No. 19-1392

In the

Supreme Court of the United States

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

Petitioners,

v.

JACKSON'S WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* CLEVELAND LAWYERS FOR LIFE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amici curiae are practicing attorneys, organized as Cleveland Lawyers for Life, who possess an acute interest in the furtherance of the legal protection for human life in all of its stages of existence.

SUMMARY OF ARGUMENT

Never before has the Court had the opportunity as now to consider arguments regarding the use of viability as a temporal line for review of abortion regulations. This case demonstrates the imperative need for reconsideration of the constitutional significance of viability in the abortion context. The Court's abortion jurisprudence is subject to reflection and modification in light of changed circumstances and the advance of medical knowledge. As states like Mississippi have attempted to protect fetal life based on advances in medical knowledge, the rigid application of viability as a bright line rule has frustrated compelling state interests in the protection of women's health, the integrity of the medical profession, and fetal life. Viability as a temporal limit to the prohibition of abortion is logically incoherent. The Court's reason for viability as a constitutional marker is the same as its definition. This ties the states' interests to the development of obstetrics rather than the development of the fetus, which should be the correct constitutional marker. Viability also suffers from the constitutional flaw of be-

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[1] All parties have consented to the filing of this amicus brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

ing vague and indeterminate. Viability is defined differently in obstetrics and is subject to too many external and subjective factors. The correct constitutional marker, of which viability is an example, is the physical manifestation of the humanity of the fetus. Mississippi can demonstrate that biological markers of the fetus' humanity exist at fifteen weeks' gestation.

ARGUMENT

I. There Is an Imperative Need for the Court To Consider Fully the Concept of Viability As a Temporal Line for Purposes Of Review Of Abortion Regulations.

Although the Court has re-examined and modified many aspects of its abortion jurisprudence since *Roe v. Wade*, it has yet to consider fully the concept of viability as a line that demarcates the state's predominant interest in preserving the life of the developing fetus. In *Roe*, the Court identified two different compelling state interests: to protect the health and wellbeing of the mother, and to protect the "potential" life of the unborn child. 410 U.S. 113, 150, 162 (1973). But, the Court declared that these interests were separate and distinct and "[e]ach grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'" *Id.* at 162-63. [2]

[2] It must be noted that aside from the health and wellbeing of the mother and the potential life of the unborn child, the Court in *Roe* also acknowledged the "important state interests in the areas of health and medical standards." *Id.* at 149. The Court has further maintained that the state "has an interest in protecting the integrity and ethics of the medical profession." *Gonzales v.*

The Court summarized the trimester-based framework as follows:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164-65. "Viability" was defined by the Court as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." *Id.* at 160.

Although the Court was not explicit regarding the standard of review for the abortion right in *Roe* itself,

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Carhart, 550 U.S. 124, 157 (2007) (quoting *Washington v. Glucksberg*, 521 U. S. 702, 731 (1997)).

subsequent decisions created an inference that the standard of review was strict scrutiny. *See, e.g., City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427-28 (1983).

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), however, the Court modified both the timing and nature of the state's interests in relation to abortion as well as the level of scrutiny afforded any such regulation. The Court specifically rejected the trimester-based framework as a "rigid prohibition on all previability regulation aimed at the protection of fetal life" and not part of the "essential holding" of *Roe*. 505 U.S. at 873. The flaws of the trimester framework were that "it misconceives the nature of the pregnant woman's interest[ ] and in practice it undervalues the State's interest in potential life." *Id.* Specifically, the Court criticized the trimester framework for forbidding any regulation of abortion designed to advance the state's interest in potential life before viability. *Id.* at 876. The Court clarified that the state's interest in potential life was "substantial" and remained substantial throughout the course of pregnancy, not just at the point of viability. *Id.*

In addition, the Court explicitly rejected strict scrutiny as the appropriate standard for reviewing abortion regulations and instead adopted the undue burden standard. *Id.* at 871. The Court defined an undue burden as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus." *Id.* at 877. The Court further explained that any regulation with the intent to further the interest in protecting the potential life of the fetus must be

