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 Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF TRINITY LEGAL CENTER IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Amicus Trinity Legal Center is a nongovernmental corporate entity, and it has no parent corporations and no publicly held corporations hold 10% or more of their stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Both parties have given consent to file this Amicus Curiae brief. Counsel for Amicus has prepared this brief supporting Petitioners.[1]

Trinity Legal Center is a nonprofit foundation that works with women who are considering an abortion to provide accurate information and educational materials concerning abortion and the development of their unborn child which is necessary to make an informed decision. The Center also represents post-abortive women who attest to the physical and psychological harm that abortion causes them. These women know from their personal experience the physical, psychological, and emotional injuries that abortion causes and, particularly women who have had second and third trimester abortions. These injuries are both short-term and long-term.

This case is of great national importance and consequence because it goes to the heart of this Court's abortion jurisprudence. Amicus respectfully contends that previability laws protect the physical and psychological health of women and the life of her unborn child

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Trinity Legal Center is a nonprofit corporation and is supported through private contributions of donors who have made the preparation and submission of this brief possible. No person other than Amicus Curiae, its counsel, or donors to Trinity Legal Center made a monetary contribution to its preparation or submission. The parties have consented to this brief.

without causing an undue burden, and therefore, are constitutional.

SUMMARY OF THE ARGUMENT

I.

As has been widely stated by Justices and commentators, viability is an arbitrary standard that is outmoded with current medical science and technology. Therefore, this Court should consider the suggested alternative standard that does not have the many variables that determine viability. There have also been a myriad of scientific and technology advances that were not known by the *Roe* Court in 1973 which make the viability standard outmoded. In addition, the viability standard in the abortion context is in conflict with other areas of the law, and therefore, the law should be uniform in protecting the unborn child.

II.

This Court has given broad deference to legislative findings and enactments. Because health issues such as abortion are complex issues that are both fact bound and involve national and state policy, they are best left to the legislative branches of government. The Mississippi Legislature made detailed findings when it decided to protect both mothers and their unborn children. Thus, the provisions of HB 1510 are within this Court's constitutional framework and should be upheld.

ARGUMENT

I. THE VIABILITY STANDARD IS ARBITRARY AND OUTMODED WITH CURRENT MEDICAL SCIENCE AND TECHNOLOGY, AND THEREFORE, THIS COURT SHOULD ABANDON IT.

A. Justices and Commentators Have Correctly Criticized the Viability Standard as Arbitrary and Outmoded, and Therefore, the Suggested Alternative Standard Should Be Used.

Origin of the Viability Standard

The origin of the Supreme Court's viability standard was in *Roe v. Wade*[2] where this Court stated in three short sentences the rationale that: "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications."[3]

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[2] Roe v. Wade, 410 U.S. 113 (1973). For a critique of Roe v. Wade, *see*, *e.g.*, Horan & Thomas, *Roe v. Wade: No Justification in History, Law, or Logic* (1987), *available at* https://studylib.net/doc/8127662/roe-v.-wade--no-justification-in-history--law--or-logic; Schlueter, *40th Anniversary of Roe v. Wade: Reflections Past, Present, and Future*, 40 OHIO NO. U.L. REV. 105 (2013).

[3] Roe v. Wade, 410 U.S. 113, 163 (1973). For a critique of the viability rule, *see generally* Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 113 ST. LOUIS U. PUB. L. REV. 15 (1993).

Although the *Casey* Court rejected *Roe*'s trimester framework, it continued to apply the viability standard as the dividing line stating "there is no line other than viability which is more workable,"[4] and thereby, used that standard in determining the State's compelling interest in preserving fetal life. But, in 1992, the *Casey* Court believed that the viability dividing line was at 23 or 24 weeks,[5] which is not the case for the unborn child today due to medical science and technological advancements.

Criticism of the Standard

The "logical and biological justifications" for the viability standard, however, began to fade a mere decade later when Justice O'Connor opined that under this rationale "As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."[6] She contended that the "state interest in potential human life is likewise extant throughout pregnancy."[7] She challenged the reasoning in *Roe* by stating that:

> The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or

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[4] Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992) (plurality).

[5] *Id*.

[6] City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 458 (1983) (O'Connor, J. dissenting).

[7] *Id*. at 460.

> afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to 'resolve the difficult question of when life begins,' the Court chose the point of viability – when the fetus is *capable* of life independent of its mother – to permit the complete proscription of abortion. 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. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.[8]

Justice O'Connor repeated her belief that the State's interest exists throughout pregnancy in *Thornburgh*.[9] Justice White also articulated that the State has a compelling interest in protecting potential human life throughout pregnancy.[10] He stated that the "State's interest, if compelling after viability, is equally compelling before viability."[11]

Justice Scalia opined in *Casey* that Justice O'Connor was correct in her view that the viability standard

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[8] *Id*. at 461 (emphasis in original; citations omitted).

