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 WOMEN'S HEALTH ORGANIZATION, ON BEHALF OF ITSELF AND ITS PATIENTS, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE ROMAN CATHOLIC DIOCESE OF JACKSON AND THE ROMAN CATHOLIC DIOCESE OF BILOXI IN SUPPORT OF PETITIONERS

Christian Strickland, Esq.
Counsel of Record
Schwartz, Orgler
& Jordan, PLLC
2355 Pass Road, Suite B
Biloxi, MS 39531
Telephone: (228) 388-7441
Facsimile: (228) 388-7442
christian@sojlaw.net

Stephen J. Carmody, Esq.
Brunini, Grantham,
Grower & Hewes, PLLC
Post Office Drawer 119
Jackson, MS 39205-0119
Telephone: (601) 948-3101
Facsimile: (601) 960-6902
scarmody@brunini.com

Counsel for Amici, the Roman Catholic Diocese of Jackson and the Roman Catholic Diocese of Biloxi

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Amicus curiae, the Roman Catholic Diocese of Biloxi, Mississippi and the Roman Catholic Diocese of Jackson, Mississippi, respectfully submit this brief supporting the Petition for Writ of Certiorari filed by Appellants.[1]

INTEREST OF AMICI CURIAE

The Roman Catholic Diocese of Jackson, Mississippi, and the Roman Catholic Diocese of Biloxi, Mississippi (collectively "Church" and/or "Amici") are ecclesiastical entities of the Roman Catholic Church. Amici are the two Roman Catholic Dioceses in Mississippi. Mississippi's only abortion facility, Jackson Women's Health Organization, is located in Jackson, Mississippi, within the boundaries of ministry of the Diocese of Jackson. The Church has vested interests in this matter - - the dignity and sanctity of all human life. The Church offers a valuable perspective and humbly submits this amicus curiae brief in furtherance of the interests of justice.

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[1] Pursuant to Rule 37.2(a), amici have received written consent to the filing of this brief from all parties. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

As a matter of first impression, this Court should find that the state's interest in protecting unborn children who have the capacity to feel pain is sufficiently compelling to support a limited prohibition on abortion. The Court should grant the petition for writ of certiorari and reverse the Fifth Circuit's decision because H.B. 1510 is a valid regulation under *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). Furthermore, the exclusion of any discovery or briefing on fetal pain, which is clearly relevant to examination of an abortion regulation's constitutionality, is reversible error. Amici pray that the Court, following the granting of the Appellants' petition for certiorari, dissolve the district court's restraining order and declare H.B. 1510 constitutional, or, alternatively, reverse the district court's summary judgment order and remand for further proceedings, including broad discovery on the issue of fetal pain.

ARGUMENT

I. The Court Should Grant Certiorari and Reverse the Fifth Circuit Because H.B. 1510 is a Valid Regulation Under *Gonzales v. Carhart*, 550 U.S. 124 (2007).

The Court should find that the state's interest in protecting unborn children who have the capacity to feel pain is sufficiently compelling to support a limited prohibition on abortion. This is a matter of first impression. Teresa S. Collett, *Previability*

Abortion and the Pain of the Unborn, 71 Wash. & Lee L. Rev. 1211, 1226 (2014). Therefore, the Court should grant certiorari and decide this issue.

The Court should grant the Petition and reverse the Fifth Circuit because H.B. 1510 is, in fact, a lawful regulation. The United States Supreme Court has held that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express **profound respect for the life of the unborn are permitted**, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (emphasis added) (*citing Pennsylvania v. Casey*, 505 U.S. 833 (1992)). The purpose of H.B. 1510 is to protect those unborn children who, at fifteen weeks gestation, have the capacity to feel pain. *See*, Petition for Writ of Certiorari, *passim*. The government supplied expert evidence on this point (which was excluded by the district court). Furthermore, as the Court in *Gonzales* opined: **[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted** if they are not a substantial obstacle to the woman's exercise of the right to choose to terminate unwanted pregnancy." *Id*. (emphasis added).

"The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales,* at 153 (parallel citations omitted). In accordance with *Gonzales,* a State may enact abortion regulation pursuant to legitimate governmental interests, such

as profound respect for the life within the woman: "The government may use its voice and its regulatory authority to show its profound respect for the life within the woman… [t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.* (citations omitted) (emphasis added). Under *Gonzales*, jurisprudence mandated that the Fifth Circuit consider that **"[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 . . .."** *Id.* at 157 (emphasis added). If it has a rational basis and its regulations do not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn. *Gonzales v. Carhart*, at 157–58.

