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.,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

CLAUDIA HAMMERMAN
ALEXIA D. KORBERG
AARON S. DELANEY
CAITLIN GRUSAUSKAS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 AVE OF THE AMERICAS
NEW YORK, NY 10019
(212) 373-3000

HILLARY SCHNELLER
Counsel of Record
JULIE RIKELMAN
MICHELLE MORIARTY
JENNY MA
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street
New York, NY 10038
(917) 637-3777
hschneller@reprorights.org

ROBERT B. MCDUFF
MISSISSIPPI CENTER FOR JUSTICE
767 North Congress Street
Jackson, MS 39202
(601) 969-0802

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

Mississippi suggests there is a circuit split as to the standard under which courts analyze bans on abortion before viability. There is not. The circuit courts are unanimous as to the only question raised by this case—whether a pre-viability abortion ban is unconstitutional. There is thus no "burgeoning split of authority" that would or even *could* alter the outcome here.

ARGUMENT

This case turns on whether Mississippi can prohibit individuals from making the decision to terminate a pre-viability abortion after fifteen weeks. Brief in Opp. at 6-13. Like *every* other court addressing pre-viability abortion bans, the Fifth Circuit held Mississippi's ban unconstitutional. Now, in a supplemental brief, Mississippi points to two recent cases involving challenges to certain abortion regulations, neither of which involve a ban like that at issue here. *EMW Women's Surgical Ctr. v. Friedlander*, No. 18-6161, 2020 WL 6111008, at **15, 20 (6th Cir. Oct. 16, 2020) (upholding abortion regulation and remanding for further consideration); *Whole Woman's Health v. Paxton*, No. 17-51060, 2020 WL 6218657, at *9 (5th Cir. Oct. 13, 2020) (holding abortion regulation unconstitutional). Each of those regulations could conceivably be justified by a legitimate state interest, so long as they do not impose a substantial obstacle in the path of people seeking pre-viability abortion care.

That is not the case here. Mississippi's abortion ban *prohibits* individuals from making the ultimate decision whether to continue a pre-viability pregnancy after fifteen weeks. As this Court—and all of the courts of appeal that have considered the issue—have held, abortion bans like Mississippi's are unconstitutional because no

state interest is strong enough to support a pre-viability prohibition. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("Before viability, the state's interests are not strong enough to support a *prohibition* of abortion." (emphasis added)). Mississippi's ban is, by definition, a "substantial obstacle:" it imposes a total and insurmountable obstacle in the path of every person seeking a pre-viability abortion after fifteen weeks who does not fit within its narrow exceptions.

EMW Women's and *Paxton* neither inform nor alter that conclusion. Neither case contradicts the uniform agreement among the courts of appeal that pre-viability abortion bans are unconstitutional. *See* Brief in Opp. at 13-14. And nothing in this Court's recent *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), decision disturbs this Court's core holding, reaffirmed time and again, that the State cannot extinguish an individual's right to decide whether to continue a pre-viability pregnancy. Brief in Opp. at 6-13; *see also June Med. Servs.*, 140 S. Ct. at 2121 (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring in the judgment) ("*Casey* reaffirmed 'the most central principle of *Roe v. Wade*,' 'a woman's right to terminate her pregnancy before viability.'" (quoting *Casey*, 505 U.S. at 871)). The Mississippi ban is unconstitutional by any measure.

This Court should reject Mississippi's attempt to use an already meritless appeal to manufacture an issue that is entirely unnecessary to resolve this case.

CONCLUSION

For the foregoing reasons and those stated in Respondents' opposition, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CLAUDIA HAMMERMAN
ALEXIA D. KORBERG
AARON S. DELANEY
CAITLIN GRUSAUSKAS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON, LLP
1285 AVE OF THE
AMERICAS
NEW YORK, NY 10019
(212) 373-3000

HILLARY SCHNELLER
Counsel of Record
JULIE RIKELMAN
MICHELLE MORIARTY
JENNY MA
CENTER FOR
REPRODUCTIVE RIGHTS
199 Water Street
New York, NY 10038
(917) 637-3777
hschneller@reprorights.org

ROBERT B. MCDUFF
MISSISSIPPI CENTER FOR JUSTICE
767 North Congress Street
Jackson, MS 39202
(601) 969-0802

Dated: October 26, 2020.