[9] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J. dissenting) (stating "State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy' ").

[10] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 795 (1986) (White, J. dissenting).

[11] *Id*.

was arbitrary.[12] He continued: "The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "'can in reason and all fairness' be thought to override the interests of the mother." He argued:

> Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.[13]

This Court in *Webster* questioned "why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."[14] This was a valid question and this Court should provide an adequate constitutional rationale

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[12] Planned Parenthood v. Casey, 505 U.S. 833, 989 n.5 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (referencing City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting)).

[13] *Id*.

[14] Webster v. Reproductive Health Services, 492 U.S. 490, 519 (1989). *See generally* JOHN C. WILLKE & BARBARA H. WILLKE, ABORTION: QUESTIONS AND ANSWERS 95 (rev. 2003).

for the viability standard or abandon it.[15] The Amicus believes that it should be abandoned due to the variable factors in determining viability and the lack of any articulated justification for it.

At the time these opinions were announced, the Justices repeatedly referred to the unborn child as "potential life." Because of advancement in medical science and technology, it is known that life begins at conception.[16] Thus, Justices O'Connor, White, and Scalia's argument that the State has a compelling

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[15] Beck, *Gonzales, Casey, and the Viability Rule*, 103 NW. U. L. REV. 249, 251, 252 (2009). Professor Beck provides three reasons why the Court should either justify it or abandon it. *Id*. at 252. First, "Casey's acknowledgement that judicial decisions can only be considered legitimate to the extent the Court provides a nonarbitrary constitutional justification for the lines it draws. As a majority of the Casey Court recognized, 'a decision without principled justification would be no judicial act at all.'" *Id.* Second, Professor Beck discusses some of the consequences of the viability rule, causing "fetal and maternal rights to vary based on legally and morally irrelevant factors, such as the state of prenatal medicine during the period of gestation, the proximity of the mother to advanced medical facilities, the outlook of the doctor making the viability assessment, and the race and gender of the fetus." *Id.* Third, Professor Beck examines "the practical import of the viability rule, which prevents state regulation of late-term abortions that would be illegal in all but a handful of other countries." *Id*.

[16] Senate Judiciary Committee's Subcommittee on Separation of Powers on the Human Life Bill – S. 158, 97th Cong., 1st Sess. (April 23-24, 1981) (hearing testimony from prominent scientists and physicians that life begins at conception). Although the bill stated that life begins at conception, it never progressed to a floor vote. Subsequent bills have been introduced including the most recent one, H.R. 877 – Sanctity of Human Life Act (2021).

interest throughout pregnancy becomes more profound because the baby is not just a potential life, but it is the life of a whole, separate human being.[17] Furthermore, from a medical perspective, the unborn child is treated as a separate patient.[18]

Justice Scalia further emphasized that the unborn child is not just potential life but human life. Thus, the State is protecting the human life of the unborn child and not just potential life. He stated:

> But 'reasoned judgment' does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere 'potentiality of human life.' The whole argument

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[17] S.D. Task Force Report at 10, *available at* www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf (stating "It can no longer be doubted that the unborn child from the moment of conception is a whole separate human being.") This was the largest and most extensive government investigation on abortion since *Roe* and the Task Force heard testimony from many experts. In Planned Parenthood v. Rounds, 530 F.3d 724, 735 (8th Cir. 2008) (en banc), the court upheld the South Dakota law requiring that women be informed that abortion ends the "life of a whole, separate, unique, living human being," and finding that opponents of the definition provided no evidence to the contrary. *Id.* at 736.

[18] S.D. Task Force Report at 26 *available at* www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf (stating " . . . the unborn child today is treated as a separate patient in his or her own right, not only during child birth and delivery, but from the earliest ages of gestation. Today conditions are diagnosed as early as eight weeks post-conception, and surgery is performed on the child at the fetal age of sixteen weeks post-conception, long before the age of so-called "viability", which is generally regarded as 21 to 23 weeks post-conception.").

> of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life.*[19]

Viability is based on the gestational age of the unborn child.[20] There are, however, other factors that affect the baby's survival rate such as the sex of the child, birth weight, and maternal exposure to steroids.[21] In addition, the baby's survival rate is affected by any complications from the early birth, oxygen deprivation, and whether it was a single preterm birth or multiple births.[22] Even variables such as the quality of healthcare a baby has access to and in what part of the world they are born can factor into viability.[23] Furthermore, viability may differ with each pregnancy.[24]

The viability threshold is also dependent on technology and medical developments which will determine the concept.[25] Considering the speed at which

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[19] Planned Parenthood v. Casey, 505 U.S. 833, 982 (1992) (Scalia, J. concurring in the judgment in part and dissenting in part) (emphasis in original and citations omitted).

