NO. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., *et al.*,
Petitioners,

v.

JACKSON WOMEN'S HEATLH ORGANIZATION, *et al.*
Respondents,

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

BRIEF OF CENTER FOR RELIGIOUS EXPRESSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Center for Religious Expression (CRE) is a nonprofit legal organization dedicated to religious liberty and expression. Forming in 2012, CRE has represented and currently represents individuals and entities who wish to share religious views opposing abortion on public ways, including Philip Benham, a plaintiff in a case pending in the Northern District of Mississippi against the City of Jackson, Mississippi, challenging an ordinance that prohibits his speech in front of the respondent, Jackson Women's Health Organization.[1] The *amicus* is interested in the outcome of this important case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1973, this Court interpreted the U.S. Constitution to bestow upon women a right to have an abortion procedure. *Roe v. Wade*, 410 U.S. 113, 152-54 (1973). The ruling was novel, a sea change - not only in jurisprudence but in how jurisprudence is reached. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J., 920, 947 (1973) (*Roe* "is … a very bad decision… because it is bad constitutional law, or rather because it is not

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[1] In compliance with Supreme Court Rule 37.6, counsel for *amicus* represents that he authored this brief in its entirety and neither the parties, nor their counsel, nor anyone other than *amicus* and *amicus* counsel, made a monetary contribution to fund the preparation or submission of this brief. And pursuant to Supreme Court Rule 37.3, counsel for *amicus* represents that he received requisite consent from counsel of record of all parties to file this brief.

constitutional law and gives almost no sense of an obligation to try to be"). And it was immediately wrought with difficulties. Most notably, courts had to reconcile this newly established right with the State's ongoing, compelling interest in life, begging the question of when life - and the State's interest in it - begins. *See Roe*, 410 U.S. at 159 ("it is reasonable and appropriate for a State to decide at some point in time another interest… that of potential human life, becomes significantly involved").

The *Roe* Court demurred on the central inquiry. When the case was decided, the presence of a life inside a mother's womb was a debatable topic, largely informed by religious and philosophical perspectives. 410 U.S. at 159-60 (passing on "the difficult question of when life begins," referencing differing belief systems).[2] Wary of decreeing the precise moment of life, whether at conception, birth, or some time in between, the *Roe* Court rejected life as a marker and settled on viability as way to denote the State's interest. *Id.* at 163 (commenting the fetus presumably enjoys "meaningful" life outside mother's womb at this point).

The Court took a grievous and regrettable misstep. Having no relationship with life or any signs of life, the viability standard was flawed from its inception. *See generally* Ely, *supra*, at 924. It did, however, offer a simple measurement for determining viability. Observing medical science at the time

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[2] This Court also noted a historical common law view that quickening (movement inside womb) signals life but declined to rely on it. 410 U.S. at 160.

considered unborn children viable around the beginning of the third trimester of pregnancy, the *Roe* Court banked on this computation for assigning the State's interest. 410 U.S. at 160. Under this framework, the State could act on its interest in unborn life in the final trimester (though not a moment beforehand). *Id.* at 163 (pegging this moment as when the State's interest in unborn life becomes compelling).

The approach was memorable, easy to apply, and instantly became the controlling arbiter for abortion rights. But by the time this Court evaluated the effect of *Roe* in 1992 the trimester framework was obsolete. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992). Unborn children had become viable in the second trimester of pregnancies. And the *Casey* Court was constrained to ditch the trimester criterion because it failed to "fulfill *Roe's* own promise that the State has an interest in protecting fetal life or potential life." *Id.*

So doing, this Court kept the viability rule and without substituting another method for judging viability. *Id.* at 846. Instead, *Casey* added an undue burden analysis, holding state laws unconstitutional if they place an "undue burden" on a woman's right to have an abortion before the fetus attains viability. *Id.* at 877-78.[3] The Court effectively "reaffirm[ed]" the

[3] Under the "undue burden" analysis adopted in *Casey*, an abortion restriction is unconstitutional if it has the purpose or effect of placing a substantial obstacle in path of woman seeking abortion before viability. *Id.* at 877.

right of a woman to have an abortion before viability is declared. *Id*. at 846.

Much has changed in prenatal care in the almost fifty years *Roe* and the almost thirty years *Casey* were decided. We now know far more about human life inside the mother's womb than we did back then. With ultrasound and other notable advancements in medical technology, the existence of life inside the mother's womb is no longer debatable. It is undeniable. And viability of life outside the womb has progressed over time, moving to earlier stages in pregnancy.

