158.

In *Casey*, the Court explained that the *Roe* standard "undervalues the State's interest in the potential life within the woman." *Casey*, 505 U.S. at 873-76. Members of the Court had long recognized that "[t]he *Roe* framework [was] on a collision course with itself," *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting), resulting in *Casey*'s acknowledgment that "[b]efore viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her is unwarranted. This treatment is, in our judgment, incompatible

with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Casey*, 505 U.S. at 876.

Thus, the plurality in *Casey* specifically rejected the "interpretation of *Roe* that considered all previability regulations of abortion unwarranted." *Gonzales*, 550 U.S. at 146. Indeed, Justice Ginsburg argued that the majority in *Gonzales* "blur[red] the line, firmly drawn in *Casey*, between previability and postviability abortions." *Id.* at 186 (Ginsburg, J., dissenting). Whatever the undue burden test is intended to be, the Supreme Court has unequivocally instructed that it is not strict scrutiny—which is at odds with the Plaintiffs' and district court's analysis and explanation of that standard.

B. The Lower Courts Should Examine Existing Supreme Court Abortion Decisions Very Carefully to Determine If a New Case Is Distinguishable, and Reject an Expansive View of Those Opinions.

In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Supreme Court held that two Texas laws, an admitting privileges requirement for abortion doctors and a requirement that abortion clinics meet the same standards as licensed ambulatory surgical facilities, were unconstitutional. *Hellerstedt*, 136 S. Ct. at 2318. The Court concluded that based on the record presented in that case, the evidence of burden for each law was outweighed by the benefit to maternal health each law provided. *Id.* at 2300. The Supreme Court analyzed the laws

challenged in *Hellerstedt* based on the state's interest in protecting maternal health. *Id.* at 2310 ("Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health.")). The *Hellerstedt* majority opinion is utterly silent concerning the strength and legitimacy of other state interests related to abortion.

In dissent, Justice Thomas pointedly criticized the fundamental inconsistencies in the *Hellerstedt* majority opinion, not the least of which was saying one thing yet doing another:

> To begin, the very existence of this suit is a jurisprudential oddity. Ordinarily, plaintiffs cannot file suits to vindicate the constitutional rights of others. But the Court employs a different approach to rights that it favors. So in this case and many others, the Court has erroneously allowed doctors and clinics to vicariously vindicate the putative constitutional right of women seeking abortions.
>
> This case also underscores the Court's increasingly common practice of invoking a given level of scrutiny-here, the abortion-specific undue burden standard-while applying a different standard of review entirely. Whatever scrutiny the majority applies to Texas' law, it bears little resemblance to the undue-burden test the Court articulated in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992), and its successors. Instead, the majority eviscerates important features of that test to return to a regime like the one that *Casey* repudiated.
>
> Ultimately, this case shows why the Court never should have bent the rules for favored rights in the first place. Our law is now so riddled with special exceptions for special rights that our decisions deliver

> neither predictability nor the promise of a judiciary bound by the rule of law.

Hellerstedt, 136 S. Ct. at 2321-22 (Thomas, J., dissenting). *Cf. Hellerstedt*, 136 S. Ct. at 2243 n.11 (Alito, J., dissenting) ("The proper standard for facial challenges is unsettled in the abortion context."). Thus, attempting to harmonize the Supreme Court's abortion opinions into a coherent whole is difficult at best.

Although this Court is "compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it," *Hopwood v. State of Texas*, 84 F.3d 720, 722 (5th Cir. 1996), the Court must consider whether those decisions are actually as broad as conventionally thought.

In *Stenberg v. Carhart*, the Court struck down Nebraska's partial birth abortion ban, but what turned out to be the key opinion was Justice Kennedy's dissent, in which he criticized the undue burden test as giving insufficient weight to the State's interest in protecting unborn life, and emphasized that *Roe* did not establish a strict scrutiny standard:

> *Casey* held that cases decided in the wake of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973), had "given [state interests] too little acknowledgment and implementation." 505 U.S., at 871, 112 S. Ct. 2791 (plurality opinion). The decision turned aside any contention that a person has the "right to decide whether to have an abortion without 'interference from the State,' " *id.*, at 875, 112 S. Ct. 2791, and rejected a strict scrutiny standard of review as

> "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Id.*, at 876, 112 S. Ct. 2791. "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." *Ibid.* We held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion. *Id*., at 877, 112 S. Ct. 2791.