[20] Cohen & Sayeed, *Fetal Pain, Abortion, Viability and the Constitution*, Harvard Law School Public Law & Legal Theory Working Paper Series, (2011), *available at* https://dash.harvard.edu/bitstream/handle/1/12025606/SSRN-id1805904.pdf?sequence=1.

[21] *Id*.

[22] Danielsson, *What Is Fetal Viability* (2021), *available at* http://www.verywellfamily.com/premature-birth-and-viability 237152#factors-affecting-fetal-viability.

[23] *Id*.

[24] AM. JUR. 2d *Abortion and Birth Control* § 11 (2021).

[25] Romanis, *Is 'Viability' Viable?*, 7 J.L. & BIOSCIENCES (2020), *available at* https://doi.org/10.1093/jib/Isaa059.

medical advances have developed, the viability standard is an outmoded standard.[26] This Court has never defined viability and it would be inappropriate to do so as it is a medical concept that will change with technological advances. Furthermore, there has been a move in the states to abandon viability altogether.[27] For example, where viability has been abandoned, the States have used the better standards of either banning abortion when a heartbeat is detected or the child can feel pain.[28]

Reliance on viability as the constitutional benchmark for balancing the woman's liberty interest and the State's interest in protecting the child's life is wholly arbitrary from the perspective of the woman, the child, and the State.[29] Even the Court in *Casey*

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[26] *See* Swyers, *Abortion and Its Viability Standard: The Woman's Diminishing Right to Choose*, 8 GEO. MASON U. CIV. R. L. J. 87, 104 (1997) (stating "assuming that medical science continues with the same momentum seen over the past two decades of advances in . . . postnatal care, a woman's right to terminate her pregnancy under the current viability standard may soon disappear").

[27] Romanis, *Is 'Viability' Viable?*, 7 J.L. & BIOSCIENCES (2020), *available at* https://doi.org/10.1093/jib/Isaa059.

[28] National Right to Life, *Early Abortion Bans and Time-Based Bans* (2021), *available at* https://www.nrlc.org/uploads/stateleg/EarlyAbortionandHeartbeatBans.pdf (listing states with these laws).

[29] Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 113 ST. LOUIS U. PUB. L. REV. 15, 41 (1993).

recognized that viability might seem as arbitrary line-drawing.[30] As one commentator has stated:

> This is true because the determination of whether an unborn child is or is not 'viable' may differ solely as a result of the skill of the examining physician whom the woman chooses and the technology available in the community where the abortion is sought. The woman's liberty interest would not be protected where a nonviable child is erroneously determined to be viable. And the interests of both the State and the child would be violated where a viable child is erroneously determined to be nonviable. Thus, viability appears to be arbitrary and, therefore, unworkable.[31]

Furthermore, the Court in *Danforth* recognized that "it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period.[32] In addition, the Court stated that "The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."[33] Therefore, a specified number of weeks in pregnancy should

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[30] Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992).

[31] Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 113 ST. LOUIS U. PUB. L. REV. 15, 41 (1993).

[32] Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976).

[33] *Id*.

not be fixed by statute or the courts as the point of viability.[34]

Alternatives to the Viability Standard

There are alternative standards that would be better than viability because they eliminate the various factors and arbitrariness of the viability standard. A better standard would be when the unborn child can feel pain or when the heartbeat of the unborn child is detected because they eliminate the various factors and arbitrariness of the viability standard. In Mississippi's Legislative findings for HB 1510, the Legislature correctly recognized when the unborn child has a heartbeat and is sensitive to outside stimuli.[35]

Relying on medical experts and peer reviewed scientific journals, Judge Jones in *McCorvey* concluded: " . . . neonatal and medical science . . . now graphically portrays, as science was unable to do 31 years ago, how a baby develops sensitivity to external stimuli and to pain much earlier than was then believed."[36] This was one of four reasons she gave for stating that " . . . if courts were to delve into the facts underlying *Roe*'s balancing scheme with present-day knowledge, they might conclude that the woman's 'choice' is far more

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[34] *Id*. at 65.

[35] *See* Legislative findings for HB 1510 *available at* https://legiscan.com/MS/text/HB1510/id/1692666.

[36] McCorvey v. Hill, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring).

risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew."[37]

Judge Ho in *Jackson* concurred in affirming the lower court decision, but he was critical of the district court stating he was "deeply troubled by how the district court handled this case" and the "alarming lack of disrespect" it had demonstrated.[38] In addressing the issue of fetal pain and the State's interest, he cited Dr. Maureen Condic's declaration that the unborn child can feel pain as early as ten weeks 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."[39] In addition, Dr. Condic stated that it is "'universally accepted' that a fetus has a neural network 'capable of pain perception' at some 'point between [14-20] weeks' LMP."[40] Judge Ho said that this was "consistent with the Legislature's finding that, '[a]t twelve weeks [LMP], an unborn human being . . . senses stimulation from the world outside the womb.'"[41] In addition, he opined that a "State has an unquestionably legitimate (if not compelling) interest in preventing gratuitous pain to the unborn."[42]

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[37] *Id*.

