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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF 228 MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

CATHERINE GLENN FOSTER
STEVEN H. ADEN
Counsel of Record
KATIE GLENN
NATALIE HEJRAN
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave., NW
Ste. 500
Washington, D.C. 20036
Steven.Aden@aul.org
Tel.: (202) 741-4917

Counsel for Amici Curiae

July 29, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are 228 Members of Congress—44 Senators and 184 Members of the House of Representatives—representing 40 states. (See Appendix for List of *Amici*.) The Members of Congress have a special interest in the legislative branch's ability to enact and to see enforced laws that address abortion's risks and harms on behalf of the People of the States they represent.

Some federal courts have interpreted *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) as creating a bright-line rule that forbids lawmakers from restricting previability abortions in any way, regardless of the strength of the interests at stake. Like the federal Partial-Birth Abortion Act (18 U.S.C. § 1531) this Court upheld in *Gonzales v. Carhart*, 550 U.S. 124 (2007)[2] without regard for the viability line, the second-trimester regulation embodied in Mississippi's Gestational Age Act is strongly supported by the American public.

---

[1] No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties were provided notice of the filing of this *amicus* brief pursuant to Sup. Ct. R. 37.2(a), and have granted written consent to its filing.

[2] "After [the partial-birth abortion] procedure received public attention, with ensuing and increasing public concern, bans on 'partial-birth abortion' proliferated. By the time of the *Stenberg* decision, about 30 States had enacted bans designed to prohibit the procedure." *Gonzales*, 550 U.S. at 140 (citing *Stenberg v. Carhart*, 530 U.S. 914, 995–96 & nn. 12–13 (2000) (Thomas, J., dissenting).

Public polling has shown in 2016,[3] 2018,[4] and 2020[5] that two-thirds or more of Americans support limiting abortion after twelve weeks' gestation.

Mississippi's case provides the Court a chance to release its vise grip on abortion politics, as Congress[6] and the States have shown that they are ready and able to address the issue in ways that reflect Americans' varying viewpoints and are grounded in the science of fetal development and maternal health. The States have expressed the desire to protect life through a burgeoning number of laws enacted to further the States' important interests in protecting women from dangerous late-term abortion, ending the destruction of human life based on sexism, racism, or

---

[3] Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 Hastings Const. L.Q. 187, 199 (2016).

[4] *Abortion*, Gallup, https://news.gallup.com/poll/1576/abortion.aspx (last visited June 23, 2021).

[5] *Americans' Opinions on Abortion*, Knights of Columbus/Marist Poll National Survey (Jan. 2021), http://www.kofc.org/en/resources/news-room/polls/kofc-national-survey-with-tables012021.pdf.

[6] In the 117th United States Congress, Members have already introduced at least nine bills that have previability implications. See e.g., Dismemberment Abortion Ban Act, H.R. 558, 117th Cong. (2021); Protecting Individuals with Down Syndrome Act, H.R. 532, 117th Cong. (2021); Protecting Individuals with Down Syndrome Act, S. 75, 117th Cong. (2021); Support and Value Expectant (SAVE) Moms and Babies Act, H.R. 554, 117th Cong. (2021); Support and Value Expectant (SAVE) Moms and Babies Act, S. 78, 117th Cong. (2021) Ensuring Accurate and Complete Abortion Data Reporting Act, H.R. 581, 117th Cong. (2021); Pain-Capable Unborn Child Protection Act, H.R. 1080, 117th Cong. (2021); Pain-Capable Unborn Child Protection Act, S. 61, 117th Cong. (2021); Prenatal Nondiscrimination Act, S. 86, 117th Cong. (2021).

ableism, upholding the integrity of the medical profession against the barbaric practice of dismembering human beings in the womb, and protecting preborn infants from the horrific pain of such abortions.

It is long overdue for this Court to return lawmaking to legislators. "The most reliable objective signs [of societal views] consist of the legislation that the society has enacted. It will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives."[7] For these reasons, *Amici* respectfully urge the Court to affirm the constitutional authority of the federal and state governments to safeguard the lives and health of their citizens, born and not yet born.

SUMMARY OF ARGUMENT

The Court has agreed to consider a single question presented by the State of Mississippi, *viz*., "Whether all pre-viability prohibitions on elective abortions are unconstitutional." The Members of Congress urge the Court to answer "No" and uphold Mississippi's law, or return the case to the lower courts for consideration on a full evidentiary record of the crucial interests the State relied upon in determining to regulate the availability of late-term abortion.