Despite these remarkable changes, as of today, the *Roe/Casey* viability standard remains and as an obstacle for states like Mississippi who seek to act on their interest in unborn life.

In *Gonzales v. Carhart*, this Court apparently recognized the dilemma. 550 U.S. 124, 145-46 (2007). There, the Court declined to affirm - choosing instead to assume - the validity of the viability maker for the State's interest. *Id*. Upholding as constitutional a federal law barring partial-birth abortions, viability was not a factor in ruling, *id*. at 147, putting into question whether it ever should be. In dissent, Justice Ginsberg did not view the omission of viability an oversight. She considered the holding "alarming" for "blur[ing] the line, firmly drawn in *Casey*, between previability and postviability abortions." *Id*. at 171 (Ginsberg, J, dissenting). *Gonzales* foreshadowed the need for this Court to revisit viability as an appropriate tool for judging the State's interest. *See*

MKB Management Corp. v. Stenhjem, 795 F.3d 768, 772 (8th Cir. 2015) (concluding *Gonzales* may suggest a willingness to reevaluate the viability standard); Khira M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 WASH & LEE L. REV. 915, 941 (2010) (reckoning this Court did away with viability as a marker in *Gonzales*).

Casey opened its joint opinion with the adage: "Liberty finds no refuge in a jurisprudence of doubt." 505 U.S. at 844. Indeed. But ironically, *Casey* has fostered a jurisprudence of doubt with its affirmance of the viability standard. Though the Court acknowledged the State's interest in unborn life, its support of the viability standard undercuts the State's ability to purse this interest.

The *Roe/Casey* viability standard is an idea whose time has expired. In support of arguments advanced by petitioner, *amicus* asks this Court to abandon the viability standard, so Mississippi and other states can pursue their interest in unborn life with laws attending the interest, such as Mississippi's Gestational Age Act. This Court should uphold this law restricting abortions at 15 weeks as constitutional because I) the State of Mississippi has a compelling interest in unborn life, II) viability is a poor marker for gaging the State's interest in life, III) this Court should overrule *Roe* and *Casey*, jettison the viability standard, and allow the State to further its interest in unborn life, and IV) Mississippi's 15-week prohibition on abortion relying on medical markers of life is warranted.

ARGUMENT

I. The State of Mississippi has a Compelling Interest in Unborn Life

In 2018, the State of Mississippi enacted the Gestational Age Act, a law disallowing an abortion after the unborn child reaches 15 weeks gestational age except in the case of medical emergency or severe fetal abnormality. Petitioner's Appendix to Petition for Certiorari ("Pet. App.") at 65a-74a. Among other reasons for this legislation, Mississippi presents an interest in unborn life. Pet. App. 66a.

This interest is undoubtedly a compelling one. Harkening back to when the Court first envisioned the right to abortion in *Roe*, it also recognized the State's interest in potential life as a corollary to this right. 410 U.S. at 159. This Court reaffirmed the State's interest in potential life in *Casey*. 505 U.S. at 876. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 428 (6th Cir. 2019) ("We have long understood *Casey* as marking a shift toward greater respect for State's interests in informing women and protecting unborn life"). And more recently, in *Gonzales*, the Court echoed the same sentiment, confirming the State can use its regulatory powers to protect life inside the womb. 550 U.S. at 157. "The evolution of the Supreme Court's [abortion] jurisprudence reflects its recognition of state's profound interest in protecting unborn children." *MKB Management Corp.*, 795 F.3d at 771.

It is thus proper for Mississippi to restrict the practice of abortion in ways that further its interest in unborn life, and specifically, through the Gestational Age Act. Both the goal for the legislation and the means for achieving it are merited. The State's interest in unborn life justifies its regulation on abortion - whether imposed after viability or before this status. *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015).

II. Viability is a Poor Marker for Gaging the State's Interest in Unborn Life

Viability outside the womb is no longer a good gage - if it ever was one - for estimating the timing of the State's interest in unborn life. The standard is inapt, inexact, and turning out to be indiscernible.

The foremost concern with the viability standard is that it is inapt, revealing a disconnect between the interest in unborn life this Court has deemed compelling and what this Court requires the State to do in addressing this interest. Life and viability are not the same, one does not necessarily have anything to do with the other. Hence, the viability rule does not give due consideration to the State's compelling interest. *See MKB Management Corp.*, 795 F.3d at 774 ("the Court has tied state's interest in unborn children to developments in obstetrics, not the unborn… lead[ing] to troubling consequences for states seeking to protect unborn children"). There is no valid reason "why the State's interest in protecting potential human life should come into existence only at the point of viability."