[38] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 278 (5th Cir. 2019) (Ho, J. concurring).

[39] *Id*. at 279.

[40] *Id*. at 279-80.

[41] *Id*. at 279.

[42] *Id*. at 280 (analyzing that the law prohibits executions of convicted murderers that involve unnecessary pain, but does not

The development of the unborn child and its ability to feel pain has also been discussed in law journals.[43] In 1973 when *Roe* was decided, evidence that the unborn child could feel pain was not available to the Court.[44] Subsequently, Justices on both sides of the debate have acknowledged the relevance of pain in adjudicating abortion cases.[45] Thus, the Court's constitutional jurisprudence should reflect the medical reality of fetal pain that now exists and respect the State's right to protect the child from unnecessary pain.[46]

Another standard that the Court could use instead of viability is the heartbeat of the unborn child. The heartbeat can be detected usually by 6-10 weeks gestation by using the best methods of standard medical practice or by 7-12 weeks using transabdominal

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permit the State from preventing abortions that cause unnecessary pain to unborn babies).

[43] *See*, *e.g.*, Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 HASTINGS CONST. L.Q. 187 (2016) (contending that the viability standard is too weak of a constitutional foundation to justify striking down abortion regulations at twenty weeks when the child can feel pain); Collett, *Previability Abortion and the Pain of the Unborn*, 71 WASH. & LEE L. REV. 1211 (2014) (supporting a fetal pain standard); Comment, *Twenty-Week Bans, New Medical Evidence, and the Effect on Current United States Supreme Court Abortion Law Precedent*, 50 IDAHO L. REV. 139 (2014) (stating fetal pain and not fetal viability should be the time when the State's interest is deemed compelling to warrant prohibitions on abortion)

[44] Collett, *Previability Abortion and the Pain of the Unborn*, 71 WASH. & LEE L. REV. 1211, 1231 (2014).

[45] *Id*. (*citing* opinions by Justices Kennedy and Stevens).

[46] *Id*.

ultrasound.[47] The presence of a heartbeat is a strong indicator that the child will survive to birth,[48] therefore, debunking the idea that the unborn child is merely potential life.

Heartbeat legislation has been introduced or passed in twenty-five states and at the federal level.[49] The Governor of Mississippi signed heartbeat bill SB 2116 into law on March 21, 2019 which banned all abortions after a heartbeat can be detected, but it was challenged and blocked by a federal judge. In the Legislative findings, the Legislature stated that "Cardiac activity begins at a biologically identifiable moment in time. . . ."[50] Unlike the viability standard, the heartbeat standard eliminates the arbitrariness because it is an identifiable time without variable factors.

It has been argued that the State has a compelling interest in protecting the life of the unborn child at "an earlier point in time than what the Court has termed 'viability'"[51] and that point is when there is the "detection of cardiac activity in the fetus, evidencing the

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[47] Population Research Institute, *Ban Abortion from the Very First Heartbeat* (2020), *available at* https://www.pop.org/project/heartbeat/.

[48] *Id*. (*citing* studies that pregnancies resulting in spontaneous miscarriage after a heartbeat is detected is less than five percent).

[49] *Id*. (listing legislation at the state and federal level).

[50] Legislative findings for SB 2116 *available at* https://legiscan.com/MS/text/SB2116/id/1846191.

[51] Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform*, 74 OHIO ST. L.J. 121, 122 (2013).

overwhelming likelihood that the fetus will reach term and live birth, absent an external lethal intervention."[52]

> The heartbeat is a better standard because:
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> It is one that has a very high degree of predictability of infant survival. It is easily determined and does not depend on guesses about gestational age. It fulfills more fully than viability the reason why the State's interest in 'the life of the fetus that may become a child' is present throughout the pregnancy. That marker is the point at which the onset of cardiac activity in the fetus occurs.[53]

Viability is arbitrary and uncertain whereas the heartbeat is not and is a "strong predictor of survivability to term. It does not require determinations based on estimates by individual doctors, but can be objectively identified through the relatively simple application of medical technologies like ultrasonography."[54] Therefore, the unborn child's heartbeat should be the standard where the State has a compelling interest.

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[52] *Id*.

[53] *Id*. at 140.

[54] *Id*. at 142.