Stenberg v. Carhart, 530 U.S. 914, 960-61 (2000) (Kennedy, J., dissenting). Justice Kennedy then wrote the majority opinion in *Gonzales*, upholding the federal partial birth abortion ban, in large part because of the brutality and inhumanity of the procedure. *See Gonzales*, 550 U.S. at 168 (deferring to legislative conclusion that "[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life").

Although the lower courts are bound to follow *controlling* Supreme Court precedent, the inherent inconsistencies in the Court's abortion decisions, highlighted by the dissenting opinions of Justices Thomas and Alito in *Hellerstedt*, send a clear message that *Hellerstedt* is limited to its facts *and evidentiary record*, and certainly did not establish a new bright line test for lower courts to follow, nor does it excuse the district courts from basing decisions on evidence rather than

assumptions.[3] When an issue is not "raised in briefs or argument nor discussed in the opinion of the Court . . . the case is not a binding precedent on this point." *United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 38 (1952); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (Supreme Court opinions that "have never squarely addressed [an] issue" do not constitute binding precedent.). As the Supreme Court has no precedent directly on point, this Court must decide the constitutionality of S.B. 2116, a law that applies only once a fetal heartbeat, an objective medical milestone, has been reached.

If the courts had simply assumed after *Stenberg* that partial birth abortion bans were unconstitutional, then *Gonzales v. Carhart* would have never happened.

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[3] In considering Arkansas laws requiring admitting privileges for abortion doctors, and that clinics comply with ambulatory surgical facility requirements, the Eighth Circuit has said:

> Despite the district court's assertions to the contrary, *Hellerstedt*'s analysis of the purported benefits of the law at issue were, of course, related to what the law in that case regulated: abortion in Texas. And so the Supreme Court recognized that "before the act's passage, abortion in Texas was extremely safe." *Id.* at 2311 (emphasis added) (internal quotation marks omitted).
>
> No such determination about abortion in Missouri was made here. Perhaps there was a unique problem Missouri was responding to under its inherent "police power." *See Barnes v. Glen Theatre, Inc*., 501 U.S. 560, 569, 111 S. Ct. 2456, 115 L.Ed.2d 504 (1991) . . . But, given no such inquiry was made—and no findings ascertained—we remand for the district court to do that which *Hellerstedt* instructed: "consider[ ] the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony" and then "weigh[ ] the asserted benefits against the burdens."

Comprehensive Health of Planned Parenthood Great Plains v. Hawley, 903 F.3d 750, 758 (8th Cir. 2018).

Similarly, if this Court had simply assumed after *Hellerstedt* that admitting privileges requirements for abortion doctors were unconstitutional *per se*, then it would have affirmed the district court's conclusion that Louisiana's admitting privileges law was unconstitutional. After *Hellerstedt*, it certainly appeared to many that any law requiring abortion doctors to hold admitting privileges at a local hospital must be struck down. Instead, in *June Medical Servs., L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018) ("*June I*") *reh'g and reh'g en banc denied* 913 F.3d 573 (Jan. 18, 2019) *stay granted* 139 S. Ct. 663 (Feb. 7, 2019), this Court upheld Louisiana's admitting privileges abortion law, despite the fact that the Supreme Court had struck down a functionally identical Texas law less than two years earlier. 905 F.3d at 791. *See also Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 758 (8th Cir. 2018) (district court considering challenge to Missouri's admitting privileges law could not assume the law was unconstitutional, but was required to balance the benefits and burdens specific to Missouri based on the evidentiary record). The difference was the evidentiary record, and the fact that this Court applied the large fraction test that had long been treated as a nullity by most courts. The additional evidence submitted by Louisiana proved that Louisiana's admitting privileges law passed constitutional muster, even though the virtually identical Texas law did not. *Id.*

Thus, regardless of how the large fraction test has been analyzed in other courts, in *this* Circuit, the large fraction analysis has teeth. The district court below did not perform undue burden balancing or perform a large fraction analysis.