"calculated to inform the woman's free choice, not hinder it." *Id.* Nevertheless, a state's regulations could express a preference for normal childbirth. *Id.* at 872-73. (citing *Webster v. Reproductive Health Services*, 492 U. S. 490, 511 (1989) (opinion of the Court) (further citations omitted)). Although the Court rejected the trimester-based framework, based on its analysis of the "essential holding" of *Roe*, the Court maintained viability as a "line" before which a woman has a right to terminate her pregnancy. *Id.* at 870. The reason articulated by the Court was that viability was "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." *Id.*

The Court continued to develop the nature of the state's interest and qualify the standard of review in *Gonzales v. Carhart*. 550 U.S. 124 (2007). In *Gonzales*, the Court expanded on the interests that a state has in regulating abortion. It upheld Congress's stated interest of prohibiting a procedure that would "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." *Id.* at 157 (quoting Congressional Findings (14)(N), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769). The Court explicitly approved of the state's interest in regulating conduct that "implicates additional ethical and moral concerns that justify a special prohibition" that "draw[s] a bright line that clearly distinguishes abortion and infanticide." *Id.* at 158 (quoting Congressional Findings (14)(G), in notes following 18 U. S. C.

§1531 (2000 ed., Supp. IV), p. 769). The Court also expressly held that the state "has an interest in protecting the integrity and ethics of the medical profession" in the context of abortion just as in other medical contexts. *Id.* at 157 (citing *Glucksberg*, 521 U.S. at 731).

The Court also attempted to clarify the use of the undue burden standard. Specifically, the Court held that a state's regulation of abortion was valid *"[w]here it has a rational basis to act*, and it does not impose an undue burden." *Id.* (*Emphasis* added). In upholding the partial birth abortion ban, the Court further reaffirmed that "legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Id.* at 163 (citations omitted).

The Court has shown, therefore, that its abortion jurisprudence is subject to reflection and modification in light of changed circumstances and the advance of medical knowledge. The courts below have, as have many other courts in other cases, used viability to dismiss Mississippi's case without sufficient guidance from the Court. Therefore, the time has come for the Court to scrutinize closely what viability means and what is its constitutional significance in the abortion context.

II. The Use of Fetal Viability As A Bright Line For Reviewing Abortion Regulations Is Logically Incoherent.

There is no principled rationale for "viability," as the Supreme Court defined it in *Roe*, to be the point at which abortions may be prohibited, absent an overriding health interest of the mother. The Court in *Roe* declared that the state's compelling interest in the

continued life of the fetus ripened at viability on the basis that "the fetus then presumably has the capability of meaningful life outside the mother's womb." 410 U.S. at 163. The Court failed to elaborate any further.

Roe's formula is that once a child can survive outside the mother's womb, the state can require her to keep it until birth. If the fetus cannot survive, she can have her pregnancy terminated, inevitably producing a dead child. The entire proposition is curiously contradictory. In effect, it says to a skipper of a lifeboat, "If there is someone in your boat who cannot swim, you may throw her overboard. But if she can swim, you must allow her to stay onboard until you reach shore."

The logic of the formula is backwards. If a state has a substantial interest in protecting the life of the developing unborn human, it should be able to require that the child be protected before viability in the only way it can be protected, by continuing to have it nurtured in its mother's womb. Conversely, if the human individual could survive outside its mother's womb, and the mother has a right to terminate her pregnancy, it is illogical to force the mother to continue the pregnancy to full term if the child could be delivered safely beforehand.