Stare Decisis

Stare decisis should not prevent this Court from abandoning the viability standard.[55] This Court articulated the four stare decisis factors of workability, reliance, change of law, and change of facts.[56] In an analysis of these factors, they do not preclude reconsideration of *Roe*, but "all of them strongly favor a decision overruling *Roe*."[57]

First, viability is an unworkable standard because it cannot be either applied or enforced in a principled and consistent fashion.[58] This is because it is difficult to make an accurate determination of viability and "there is no current medical consensus even as to what constitutes viability."[59]

Second, the reliance factor does not preclude reconsideration of *Roe*. There is widespread availability of many highly effective forms of contraception, and therefore, there is "no plausible reliance interest in unrestricted abortion up until viability."[60] In addition, women have achieved both social and economic progress, but that "cannot fairly be attributed to the

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[55] Linton & Quinlan, *Does Stare Decisis Preclude Reconsideration of Roe v. Wade? A Critique of Planned Parenthood v. Casey*, 70 CASE W. RES. L. REV. 283 (2019).

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*.

availability of abortion on demand."[61] Furthermore, there would not be a total ban on abortion, but simply limiting abortion to when it is safer for the woman and affirming the State's compelling interest to protect the unborn child.

The third factor is the changes in the law. Since *Roe*, there have been "substantial changes in criminal, tort, and healthcare law that now protect unborn children throughout pregnancy."[62] These changes have discarded viability "as an outmoded relic of legal analysis."[63] Because the unborn child is protected in other areas of the law, *Roe*'s determination that the unborn child should not be protected until after viability is undermined.[64]

The fourth factor focuses on changes in the facts. Since *Roe*, there have been many scientific and medical developments. Probably the most significant developments have been in ultrasound technology and fetal surgery.[65] Ultrasound technology demonstrates that the unborn child is human life that is actually alive and shows the development of the baby. This undermines *Roe*'s claim that the unborn child is only potential life.[66]

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[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] *Id*.

Thus, the question has been asked: "does the unborn child's attainment of viability, however difficult that may be to determine, make any actual difference in the State's authority to prohibit a pregnant woman from obtaining an abortion?"[67] Some commentators answer that question "no"[68] and so does Amicus. That answer "suggests that the viability rule reaffirmed in *Casey* is an illusory distinction without legal or practical significance."[69]

B. A Myriad of Advances in Science and Technology Have Occurred Since *Roe* Requiring the Court to Re-examine the Outmoded Viability Standard.

Fetal viability is dependent on the evolution and progress of modern neonatology.[70] "Just as improvements in medical technology inevitably will move *forward* the point at which the State may regulate for reasons of maternal health, different technological improvements will move *backward* the point of viability at which the State may proscribe abortions except

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[67] *Id*. at 333.

[68] *Id*.

[69] *Id*.

[70] P. Lefevre, F. Beauthier, & P. Beauthier, *Fetal Viability*, ENCYCLOPEDIA OF FORENSIC AND LEGAL MEDICINE (2d ed. 2016), *available at* https://www.sciencedirect.com/topics/medicine-and-dentistry/fetal-viability.

when necessary to preserve the life and health of the mother."[71]

Since *Roe*, there have been significant developments in science and technology that have allowed premature babies to survive. For example, Special Care Baby Units, the precursors of the modern NICU, used incubators that provided heat, humidity, and oxygen for the babies.[72] In the 1990's, there was an increase of technology and medical knowledge about premature infants that gave hope that babies as young as twenty-three weeks and as small as 500 grams could survive.[73] In addition, new technology that allowed for the precise fluid delivery, maintaining temperature and proper ventilation also contributed to the survival of these infants.[74] Because of these technologies, survival of premature infants is turning from the exception to the standard.[75]

Some of the technology developments that have been made since *Roe* include:

- The electronic fetal monitors (EFM) are used to continually read the fetus' heartbeat and the woman's contractions when

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[71] City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 456-57 (1983) (O'Connor, J. dissenting) (emphasis in original).

[72] *A Brief History of Advances in Neonatal Care* (2016), *available at* https://www.nicuawareness.org/blog/a-brief-history-of-advances-in-neonatal-care.

[73] *Id*.

[74] *Id*.

[75] *Id*.

she is in labor. EFMs were not widely used until after *Roe v. Wade*, and uniform standards for EFMs were not firmly established until 1997[76] when the American College of Obstetricians and Gynecologists (ACOG) and other professional organizations adopted the terminology.

- Use of the fetoscope began in the 1980's.[77] A fetoscope is a device to obtain information about the fetus and used during pregnancy for surgical procedures on the fetus. The first intrauterine surgery done successfully on a pre-born child occurred in 1981.[78] It is also used to diagnose certain defects such as spina bifida.

- Ultrasound technology provides an amazing "window to the womb" with 3D ultrasound developed in the 1980s and 4D ultrasound in the 1990's.[79] In 2011, HD or 5D ultrasound was developed which provides a more crisp, clear, and defined image of the unborn child.