The district court relied heavily on its previous 15-week ruling: "[t]his 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." ROA.1248-1249; RE4. In support of this analysis, the district court relied on a significant overreach by the majority in *Hellerstedt*, quoting Justice Breyer's statement that "we now use 'viability' as the relevant point at which a State *may begin limiting* women's access to abortion *for reasons unrelated to maternal health*." ROA.1248 (emphasis added). Justice Breyer's gratuitous statement relied on by the district court is both inaccurate and pure *dicta*.

Even in *Roe* the Supreme Court held that at the point of viability a state's interests become so compelling that it may ban abortion outright, subject to a maternal health exception. *Roe*, 410 U.S. at 163-64. Thus, a state's restrictive regulatory authority based on its interest in protecting unborn life does not *begin* at

viability—that is the point it becomes all but absolute—even under the most liberal interpretation of *Roe*. And such a broad interpretation of *Roe* was expressly rejected in *Casey* and *Gonzales*. *See Casey*, 505 U.S. at 881-83; *Gonzales*, 550 U.S. at 146.

Moreover, the Texas laws challenged in *Hellerstedt were* based on the State's interest in maternal health: "[u]nlike in *Gonzales*, the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health)." *Hellerstedt*, 136 S. Ct. at 2310. "[R]easons unrelated to maternal health" were not considered by the Court for the Texas laws struck down in *Hellerstedt*, so Justice Breyer's statement is a complete non-sequitur, *dicta*, and is not controlling.

The fetal heartbeat law at issue here *does* implicate "reasons unrelated to maternal health" because it furthers three different legitimate state interests: protecting maternal health, protecting unborn life, and protecting and regulating the medical profession. While merely one of those interests might be insufficient to justify a pre-viability abortion restriction, it remains an open question if some combination of those legitimate and substantial state interests could be sufficient. The Supreme Court has never explained how the undue burden balancing test is to

be performed when benefits and burdens that are by their very nature incommensurable are at issue, nor has this Court. Protection of unborn life, the very sanctity of human life, cannot be measured against or compared to the number of miles a woman must travel to obtain an abortion, the number of clinics that might close, or the number of hours a woman must wait to terminate her pregnancy.

Gonzales is the most recent Supreme Court case where the states' interest in protecting unborn life was squarely presented—and in that case the Court *upheld* Congress's decision to totally ban the partial birth abortion procedure based in large part on the legislative conclusion that "[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." *Gonzales*, 550 U.S. at 168. Both *Casey* and *Gonzales* permitted certain pre-viability restrictions on abortions and rejected strict scrutiny. Therefore, those cases should not be read narrowly, not expansively.

C. S.B. 2116 Advances Legitimate State Interests in Protecting Maternal Health, Protecting Unborn Life, and Protecting the Integrity and Ethics of the Medical Profession.

As a matter of science and medicine, life begins at conception. Justice

Kennedy acknowledged this indisputable fact in *Gonzales*: "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." 550 U.S. at 147. When an unborn child has developed a beating heart, it is a sign that the child has begun to "assum[e] the human form." *Id.* at 160. As opposed to a vague and constantly shifting concept of "viability," detection of a fetal heartbeat is an objective milestone, and also an extremely accurate indicator of the likelihood a fetus will survive until birth. *See* David F. Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform*, 74 Ohio St. L.J. 121, 140-146 (2013). "Full term survival, however, is not only seen in the indeterminate state of 'viability.' It can be predictably seen at an earlier point in time. Recent medical research has determined that although the miscarriage rate for all pregnancies may be as high as 30%, once a fetus possesses cardiac activity, its chances of surviving to full term are between 95%-98%. That extraordinary difference is the key in determining ultimate survivability." 74 Ohio St. L.J. at 140 & nn.119-123. Thus, the fetal heartbeat law protects the unborn who have a 95-98% chance of surviving to full term—if that viability is not extinguished by abortion.