As the *Gonzales* Court observed, "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child." *Id.* at 159. In fact, *Gonzales* uses the word "respect" in this context **six times** in the opinion, specifically referring to respect for life, respect for the mother, and respect for the unborn child. *Id*. at 146, 157, 159, 160, and 163. Respect for life is clearly shown in *Gonzales* to be a sufficient governmental interest in abortion regulations.

This Court has upheld regulations which further legitimate governmental interests. In *Texas Med. Providers Perf. Abortion Services v. Lakey*, 667

F.3d 570, 581 (5th Cir. 2012), this Court held that informed consent laws do not impose undue burden on woman's right to have abortion and are permissible if they require truthful, nonmisleading, and relevant disclosures. For facial constitutional challenges to abortion regulations, abortion providers can prevail by demonstrating that the regulation will operate as a substantial obstacle to a woman's right to choose an abortion. *Id.* at 802. The balancing test for determining whether an abortion restriction imposes an undue burden on a woman's right to choose an abortion is not a pure balancing test under which any burden, no matter how slight, invalidates the restriction; instead, the burden must be substantial. *Id.* A minimal burden even on a large fraction of women does not undermine the right to abortion by imposing an undue burden. *Id*.

The review of an abortion regulation requires a fact intensive analysis in the context of the determination of whether an "undue burden" exists. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)). Here, neither the district court, nor the Fifth Circuit, conducted a sufficient fact intensive analysis. The Fifth Circuit, with no factual analysis found: (1) any law which prohibits any abortion prior to viability is unconstitutional; (2) H.B. 1510 related to unborn children at fifteen weeks gestation; (3) fifteen weeks gestation is prior to viability; and, (4) therefore, H.B. 1510 is unconstitutional. The courts' rulings, however, are an oversimplification of *Gonzales*. The district court and the Fifth Circuit turned a blind eye to the instruction found in *Gonzales.* Concentrating only on the issue of viability is reversible error. Here, there is ample precedent for this Court to find H.B. 1510 constitutional. H.B.

1510 is a valid and lawful regulation designed to advance legitimate governmental interests in the unborn child's life, the mother's safety, and furtherance of the dignity of the medical profession (specifically, to do no harm as in the Hippocratic Oath, *e.g.,* fetal pain would certainly constitute harm). The district court and the Fifth Circuit did not apply *Gonzales* correctly and utterly failed to conduct an analysis of the government's rational basis and interests. If the Fifth Circuit would have conducted the proper constitutional analysis, it would have most certainly found the law to be constitutional.

The Fifth Circuit's decision is incongruent with its own recent decision regarding abortion regulations. *In re Abbott*, 954 F.3d 772, 791 (5th Cir. 2020) (Finding, *inter alia*, that "based on this record we conclude that GA-09—an emergency measure that postpones certain non-essential abortions during an epidemic—does not "beyond question" violate the constitutional right to abortion."). The Fifth Circuit disagreed with the lower court's conclusion that the GA-09 abortion regulation was a "ban." *Id.* at 788. The Fifth Circuit found that a State may regulate abortions in a time of pandemic and that GA-09 was a lawful regulation based on the record. *Id.* at 791. Here, however, the trial court did not allow a record to develop and banned any discovery on fetal pain. The Fifth Circuit affirmed. However, absent a proper constitutional analysis and complete record, the Fifth Circuit's determination was arbitrary.

The time has come for this Court to examine whether the current law on abortion should be clarified in light of a State's interests in protecting

the sanctity of life. *See, Harris v. W. Alabama Women's Ctr.*, 139 S. Ct. 2606, 2607 (2019) (denying petition for certiorari regarding Alabama law which prohibited "dismemberment abortions.") (Justice THOMAS, concurring) (Noting that the "undue burden" standard is an "aberration of constitutional law," and that "our abortion jurisprudence has spiraled out of control."); *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019) (*citing Akron v. Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 452, n. 45, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983)) ("[A] State has a "legitimate interest in proper disposal of fetal remains"); *Cf. Stenberg v. Carhart*, 530 U.S. 914, 965 (2000) (Justice KENNEDY, dissenting, recognizing a State's "important interests regarding the sanctity of life…").