The Court's additional reasoning in *Casey*, that by failing to act by a certain point in her pregnancy a mother concedes to the state's intervention in her decision, 505 U.S. at 870, provides a rationale for the state to have some temporal limit on when it can begin

to prohibit abortions, but not one based specifically on viability, which would be irrelevant in such a case.[3]

In *Roe,* the Court mistook a definition for a syllogism.[4] Its definition of viability was constructed for the purpose of a rule to which it has no logical relevance. In obstetrics, viability has a completely different meaning - a pregnancy is "viable" if there are no indicators of miscarriage and there is a reasonable expectation that the pregnancy will result in the birth of a live infant.[5] Conversely, a nonviable pregnancy would be a pregnancy in which there is no chance of a live infant being born, such as an ectopic pregnancy, a molar pregnancy, or a pregnancy in which the fetus no longer has a heartbeat.[6] The obstetrical definition of a viable pregnancy is not measured by the survivability of the fetus outside the womb at a particular point in pregnancy, but the likelihood that the fetus will survive *in the womb* until natural birth.

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[3] In fact, most countries prohibit abortion much earlier in the pregnancy – the most common date for countries that otherwise restrict abortion absent certain justifications is after twelve weeks gestation. *See* Center for Reproductive Rights, *The World's Abortion Laws* available at https://reproductiverights.org/sites/default/files/documents/World-Abortion-Map.pdf (current as of April 26, 2019).

[4] *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920, 924 (1973).

[5] Krissi Danielsson, *Viable Pregnancy (Viability)* ABOUT (May 31, 2008) (available at http://miscarriage.about.com/od/pregnancylossbasics/g/viability.htm).

[6] *Id.*

Justice O'Connor implicitly recognized this in her dissent in *City of Akron v. Akron Center for Reproductive Health*. She argued, "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life…The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." 462 U.S. at 460-61 (O'Connor, J., dissenting) (*Emphasis* in original). Justice White agreed, dissenting in *Thornburgh v. American College of Obstetricians and Gynecologists*, that the "State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability." 476 U.S. 747, 795 (1986)(White, J., dissenting). Justice Scalia also recognized the viability rule as "arbitrary" and criticized the Court's rationale for it as "conclusory." *Casey*, 505 U.S. at 989, fn. 5 (Scalia, J., concurring and dissenting).

Responding to Justice White's criticism, Justice Stevens did not defend viability specifically as a point at which a state's interest may be compelling, but defended the general idea that a state's interest becomes compelling as a fetus develops. Specifically, Justice Steven's argued that such development includes "the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings." *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring). The fetus's capacity to feel pain, experience pleasure,

and react to its surroundings is exactly what Mississippi has found exists at the gestational age of fifteen weeks.

As our scientific understanding of human development continues to grow, states have come to recognize the value of the life of the fetus at various stages in its development. But the arbitrary nature of the viability standard stands in the way of the states' ripening substantial interests and must now be reexamined and rejected.

III. The Use of Fetal Viability As A Bright Line For Reviewing Abortion Regulations Is Vague And Indeterminate

Viability, as the Court has defined it, is vague and imprecise, effectively frustrating the states' compelling interest to protect fetal life. In *Roe*, the Court opined that viability usually occurred at 28 weeks, but could occur as early as 24 weeks. 410 U.S. at 160. By the time of *Casey*, the Court had acknowledged that advancements in science and medicine would continue to affect when viability occurred. The best that the Court could do was to admit that its viability standard was "an imprecision within tolerable limits." 505 U.S. at 870. Obviously, chances of surviving birth increase with the length of the pregnancy,[7] but determining whether a *particular* infant within a *particular* pregnancy will survive birth is problematic. Usu-

[7] *See* Alan T.N. Tita, et al, *Preterm Neonatal Morbidity and Mortality by Gestational Age: A Contemporary Cohort*, 2016 AM. J. OBSTET. GYNECOL. 215 (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4921282/).

ally based on an ultrasound, a physician will determine the crown-rump length of the fetus and/or fetal head circumference. She will then estimate the gestational age. But because of variables, such as time of ovulation, when the last menstrual period (LMP) occurred, and the pace in which a particular fetus grows, the calculations of gestational age have been notoriously inexact. One recent study concluded:

> Estimates of current gestational age represent moving averages over heterogeneous data recorded with substantial timing error. … In all estimation techniques …the absolute accuracy of the gestational age estimate deteriorates—as the pregnancy advances. For example, using ultrasound to measure the fetal head circumference midgestation to estimate gestational age assumes that all fetuses of the same gestation have the same measurement, which is intrinsically inaccurate. Consequently, accurate determination of gestational age, arguably one of the most important fetal characteristics, has remained challenging.[8]

Within this range of potential states of viability, as the Court has acknowledged, there are a number of additional external and subjective factors that determine whether a fetus can actually survive outside the

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[8] Abbas Ourmazd et al., *Achieving Accurate Estimates of Fetal Gestatitonal Age and Personalised Predictions of Fetal Growth Based on Data from an International Prospective Cohort Study: A Population-Based Machine Learning Study*, 2 Lancet Digit Health e368 (2020) (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7323599/).

womb: "fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors." *Colautti v. Franklin*, 439 U.S. 379, 395-96 (1979). Other factors include whether the mother smokes and the altitude at which the mother lives.[9] There are further discrepancies due to a child's gender and race: Female fetuses become viable earlier than males, and African-American fetuses become viable earlier than Caucasians.[10]

The most important consideration in preterm birth survival, however, is the ability to provide immediate treatment to a preterm baby.[11] The confidence of the medical practitioner can make it as high as 18 times more likely that a fetus will actually survive.[12] The converse is seen in particular where there is an incorrect presumption that most if not all survivors will

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[9] Randy Beck, *State Interests and the Duration of Abortion Rights*, 44 MCGEORGE L. REV. 31, 39 (2013).

[10] Steven B. Morse et al., *Racial and Gender Differences in the Viability of Extremely Low Birth Weight Infants: A Population-Based Study*, 117 PEDIATRICS 106, 110 (2006).

[11] *See* C. H. Backes et al., *Outcomes Following a Comprehensive Versus a Selective Approach for Infants Born at 22 Weeks of Gestation*, 39 J. PERINATOLOGY 39, 45 (2019); *see also* M. A. Rysavy, et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infant*s, 372 NEW ENGL. J. MED. 1801 (2015).

[12] *See* Jay D. Iams, *Preterm Birth*, in Steven G. Gabbe et al., OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES 755, 812 (4th ed. 2002)(stating "A study of 66 infants with birth weights between 500 and 749 g found that after controlling for birth weight and gestational age, fetuses who were considered 'viable' (i.e., likely to survive) were 18 times more likely to survive than fetuses who were deemed previable").

have severe disabilities.[13] The experience of the staff is most important – even where there is a high concentration of newborn intensive care units ("NICUs"), the fewer preterm births per units results in a lower probability of preterm birth survival.[14] What this Court should find most disturbing is the effect on viability based on socioeconomic factors. For example, even though African American fetuses reach viability earlier than fetuses of other races, they suffer the highest infant mortality rates.[15]

In *MKB Mgmt. Corp. v. Stenehjem*, the Eighth Circuit Court of Appeals acknowledged that in using viability as a tipping point between the mother's right and the state's interests, "the Court has tied a state's interest in unborn children to developments in obstetrics, not to developments in the unborn." 795 F.3d 768, 774 (8th Cir. 2015). The circuit court criticized this standard on the basis that "the same fetus would be deserving of state protection in one year but undeserving of state protection in another." *Id.* Instead the

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[13] P. Watkins et al., *Outcomes at 18 to 22 Months of Corrected Age for Infants Born at 22 to 25 Weeks of Gestation in a Center Practicing Active Management*, 217 J. Pediatrics 52 (2020).

[14] R. Patel et al., *Survival of Infants Born at Periviable Gestational Ages*, 44 Clinics in Perinatology 287 (2017).