S.B. 2116 also furthers the State's interest in maternal health, by preventing the deleterious effects of abortion on women which have been recognized by the

courts. *Gonzales*, 550 U.S. at 159 ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child . . . Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.") (internal citations omitted); *McCorvey v. Hill*, 385 F.3d 846, 851-53 (5th Cir. 2004) (Jones, J., concurring) ("Studies by scientists, offered by McCorvey, suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions"); *Planned Parenthood v. Rounds*, 686 F.3d 889 (8th Cir. 2012) ("With regard to whether the required disclosure is truthful . . . the State submitted into the record numerous studies published in peer-reviewed medical journals that demonstrate a statistically significant correlation between abortion and suicide. The studies were published in respected, peer-reviewed journals such as the *Obstetrical and Gynecological Survey*, the *British Medical Journal*, the *Journal of Child Psychology and Psychiatry*, the *Southern Medical Journal*, *and the European Journal of Public Health.*").

The law further protects maternal health by requiring abortions to be

performed earlier. Late term abortions have much higher complication rates than early term abortions. Further, in support of the 15-week law, H.B. 1510, the Mississippi legislature specifically found that "[a]bortion carries significant physical and psychological risks to the maternal patient" and that, "in abortions performed after eight (8) weeks' gestation, the relative physical and psychological risks escalate exponentially as gestational age increases." ROA.767. The study relied on by the legislature was Bartlett, et al., *Risk Factors for Legal Induced Abortion Related Mortality in the United States*, 103:4 OBS &GYN. 729-737 (2004). ROA.857-865. The Bartlett study reflects the following findings:

> During 1988-1997, the overall death rate for women obtaining legally induced abortions was 0.7 per 100,000 legal induced abortions. The risk of death increased exponentially by 38% for each additional week of gestation. Compared with women whose abortions were performed at or before 8 weeks of gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes. The relative risk (unadjusted) of abortion-related mortality was 14.7 at 13-15 weeks of gestation[.]

ROA.857. Further, the study found that the relative risk of mortality at 13-15 weeks was 14.7, whereas the risk was only 3.4 at 11-12 weeks of gestation. ROA.861. Thus, the level of risk almost quadruples between 11 weeks and 15 weeks of gestation. Therefore, it necessarily follows that by requiring abortions to be performed prior to the detection of a fetal heartbeat, i.e., 6-9 weeks LMP, S.B. 2116 also directly advances the State's legitimate and compelling interest in

protecting women from the increased risks of later term abortions.

S.B. 2116 is also based on the State's "interest in protecting the integrity and ethics of the medical profession." *Gonzales*, 550 U.S. at 157 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). Specifically, the Supreme Court has recognized that the states may "regulat[e] the medical profession in order to promote respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158. As a law intended to promote respect for life, S.B. 2116 also furthers the State's interest in protecting the ethics of the medical profession.

As interpreted by the Supreme Court in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the undue burden test requires a court to explicitly balance the benefits of a law against the burdens, to determine whether a particular burden imposed by a law is "undue." The district court did nothing of the kind. The district court did not balance any evidence offered by Defendants in support of either the 15-week law or the fetal heartbeat law against the purported burden associated with each law. Instead, the district court applied a bright line test, holding that any law preventing *any* woman from having a pre-viability abortion was *per se* unconstitutional. ROA.1249-50; RE4. In this regard, the district court's analysis of the fetal heartbeat law was both cursory and conclusory.

The district court's analysis was flawed further because it failed to even

acknowledge that neither this Court nor the Supreme Court has ever decided the constitutionality of an abortion restriction based on the presence or absence of a fetal heartbeat, an objective medical milestone. ROA.1248-50; RE4. The Supreme Court's abortion opinions are so convoluted and contradictory, that it is impossible to fully reconcile or harmonize those opinions, much less to conclude that a law such as S.B. 2116 is *per se* unconstitutional—without even trying to perform the analysis that supposedly governs a constitutional challenge to such a law. Because the district court failed to apply the undue burden test, ignored evidence of the benefits of the fetal heartbeat law, and erroneously concluded that prior precedents foreclose any possibility that S.B. 2116 might pass constitutional muster, the district court's decision was flawed as a matter of law. This Court should reverse the preliminary injunction, and remand this case for discovery concerning the benefits and burdens of S.B. 2116 and consideration of same under existing law.