This Court has "struggle[d] to find a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not…" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1424 (2020) (Justice Thomas, Concurring) (*citing Obergefell v. Hodges*, 576 U. S. 644, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857)). Here, there remain two unanswered questions:

- Does an unborn child have a *fundamental right* to be free from pain in the womb?
- Does the State have a legitimate governmental interest in regulating medical procedures

> so that the most defenseless of our society are protected from the cruel pain of abortion?

Summary judgment was improper and the trial court should have allowed discovery. *See, infra*. Because neither the district court, nor the Fifth Circuit, adequately considered the ramifications of *Gonzales*, the lower court erred in not accurately applying its mandatory authority, and the Fifth Circuit committed reversible error in declaring H.B. 1510 unconstitutional. Accordingly, the Court should reverse these rulings.

II. The Court Should Reverse the Fifth Circuit Decision Supporting the Exclusion of Discovery or Briefing on Fetal Pain.

Fetal pain is relevant in this case. Under the Federal Rules of Evidence, if a matter is relevant, it is admissible. FRE 402. Whether an unborn child can feel pain when a doctor aborts, or, kills it, it is clearly relevant to a law which forbids abortions at a time when the unborn child can feel pain. Simply avoiding the issue of fetal pain and focusing only on viability is improper.

"To support th[e] interest [in avoiding pain in the unborn baby], Mississippi proffered the declaration of an expert, Dr. Maureen Condic, a professor of neurobiology at the University of Utah who specializes in the development and regeneration of the nervous system." *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 279 (5th Cir. 2019) (Ho, Concurring). "In her declaration, Dr. Condic

explained that, based on current scientific evidence, "[d]uring the time period covered by [HB 1510], the human fetus is likely to be capable of conscious pain perception." *Id.* Dr. Condic further indicated "that fetuses may be able to feel pain as early as ten weeks from the last menstrual period (LMP), when '[t]he neural circuitry responsible for the most primitive response to pain ... is in place.' At that point, the 'fetus ... actively withdraw[s] from ... painful stimulus.'" *Id.* Dr. Condic noted that it was "universally accepted" that a fetus has a neural network "capable of pain perception" at some point "between [14–20] weeks" of the LMP. *Id.* at 280-281. Dr. Condic discussed various studies showing that fetuses physically respond to painful experiences, including "a recent review of the evidence" that "conclude[d] that from the [fifteenth week LMP] onward, 'the fetus is extremely sensitive to painful stimuli, and that this fact should be taken into account when performing invasive medical procedures on the fetus.' " *Id.* at 281.

Based on Dr. Condic's conclusion, the State has argued "that nontherapeutic (that is, medically unnecessary) abortions after fifteen weeks LMP . . . undermine the State's interest in the life of the unborn child." *Id.* Judge Ho opined that "**[a] State has an unquestionably legitimate (if not compelling) interest in preventing gratuitous pain to the unborn**. Consider how the Supreme Court has construed the Cruel and Unusual Punishments Clause of the Eighth Amendment to forbid executions of convicted murderers that involve unnecessary pain." *Id.* at 280 (emphasis added). Judge Ho added, in no uncertain terms, "[i]f courts grant convicted murderers the right to discovery to

mitigate pain from executions, there's no reason they shouldn't be even more solicitous of innocent babies." *Id.* at 282. Viability is not the only question.

Whether fetal pain exists during an abortion at fifteen weeks gestation is clearly a matter of legitimate governmental interest under *Gonzales*. *See also*, *Previability Abortion and the Pain of the Unborn*, 71 Wash. & Lee L. Rev. 1211 at 1218-1224. It is also relevant to "the evolving standards of decency that mark the progress of a maturing society…" *Roper v. Simmons*, 543 U.S. 551 (2005) (*citing Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion). When *Roe v. Wade*, 410 U.S. 113 (1973), was decided, medical advancements were not present then as they are now. *Roe v. Wade*, 410 U.S. 113 (1973). Neonatologists are making enormous medical gains in treating premature infants and the date of viability continues to reset to an earlier date. Therefore, *Roe* jurisprudence, culminating most recently in *Gonzales*, should evolve and take into account current standards of decency and medical advancements, specifically in the fields of neonatology and embryology.