Webster v. Reproductive Health Services, 492 U.S. 490, 519 (1989).

The viability standard is also inexact. Viability is far from a universal notion, varying with each individual pregnancy, determined on a case-by-case basis. *Casey*, 505 U.S. at 860. No two fetuses are the same. The timing of viability for a particular fetus turns on the race of the mother, health of the mother, gender of the child, and quality of medical services available, among other factors. *Beck*, 786 F.3d at 1117-18. States should have a "more consistent certain marker than viability." *MKB Management Corp.*, 795 F.3d at 774.

Moreover, with the continual progress in medical science, the point of viability for the unborn child is becoming indiscernible. Fetuses are surviving outside the womb at much earlier stages in the pregnancy now days, as viability approaches every trimester, every aspect of development, creeping towards conception. *Beck*, 786 F.3d at 1118. Back when *Roe* was decided, viability outside the womb was roughly 28 weeks. 410 U.S. at 160. By the time *Casey* was rendered, fetuses were viable at 24 weeks. 505 U.S. at 860. Now, children can come from the womb at 22, 21 weeks, and survive. *See MKB Management Corp.*, 795 F.3d at 774-75 (giving real-life examples).

The advent of in vitro fertilization puts another chink in the weathered armor of viability. This process leads to life outside the mother's womb, albeit through another womb. According to this Court,

viability is defined as "reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." *Colautti v Franklin*, 439 U.S. 379, 388 (1979). The Court did not state the concept of viability precludes use of a different womb or that the other womb could not be considered "artificial support." But even if the Court did add this arbitrary condition, embryos survive outside of any womb for some time. The only question is whether the length meets what this Court means by "sustained." Typically, embryos can live outside a womb for 2 to 6 days. *MKB Management Corp.,* 795 F.3d at 773. There are reports of scientists growing embryos outside womb for 13 days.[4] How long does the embryo have to live to exhibit viability? Is the characterization semantics? Life can and does exist (in the form of an embryo) outside the womb from conception forward. And as technology for embryonic life accelerates, with the development of artificial wombs and artificial gestation, viability is fast becoming a meaningless term.[5]

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[4] Researchers at Cambridge University grew embryos for 13 days and only stopped to avoid legal limit of 14 days. Ian Johnston, *Scientists smash record for human embryos grown in the lab in revolutionary breakthrough*, The Independent, May 4, 2016, https://www.independent.co.uk/news/science/human-embryos-grown-lab-test-tube-ivf-genetic-diseases-disability-medical-ethics-a7013656.html.

[5] Recent news reports confirm babies will grow outside the womb soon. *E.g.*, Neera Bhatia, Evie Kendal, *We may one day grow babies outside the womb, but there are many things to consider first*, The Conversation, Nov. 9, 2019, https://theconversation.com/we-may-grow-babies-outside-the womb-but-there-are-many-things-to-consider-first-125709 (referencing recent developments in artificial womb). One fertility expert predicted in 2018 that technology will allow

"The viability standard is clearly on a collision course with itself." *Beck*, 786 F.3d at 1118 quoting *City of Akron v. Akron Ctr. For Reprod. Health*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). We are witnesses to the crash, leaving a smash-up of a standard, and states, like Mississippi, grappling with the repercussions.

Viability is not a viable standard.

III. This Court Should Overrule *Roe* and *Casey*, Jettison the Viability Standard, and Allow the State to Further its Interest in Unborn Life

The time is ripe for this Court to revisit the *Roe/Casey* viability standard and purge it from abortion legal precedent. *See MKB Management Corp.*, 795 F.3d at 773 ("good reasons for the Court to reevaluate its jurisprudence").

In the 2007 *Gonzales* case, the Court - in upholding a ban on partial birth abortions - declined to employ the viability standard in its analysis. 550 U.S. at 145-46. The unworkability of the standard was implicit in the holding. With this case, the Court has opportunity to make this understanding explicit.

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babies to grow artificially outside the womb within a decade. Natasha Presky, *Would you grow your baby in an artificial womb?*, Elle, Mar. 20, 2018, https://www.elle.com/uk/life-and-culture/culture/lomgform/a42268/baby-grow-artificial-womb-ectogenesis/.

When convinced of error, this Court has always been willing to depart from precedent, no matter how long the precedent has been in place. *See, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson* after 58 years). A departure here – though mired in the politically divisive issue of abortion – is a natural and overdue break.