II. S.B. 2116 Does Not "Ban" Abortion.

The categorical approach promoted by the Plaintiffs elevates a woman's right to choose to have a pre-viability abortion to be sacrosanct, surpassing constitutional protections for life, liberty, due process, freedom of religion, and speech. *See, e.g.*, *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 890 (1990) (upholding Oregon law prohibiting possession of peyote and

denial of unemployment benefits to members of Native American Church who used drug); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (upholding place and manner restriction on free exercise of religion); *Stotland v. Pennsylvania*, 398 U.S. 916, 919 (1970) ("States, of course, have the right to place reasonable regulations upon the time, place, and manner of the exercise of the rights of speech and assembly."); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding regulation on manner of speech). No other constitutional right has ever been given this type of exalted, inviolable status, such that even a law which could pass muster under strict scrutiny would be rendered invalid. *See Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health*, 888 F.3d 300, 312 (7th Cir. 2018) (Manion, J., concurring in part and dissenting in part) ("But when contrasted against the absolute nature of the putative right to pre-viability abortion, we see that abortion is now a more untouchable right than even the freedom of speech.").

S.B. 2116 does not "ban" abortion. To start with, a fetal heartbeat is not generally detectable until approximately 6-9 weeks LMP, and it may be as late as 12 weeks depending on the type of ultrasound examination performed. *See* Kathi A. Aultman, M.D., FACOG, *Written Testimony of Before the Ohio House Health Committee on S. B. 23* (Mar. 26, 2019) (citing Mitra, AG, et al., *Transvaginal*

Versus Transabdominal Doppler Auscultation of Fetal Heart Activity: a Comparative Study, Am. J. Obstet. Gynecol. (Jul:175(1):41-4 1996)), ROA.1178-92; *Planned Parenthood v. Reynolds*, No. EQCE 83074 at 2-3 (Jan. 22, 2019 Iowa Polk Cty. D. Ct.) ("Dr. Kathi Aultman ... states that the earliest a fetal heartbeat can be detected abdominally is 7 weeks, with most detected by 8 to 9 weeks and some not until 12 weeks into the pregnancy."); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 771 (8th Cir. 2015) (fetal heartbeat generally detectable at 6-8 weeks). Thus, S.B. 2116 would not apply to all abortions beginning at 6 weeks (rendering the term "6 Week Ban" a misnomer), and therefore does not ban women from obtaining abortions. S.B. 2116 *would* require many women to make the decision to have an abortion earlier in pregnancy. However, S.B. 2116 contains a life and health exception, which allows doctors to perform an abortion when the life or health of the pregnant mother is seriously threatened. ROA.1171; RE3. Instead of banning abortion, S.B. 2116 regulates the time period during which abortions may be performed. As such, it is akin to laws regulating the time, place, or manner of speech, which have been upheld as constitutional. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 107-08 (1972) (rejecting constitutional challenge to time limitation in First Amendment speech case). In the same way that such laws do not "ban" speech, S.B. 2116 does not "ban" pre-viability abortions. How many women

would be affected and unable to obtain abortions by the fetal heartbeat law cannot be determined with any specificity based on the current evidentiary record.

Because the bill does not ban all abortions, it is distinguishable from the Louisiana law struck down by this Court in *Sojourner T v. Edwards*, 974 F.2d 27, 28 (5th Cir. 1992), which criminalized abortions except under very limited circumstances. Since that time, this Court has not decided a case involving a law which prohibited some but not all abortions, and has not considered a law that restricts abortions based on the existence of a fetal heartbeat or beyond a specific gestational age. Therefore, it remains an open question as to how this Court would rule on the constitutionality of such a law.

CONCLUSION

For the reasons set forth above, Defendants-Appellants respectfully request that the district court's decision to grant a preliminary injunction barring enforcement of S.B. 2116 be reversed.

Respectfully submitted, this the 28th day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed electronically with the Clerk of Court using the Court's ECF system and thereby served on all counsel of record who have entered their appearance in this action.

THIS the 28th day of August, 2019.

s/Paul E. Barnes
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,293 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X4 in Times New Roman, 14 point.

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