This Court has consistently recognized the States' various interests in ensuring abortion "is performed

---

[7] *Thompson v. Oklahoma*, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting).

under circumstances that insure maximum safety for the patient"[8] and that women provide consent to such a "grave"[9], "difficult and painful"[10] choice based on complete information about the nature of the procedure, its medical risks and the facts about how it is performed.[11] These interests reflect the fact that, as the Court acknowledges, it is the States that have primary authority over healthcare[12] and there is no constitutional right to provide abortion or to avoid regulation.[13]

Courts and legal scholars have repeatedly described *Casey*'s viability line as "arbitrary" and "artificial."[14] Three decades after *Casey,* this Court has failed to disambiguate key terms employed in *Roe* such as "viability" and "prohibition," and has failed to provide meaningful guidance on the impact of the

---

[8] *Roe v. Wade*, 410 U.S. 113, 150 (1973).
[9] *Gonzales*, 550 U.S. at 159.
[10] *Id.* at 128.
[11] *Casey*, 505 U.S. at 870 (partially overruling *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)).
[12] *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (citation omitted) ("[The] structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002).
[13] *Maher v. Roe*, 432 U.S. 464, 473–74 (1977).
[14] See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 924 (1973); Mark Tushnet, *Two Notes on the Jurisprudence of Privac*y, 8 Constitutional Commentary 75, 80–85 (1991); Sherry F. Colb, *In Defense of Viability*, Dorf on Law (May 26, 2021, 12:00 AM), http://www.dorfonlaw.org/2021/05/in-defense-of-viability.html.

viability line on lower courts' consideration of recognized state interests. In this void, federal courts increasingly perceive the viability line as a categorical prohibition on any kind of previability abortion regulation, inhibiting elected lawmakers from expressing these critical interests on behalf of the People they represent. Moreover, numerous courts have invoked a rigid view of the viability line to justify a one-sided presentation of the interests at stake in regulating abortion, by which abortion advocates are enabled to discover and introduce any and all evidence they assert relates to their claims, but defenders of abortion limits are prevented from bringing critical evidence into court on the real risks of the procedure, the barbaric nature of late-term abortion, and its historic use as a tool of eugenic policies.

Amici suggest that the Court's analysis of Congress' federal Partial-Birth Abortion Act in *Gonzales* is instructive, insofar as the record created during trial and discovery resulted in a well-informed opinion that balanced all interests. *Gonzales* addressed many of the same claims made by Respondents herein, and the interests of the State Petitioner, without regard to the viability line, in spite of the fact that the prohibition in question applied both before and after viability. If the Court construes *Roe* and *Casey* as prohibiting the assertion of vital state interests in regulating abortion—such as protecting women from dangerous late-term abortions, safeguarding persons in the womb from being aborted based on Down syndrome or genetic anomaly, and protecting the public from barbaric medical procedures—these precedents should be

reconsidered and, where necessary, wholly or partially overruled.

ARGUMENT

I. THREE DECADES AFTER *CASEY,* THE SUPREME COURT HAS FAILED TO CLARIFY THE MEANING OF THE VIABILITY LINE OR PROVIDE RELIABLE GUIDANCE ON ITS ROLE IN THE STANDARD OF REVIEW.

Although the *Roe* Court acknowledged there were "important state interests in regulation," it prohibited States from issuing regulations designed to promote their interest in "protecting potential life" during the first two trimesters of pregnancy. 410 U.S. at 154, 163–64. "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability," the Court said. *Id.* at 163. "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." *Id*. at 163–64.

The viability rule was dictum in *Roe*, since neither Texas' nor Georgia's statutes were tied to viability.[15] "Neither Congress nor state legislatures are bound by language unnecessary for a decision, however strong." Henry J. Friendly, *Time and Tide in the Supreme Court*, 2 Conn. L. Rev. 213, 216 (1968). Dicta "is

[15] Parts of an opinion are dicta if they are "not essential to [the court's] disposition of any of the issues contested." *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001).

neither binding nor persuasive." *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959). See also *Humphrey's Ex'r. v. United States*, 295 U.S. 602, 627 (1935). Chief Justice Marshall explained the difference between dicta and the holding of the Court in *Cohens v. Virginia*:

> The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, *but their possible bearing on all other cases is seldom completely investigated*.

19 U.S. (6 Wheat.) 264, 399–400 (1821) (emphasis added). Contrary to the *Casey* plurality's later assertion, *Roe* was not "a reasoned statement, elaborated with great care." 505 U.S. at 870. The *Roe* Court claimed "logical and biological justifications" for the viability rule, 410 U.S. at 163, but never provided any. The Court did not consider the impact of a rigid viability line on maternal health concerns, nor could it have, since there was no evidentiary record in *Roe* or *Doe v. Bolton*, 410 U.S. 179 (1973).[16] Because "viability" is not a bright line point, but is dependent on fetal progression, it is unsuited to serve as a line of demarcation. "[I]t is quite difficult to make an accurate determination of viability and there is no current medical consensus even as to what constitutes viability. Thus, the viability rule is unworkable because it is incapable of being applied and enforced

[16] See Clarke D. Forsythe, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* (2013).

in a principled, consistent fashion."[17] Justice White articulated this objection to the viability line in his dissent from the Court's holding in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (partially overruled by *Casey*, 505 U.S. 833):

> The substantiality of [the State's interest in protecting fetal life] is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom.