- The artificial womb is called artificial amnion and placenta technology (AAPT). These devices are designed to mimic the

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[76] Hewes, *Priest Ordained One Year after Roe: No Law Can Change Humanity of Babies Targeted for Abortion* (2020), *available at* https://www.lifesitenews.com/opinion/priest-ordained-one-year-after-roe-no-law-can-change-humanity-of-babies-targeted-for-abortion.

[77] *Id*.

[78] *Id*.

[79] *Id*.

> function of the placenta and environment of the human uterus such that they are capable of continuing the process of gestation.[80] Because it would not have the same limitations of gestational maturity, there would be continued organ maturation and growth.[81] This could shift perceptions of the viability timeline.[82]

Thus, each advancement in neonatology pushes viability earlier in gestation with the effect that the State can constitutionally prohibit or limit abortion. Certainly, the many advances in science and technology since *Roe* proves this point.

C. Viability in the Abortion Context Creates a Conflict with Other Areas of the Law, and Therefore, the Law Should Be Uniform in Protecting the Unborn Child.

Since *Roe* was decided in 1973, "laws regarding prenatal injury, wrongful death, and fetal homicide have increasingly abandoned the viability standard expressed in *Roe*."[83] In addition to the case law, numerous scholars have criticized *Roe*'s viability rule.[84]

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[80] Romanis, *Is 'Viability' Viable?*, 7 J.L. & BIOSCIENCES (2020), *available at* https://doi.org/10.1093/jib/Isaa059.

[81] *Id*.

[82] *Id*.

[83] Hamilton v. Scott, 97 So. 3d 728, 737 (Ala. 2012) (Parker, J. concurring).

[84] *Id*. at 742 (*citing* commentators).

Currently, "there is broad academic agreement that *Roe* failed to provide an adequate explanation for the viability rule."[85] In fact, neither *Roe*, *Casey*, nor *Gonzales* "satisfied the Court's obligation to provide a principled constitutional explanation for the viability rule."[86]

The concept of viability, which was relied on in earlier cases to allow a cause of action for prenatal injuries, is outmoded and not being used.[87] "It has repeatedly been emphasized, by courts and law review writers, that there is no valid medical basis for a distinction based on viability, since the fetus is just as much an independent being prior to viability as it is afterward."[88] The rationale is "that from the moment of conception it is not a part of the mother, but rather has a separate existence within the body of the mother."[89] Therefore, the general rule is that if the child is born alive, and if the plaintiff can satisfactorily establish the tortious conduct and legal cause of the harm, he or she may recover for any prenatal injury occurring any time after conception.[90]

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[85] Beck, *Gonzales, Casey, and the Viability Rule.* 103 NW. U. L. REV. 249, 268–69 (2009).

[86] *Id*. at 268.

[87] Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222, § 2(a) (1971).

[88] *Id*.

[89] *Id*.

[90] Note, *From Conception until Birth: Exploring the Maternal Duty to Protect Fetal Health*, 80 WASH. U. L.Q. 1307 (2002) (analyzing civil and criminal liability).

In addition to liability for prenatal injuries, defendants have been liable for the wrongful death of a previable baby.[91] "Unborn children, whether they have reached the ability to survive outside their mother's womb or not, are human beings and thus persons entitled to the protections of the law – both civil and criminal."[92] Furthermore, *Roe*'s viability standard "is an incoherent standard generally, but particularly as it relates to wrongful-death law."[93]

There have been a variety of other situations warranting liability for both the viable and previable unborn child. Although there may be conflicting views, there has been liability for a previable baby. For example:

- Liability for prenatal injuries;[94]

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[91] *See*, *e.g.*, Stinnett v. Kennedy, 232 So. 3d 202 (Ala. 2016) (allowing a wrongful death action of a previable fetus and citing many cases and commentators rejecting the viability standard); Mack v. Carmack, 79 So. 3d 597 (Ala. 2011) (allowing a wrongful death action of a previable fetus and overruling prior cases); Farley v. Sartin, 195 W.Va. 671, 466 S.E.2d 522 (1995) (allowing action for both prenatal injuries and wrongful death of a previable baby). *See generally* Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971).

[92] Stinnett v. Kennedy, 232 So. 3d 202, 224 (Ala. 2016) (Parker, J. concurring).

[93] *Id*. at 220.

[94] Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971) (determining that there are many cases allowing an action to recover damages for prenatal injuries negligently inflicted regardless of whether the unborn child was viable or nonviable at the time of injury, provided the child was subsequently born alive). *See generally* Note, *The Impact of Medical Knowledge*

- Liability for preconception injuries;[95]
- Liability for the death of an unborn child;[96]
- Liability for the homicide of an unborn child;[97]
- Liability of mothers for their prenatal substance abuse;[98]
- Liability of mother for prenatal injuries due to the mother's negligence or tortious conduct;[99]

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on the Law Relating to Prenatal Injuries, 110 U. PA. L. REV. 554 (1962) (arguing against viability and stating that it is unjust to exclude actions by nonviable fetuses because the results of the negligent actor's conduct are precisely the same whether the fetus was viable or not).