[15] *See, e.g.,* E. Nehme, et al., *Infant Mortality in Communities across Texas*, The University of Texas (2012)(available at https://www.utsystem.edu/offices/population-health/overview/infant-mortality-rates-texas); *Compare* Sierra A. Hajdu et al. *Factors Associated With Maternal and Neonatal Interventions at the Threshold of Viability*, 135 Obstetrics & Gynecology 6, 1398-1408 (2020)(finding being of black race was negatively associated with maternal interventions but positively associated with neonatal interventions).

court argued that the states have a better ability to account for advances in medical and scientific technology and, thus, the critical point at which a fetus' life may be protected should be left to the discretion of the states. *Id.* The circuit court urged this Court to reevaluate the viability standard because the standard "discounts the legislative branch's recognized interest in protecting unborn children." *Id.* at 776. *Accord Little Rock Family Planning Servs. V. Rutledge,* 984 F.3d 682, 692 (8th Cir. 2021) (Shepherd, J., concurring); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health* 888 F.3d 300, 315 (7th Cir. 2018) (Manion, J., concurring in part, dissenting in part).

The Eighth Court of Appeals had it right. The states have a much better capability of determining a more "consistent and certain marker than viability." *See id.* at 774. That constitutional marker is any biologically developed attribute that attests to the humanity of the fetus.

IV. The State's Interest In Preserving Fetal Life Becomes Predominant When the Biological Humanity of the Fetus Becomes Manifest.

The state's interest in the life of the fetus should be recognized as compelling at the point at which the fetus can be recognized as a human person transitioning to birth. Biological markers are the best determinants. They are the physical manifestations of the humanity of the fetus. *Compare Gonzales*, 550 U.S. at 160 (describing the fetus as "a child assuming the human form").

The Court's selection of viability as a marker, as noted by Justice Steven's concurrence in *Thornburgh*, can be qualified as such a physical manifestation. This is most evident when one considers the other aspects of fetal development during the last trimester. At nineteen to twenty weeks after conception, the earliest point in time at which viability can currently occur, a fetus has fingerprints – certainly an individual identifier – and begins to form eyebrows and eyelashes.[16] At twenty-three weeks, a fetus can recognize its mother's voice.[17]

Mississippi can prove that the relevant attributes of humanity of the fetus, for purposes of the Constitution, are apparent at fifteen weeks' gestation. Particular biological aspects of the fetus's humanity develop earlier, but Mississippi finds that the constellation of biological attributes by the time of 15 weeks' gestation are unmistakable determinations of the humanity of the fetus.

Mississippi has found that the developing biological attributes include the following:

1) Cardiac activity commences between five and six weeks

2) Fetal motion begins at approximately eight weeks

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[16] Embryonic & Fetal Development, South Carolina Department of Health and Environmental Control, available at https://scdhec.gov/sites/default/files/Library/ML-017049.pdf

[17] *Id.*

3) At nine weeks, teeth and eyes are present,[18] as well as external genitalia

4) Internal organs are functioning by ten weeks

5) At twelve weeks, the fetus "can open and close his or her fingers, starts to make sucking motions, and senses stimulation from the world outside the womb."[19]

Further, Mississippi proffered the testimony of Dr. Maureen Condic, an expert in neurobiology, anatomy, and embryology, who would have testified as follows:

- The scientific evidence regarding the development of human brain structures is entirely uncontested in the literature and unambiguously indicates that by [10-12 weeks LMP], a human fetus develops neural circuitry capable of detecting and responding to pain.

- During the period from [14-20 weeks LMP], spinothalamic circuitry develops that is capable of supporting a conscious awareness of pain.[20]

This assemblage of biological markers of the fetus manifests its humanity and entitle Mississippi to af-

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[18] Like fingerprints, teeth and eyes can be qualified as individual identifiers as well as general biological markers of humanity.

[19] Pet.App.65a-74a.

[20] Pet.App.75a at¶ 3.

ford it legal protection. When this interest is considered with Mississippi's other compelling interests of the protection of the health of the mother and the integrity of the medical profession and society, Mississippi has satisfied its burden in prohibiting abortions at fifteen weeks LMP.

CONCLUSION

The viability standard should be jettisoned in favor of the point at which the physical humanity of the fetus has become biologically manifest. Mississippi has met that burden of proof. The decision of the Fifth Circuit Court of Appeals should be reversed.

July 2021 Respectfully submitted,

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