The inevitability of the Court abandoning the viability rule and inserting a more appropriate evaluation is self-evident. *Roe/Casey's* viability approach had a dubious start, having no direct correlation to the State's interest in life, and the troubles associated with this standard have increased over time. Medical and technological advances since *Roe* and *Casey* had made application of the viability standard more and more difficult. *Beck*, 786 F.3d at 1117. "[T]he continued application of the [] Court's viability standard discounts the legislative branch's recognized interest in protecting unborn children." *MKB Management Corp*. 795 F.3d at 776. In short, abortion jurisprudence is spiraling out of control. *Harris v. West Alabama Women's Ctr.*, 139 S. Ct. 2606, 2607 (2019) (Thomas, J. concurring in cert. denial). And the Court cannot continue to "blink[] the reality of what this Court has wrought." *Id.*

While confirming the State's interest in life, the *Roe* Court invoked viability as a substitute only because it could not come up with a more suitable standard for judging the beginning of life. 410 U.S. at 159-63. And *Casey* gave what can be described only as a lukewarm affirmation, saying no changes had rendered the viability standard any more or less

appropriate. 505 U.S. at 860-61. The same cannot be said today, some three decades later, with knowledge of new and relevant information about life inside the womb and the viability of that life. This moment is the right moment for the Court to do something different, better.

A sounder option is to let the State assess life (instead of viability) in furthering its interest in life, using the latest medical and scientific indicators of life. Legislatures are better suited to make these types of factual judgments. If challenged, courts can evaluate the legislative findings of abortion restrictions under the appropriate scrutiny. But the State's interest should be honored when it can objectively detect signs of life inside the womb.

IV. Mississippi's 15-Week Prohibition Relying on Medical Markers of Life is Warranted

It is highly appropriate, indeed, obligatory, for Mississippi to draft legislation linked to its actual interest (life) as opposed the *Roe/Casey* viability standard. Mississippi's Gestational Age Act meets this goal.

Any legislature concerned with effective implementation of its law must have a well-defined enforcement mechanism that furthers the interest behind the legislation. Having a law regulating viability does not serve this purpose. In lieu, Mississippi sets forth a bright line in its abortion restriction, specifying 15 weeks after pregnant woman's last menstrual period as the definitive

timeline, a date that is both certain and ascertainable. Pet. App. 70a-71a.

Moreover, Mississippi substantiates its 15-week restriction on abortion, highlighting a connection to its stated interest in unborn life. The enabling legislation references understandings shared by medical and other authorities on human prenatal development, and identifies many markers of life prior to 15 gestational weeks:

- 5 to 6 weeks – heart begins to beat
- 8 weeks – fetus begins to move
- 9 weeks - all basic physiological functions of fetus are present, as well as teeth, eyes, and external genitalia
- 10 weeks - vital organs begin to function; hair, fingernails, and toenails also begin to form
- 12 weeks - fetus can open and close fingers, make sucking motions, and sense stimulation from the world outside the womb

Pet. App. 65a-66a.

Citing this Court's finding in *Gonzales*, the legislation acknowledges the fetus in the womb takes on "human form" in all relevant respects by 12 weeks of gestational age. Pet. App. 66a. Mississippi further relies on the expertise of Dr. Maureen L. Condic, whose testimony shows the fetus develops brain

patterns by 9 weeks and neural circuitry able to respond to pain by 10 to 12 weeks. Pet. App. 76a.

As Mississippi has established in the Age Gestational Act legislation, human life, by any reasonable measure, exists in the womb by 15 weeks after pregnant woman's last menstrual period.[6] Medical science detects life by heartbeat, breathing, movement, response to stimuli, or brain activity. All these signs of life are present when the Mississippi law is applied.

The 15-week restriction matches the State's compelling interest in unborn life. Mississippi's Gestational Age Act is a constitutional as well as practical law.

CONCLUSION

This Court has held the State can use its voice to show its profound respect for life within the mother's womb. *Casey*, 505 U.S. at 845-46. But abortion legal precedent - as it currently stands – muzzles the State's voice.

"Having created the constitutional right to an abortion this Court is dutybound to address its scope." *Box v. Planned Parenthood of Ind. & Ky., Inc.* 139 S.Ct. 1780, 1793 (2019) (Thomas, J. concurring). In this respect, *amicus*, in support of petitioner, respectfully asks the Court to reverse the decision

[6] This is not to say 15 weeks is the point where Mississippi or any other state's interest ends. Much evidence supports proof of life in the womb as early as conception.

below and overrule *Roe* and *Casey*, at least to the extent these decisions support the viability standard, so the State of Mississippi may implement abortion regulations that advance its compelling interest in unborn life.

Respectfully Submitted,

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