[95] Annotation, *Liability for Preconception Injuries*, 91 A.L.R.3d 316 (1979) (finding child has right to sue for prenatal injuries).

[96] Annotation, *Action for Death of Unborn Child*, 84 A.L.R.3d 411 (1978) (discussing conflicting case law where some courts allow action whether or not child was viable).

[97] Annotation, *Homicide – Unborn Child*, 64 A.L.R.5th 671 (1998) (discussing cases where death of child if viability require or a person or a human being under the statute), *superseding* Annotation, *Homicide – Unborn Child*, 40 A.L.R.3d 444 (1971) (discussing earlier cases).

[98] Annotation, *Prenatal Substance Abuse*, 70 A.L.R.5th 461 (1999) (collecting cases where mothers are prosecuted for child abuse and endangerment for prenatal substance abuse).

[99] Annotation, *Fetal Injury – Maternal Liability*, 78 A.L.R.4th 1082 (1990) (stating child can sue mother for prenatal injuries due to mother's negligence or tortious conduct).

- Under some statutes an unborn child is considered an insured or injured person;[100]
- Liability for cause of action for deliberate indifference in terminating a pregnancy of inmate through miscarriage, stillborn child, or medical treatment.[101]

Although *Roe* and its progeny have discussed the unborn child in terms of potential life, the medical science and technology confirms that life begins at conception and is human life. Therefore, the law should be consistent in allowing the State to protect the life of the unborn child. Thus, Amicus urges that the Court recognize the changes in law and fact that warrants Mississippi's protection of the mother and her unborn child.

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[100] Annotation, *Unborn Child as Insured*, 15 A.L.R.4th 548 (1982) (stating under some statutes an unborn child is considered an insured or injured person).

[101] Annotation, *Prison Inmate – Pregnancy*, 5 A.L.R.7th art. 7 (2015) (stating cause of action for deliberate indifference in terminating a pregnancy through miscarriage or stillborn child or problems in medical treatment).

II. THIS COURT HAS RECOGNIZED THAT BROAD DEFERENCE SHOULD BE GIVEN TO LEGISLATIVE FINDINGS AND ENACTMENTS, AND THEREFORE, THE COURT OF APPEALS' DECISION SHOULD BE REVERSED.

A. Health Issues Are Complex Issues That Are Fact Bound and Involve National and State Policy and Are Best Left to the Legislative Branches of Government.

For over a century prior to *Roe v. Wade*[102] and *Doe v. Bolton*,[103] health issues such as abortion were traditionally State issues.[104] This Court recognized, under what was later called the State's "police power," States could regulate "health laws of every description."[105] Furthermore, this Court gives deference to legislative judgments.[106]

Since *Roe*, this Court has continued to recognize that States may make reasonable health and safety

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[102] 410 U.S. 113 (1973).

[103] 410 U.S. 179 (1973).

[104] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 2 (1824).

[105] *Id*. at 203.

[106] Gonzales v. Carhart, 550 U.S. 124, 163 (2007) (stating state and federal legislatures have wide discretion to pass legislation where there is medical and scientific uncertainty); Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 195 (1997) (stating substantial deference should be given because legislature is better equipped to amass and evaluate the vast amounts of data on legislative issues and out of respect for legislative authority); Dominion Hotel v. State of Arizona, 249 U.S. 265, 268 (1919) (stating deference due to legislative judgments has been repeatedly emphasized).

regulations that do not impose an undue burden for women.[107] In *Planned Parenthood v. Casey*, this Court recognized that because the State has a substantial interest in the life of the unborn child, the State may promulgate regulations that do not create an undue burden on the woman's right to decide.[108] In particular, regulations that are "designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."[109] This Court recognized that "[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion."[110]

Furthermore, this Court in *Casey* upheld health regulations that "are not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision."[111] The Mississippi Legislature did not attempt to sway a woman's decision but instead to protect her health once the decision is made.[112]

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[107] *See* Gonzales v. Carhart, 550 U.S. 124, 146 (2007); Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992).

[108] Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992).

[109] *Id*. at 877.

[110] *Id.* at 878.

[111] *Id*. at 917 (Stevens, J., concurring in part and dissenting in part) (providing examples of valid regulations).

[112] In its findings of HB 1510, the Legislature stated that:

> (ii) Abortion carries significant physical and psychological risks to the maternal patient, and these physical and psychological risks increase with gestational

As long as there is a "commonly used and generally accepted method" of abortion, there is not a "substantial obstacle to the abortion right."[113] Specifically, this Court stated in *Gonzales*[114] that "[c]onsiderations of marginal safety, including balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."[115] HB

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age. Specifically, in abortions performed after eight (8) weeks' gestation, the relative physical and psychological risks escalate exponentially as gestational age increases. L. Bartlett et al., *Risk factors for legal induced abortion mortality in the United States*, OBSTETRICS AND GYNECOLOGY 103(4):729 (2004).