The United States Supreme Court has at times looked to religious authorities to shed light on issues of morality that come before the Court. *See, Atkins v. Virginia*, 536 U.S. 304, 316 (ft. 21) (2002) (Citing to brief amicus curiae of the United States Conference of Catholic Bishops in capital case). Amici would humbly show that, at some point, a sense of morality, and indeed, logic, must prevail in the courts on this issue. How is it that Mississippi law recognizes that an unborn baby can be a victim of a crime, and can have property rights, and yet the label of personhood at fifteen weeks gestation is

denied them? See, *Childs v. General Motors Corp.*, 73 F. Supp. 2d 669 (N.D. Miss. 1999) (although the mother was only six weeks pregnant and had not reached the stage of viability when her husband, the father of the child, died, the child could recover); Miss. Code Ann. § 97-3-37 ("[T]he term "human being" includes an unborn child at every stage of gestation from conception until live birth and the term "unborn child" means a member of the species homo sapiens, at any stage of development, who is carried in the womb."); *Cf. Seal v. State*, 131 So. 3d 594 (Miss. Ct. App. 2013).

How is it that a 24-week-old baby, born premature, can clearly exhibit signs of pain, cry when a nurse sticks him or her with a needle, and yet courts do not want to hear about that pain if it occurs inside the womb just nine weeks earlier? How is it that a newborn baby can scream and tremor non-stop for hours after birth while it withdraws from the drugs its mother used all during pregnancy, and yet courts do not want to hear evidence of that nexus between the baby inside the womb and the baby outside the womb? Is personhood a legal fiction, or does it have existential meaning? Does Lady Justice's blindfold mean that she sees all persons, indeed, the born and the unborn, equally? Should Lady Justice turn a blind eye to the cry of the unborn child, sucking its thumb, hidden in the sacred dark refuge of his or her mother's womb, only to have that womb become a tomb? Justice should not abandon the unborn child.

One of the most important roles of law is to fight for those who cannot fight for themselves. When the district court found fetal pain was not subject to discovery, it committed reversible error. It

ruled against the most fundamental of all constitutional rights -- life. The right to life is, according to the Declaration of Independence, "self-evident." It is the sacred duty of our government to protect and respect this right, and the State of Mississippi has a legitimate interest to protect this right as set forth in H.B 1510.

The Church submits its support for the dignity of every unborn child. "Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person - among which is the inviolable right of every innocent being to life." Catechism of the Catholic Church, at paragraph 2270.

The Church opens its arms to the mothers who have had abortions and who are contemplating abortions. The Church opens its arms to the doctors who perform abortions. The Church opens its arms to the unborn children who are unwanted and bears them up to the compassion of our loving Creator. The Church submits this amicus curiae brief in support of H.B. 1510, in support of the dignity of the human person, especially the unborn, and also in support of the mothers of unborn children. "Before I formed you in the womb I knew you." Jeremiah 1:5.

CONCLUSION

As a matter of first impression, this Court should find that the state's interest in protecting unborn children who have the capacity to feel pain is sufficiently compelling to support a limited prohibition on abortion. The Court should grant the petition for writ of certiorari and reverse the Fifth Circuit's decision because H.B. 1510 is a valid regulation

under *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). The petition should also be granted, and the Fifth Circuit reversed, for affirming the exclusion of any discovery or briefing on fetal pain. Amici pray that the Court, following the granting of the Appellants' petition for certiorari, dissolve the district court's restraining order and declare H.B. 1510 constitutional, or, alternatively, reverse the district court's summary judgment order and remand for further proceedings, including allowing broad and lawful discovery.

Respectfully submitted,

Christian Strickland, Esq.
MSB NO. 104474
USSC Bar Number 307815
Schwartz, Orgler & Jordan, PLLC
2355 Pass Road, Suite B
Biloxi, MS 39531
Telephone: (228) 388-7441
Facsimile: (228) 388-7442
christian@sojlaw.net

Stephen J. Carmody, Esq.
MSB NO. 8345
Brunini, Grantham, Grower & Hewes, PLLC
Post Office Drawer 119
Jackson, MS 39205-0119
Telephone: (601) 948-3101
Facsimile: (601) 960-6902
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Counsel for Amici, the Roman Catholic Diocese of Jackson and the Roman Catholic Diocese of Biloxi