(iii) Importantly, as the second trimester progresses, in the vast majority of uncomplicated pregnancies, the maternal health risks of undergoing an abortion are greater than the risks of carrying a pregnancy to term.

(iv) Medical complications from dilation and evacuation abortions include, but are not limited to: pelvic infection; incomplete abortions (retained tissue); blood clots; heavy bleeding or hemorrhage; laceration, tear, or other injury to the cervix; puncture, laceration, tear, or other injury to the uterus; injury to the bowel or bladder; depression; anxiety; substance abuse; and other emotional or psychological problems. Further, in abortions performed after fifteen (15) weeks' gestation, there is a higher risk of requiring a hysterectomy, other reparative surgery, or blood transfusion.

Legislative findings for HB 1510 *available at* https://legiscan.com/MS/text/HB1510/id/1692666.

[113] Gonzales v. Carhart, 550 U.S. 124, 165 (2007).

[114] 550 U.S. 124 (2007).

[115] *Id*. at 166.

1510's effort to protect the health and safety of women is a legitimate end as this Court has articulated.

As one federal court recognized: "Historically, laws regulating abortion have sought to further the state's interest in protecting the health and welfare of pregnant women. . . ."[116] In furtherance of its interest, the State of Mississippi passed HB 1510 to protect pregnant women from the significant known risks and complications that can occur during and after an abortion.[117] This is within the State's authority and competence, and therefore, should be given deference.

B. The HB 1510 Provisions Are Within This Court's Constitutional Framework and Should Be Upheld.

Since *Casey*, the Mississippi Legislature has properly exercised its authority to protect women who are considering an abortion. Mississippi has a history of trying to protect women's health.[118] For example, the Mississippi Legislature passed the Woman's Right

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[116] McCormack v. Hiedeman**,** 694 F.3d 1004, 1010 (9th Cir. 2012).

[117] In its findings of HB 1510, the Legislature stated: "(v) The State of Mississippi also has "legitimate interests from the outset of pregnancy in protecting the health of women." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992), as the "medical, emotional, and psychological consequences of abortion are serious and can be lasting" *H.L. v. Matheson*, 450 U.S. 398, 411 (1981)."

[118] Title 41 has various laws that the Legislature has passed concerning abortion procedures.

to Know law, although it has been enjoined.[119] In addition, the Mississippi Legislature bans abortion based on the race, sex or genetic anomalies of a fetus; it requires that abortionists have admitting privileges, although the law has been blocked by a federal judge; it requires a 24-hour waiting period for abortions; minors must obtain permission from their parents or a judge for an abortion; and, it bans most abortions once fetal cardiac activity can be detected, although it has been blocked by a federal judge.[120] The Mississippi Legislature's enactment of HB 1510 is another step to protect women by providing common sense safety laws for women considering an abortion just as any other surgical out-patient has.

Furthermore, legislative bodies, unlike courts, are able to hold hearings, review the scientific data, and enact or revise health and safety laws to keep pace with the scientific evidence.[121] If legislatures are not able to evaluate the evolving medical knowledge and

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[119] National Right to Life, *A Woman's Right to Know: Casey-style Informed Consent Laws* (2018), *available at* www.nrlc.org/uploads/stateleg/WRTKFactSheet.pdf.

[120] See Pettus, *Mississippi Bans Abortion Based on Race, Sex, Genetic Issues* (2020) (listing laws), *available at* https://abcnews.go.com/Health/wireStory/mississippi-bans-abortion-based-on-race-sex-genetic-issues-71569004.

[121] *See* McCorvey v. Hill, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring but also writing the majority opinion for the panel). Judge Jones stated that she could not "conceive of any judicial forum in which McCorvey's evidence could be aired." *Id*. By constitutionalizing the issue, legislative bodies cannot meaningfully debate the scientific evidence and this has led to a "perverse result" which affects over a million women each year. *Id*.

scientific evidence, then it "leaves our nation in a position of willful blindness."[122] Thus, this Court correctly gives deference to legislative enactments and findings.

The Amicus urges this Court to give deference to the Mississippi Legislature which enacted HB 1510 to protect the health and safety of women once they have made the decision to have an abortion. HB 1510's safety provisions are based on current, scientific evidence and do not create an undue burden on the woman's decision to have an abortion, and therefore, should be upheld.

CONCLUSION

For the foregoing reasons, the requirements of Mississippi's Gestational Age Act, HB 1510, should be upheld and the decision of the United States Court of Appeals for the Fifth Circuit reversed.

Respectfully submitted,

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[122] *Id*. at 853.