Id. at 795 (White, J., dissenting).

Since *Roe*, the Court has considered the viability rule in a holding in only one case, *Colautti v. Franklin*, 439 U.S. 379 (1979). *Colautti* involved a facial challenge to Pennsylvania's requirement that the abortion provider determine "that the fetus is not viable" before an abortion and then exercise a standard of care if the fetus is viable. *Id.* at 391. Even then, the viability rule was not dispositive, with the Court holding the Pennsylvania law in question was

---

[17] Paul Benjamin Linton & Maura K. Quinlan, *Does* Stare Decisis *Preclude Reconsideration of* Roe v. Wade*? A Critique of* Planned Parenthood v. Casey, 70 Case W. Res. L. Rev. 283, 284 (2019).

"void for vagueness" rather than a violation of the viability rule. *Id*. at 390. But *Colautti* made the States' task of demonstrating the strength of their interests even more daunting by insisting that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus." *Id*. at 388–89.

By *Casey*, a plurality of the Court had rejected the trimester framework, which it described as a "rigid prohibition on all pre-viability regulation aimed at the protection of fetal life." 505 U.S. at 873. The plurality jettisoned the trimester framework because it failed to "fulfill *Roe*'s own promise that the State has an interest in protecting fetal life." *Id*. at 876. The plurality recognized "there is a substantial state interest in potential life [*sic*.] throughout pregnancy." *Id*. While *Casey* "reaffirm[ed]" the "right of the woman to choose to have an abortion before viability," the plurality maintained that before that point, "the State's interests are not strong enough to support a prohibition of abortion." *Id*. at 846. The Court declined to specify a precise time of "viability", although as of 2015, research indicates that infants born at 22 weeks' gestation can survive outside the womb,[18] a

[18] Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 New Eng. J. Med. 1801 (2015); Barbara J. Stoll et al., *Neonatal Outcomes of Extremely Preterm Infants from the NICHD Neonatal Research Network,* 126 Pediatrics 443 (2010).

reality Justice Blackmun once claimed was "pure science fiction."[19]

But even in *Casey*, the viability rule was only dictum because none of the five Pennsylvania statutes it addressed relied on the line of viability.[20] Yet several members of the Court mysteriously described *Roe* as holding that the constitution protects a right to abortion "in its early stages."[21] *Casey* did not supply the rationale for the viability rule that *Roe* left out. Instead, the plurality offered two reasons for retaining the viability rule: a simple invocation of stare decisis and reiterating the syllogism of an "independent existence" of the infant that *Roe* offered.[22] *Casey* never offered "a principled explanation of why the 'possibility of maintaining and nourishing a life outside the womb' changes the strength of the state interest."[23]

---

[19] *Webster v. Reprod. Health Servs.,* 492 U.S. 490, 554 n.9 (1989) (Blackmun, J., concurring in part and dissenting in part); cf. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 61 n.1 (1976) ("Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.") (quoting *Roe*, 410 U.S. at 160)); *Casey*, 505 U.S. at 860 (noting the average point of viability had advanced significantly even in the twenty years since *Roe*).

[20] *Casey*, 505 U.S. at 860, 870–71, 878–79; Randy Beck, *State Interests and the Duration of Abortion Rights*, 44 McGeorge L. Rev. 31, 33 (2013) ("The Court adopted the viability rule in dicta in *Roe* and reaffirmed it in dicta in *Casey*.").

[21] *Id.* at 843 (plurality opinion); *Id.* at 923 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

[22] *Id.* at 870.

[23] Randy Beck, *The Essential Holding of* Casey*: Rethinking Viability*, 75 U. Mo. Kansas City L. Rev. 713, 725 (2007).

The viability line has not been reaffirmed by the Court in a factually dispositive context since *Casey*. In *Gonzales*, a majority of the Court—given the opportunity to reaffirm *Casey*—chose only to "assume" *Casey*'s principles for the purposes of its opinion.[24] The Court has never suggested that viability was an absolute prohibition; in fact, in *Gonzales* it suggested otherwise by allowing a prohibition on an abortion procedure to apply before and after viability, without addressing the effect of the point of viability.[25]

The viability rule has not been applied to significantly shape the Court's abortion doctrine. Thus, thirty years after *Casey*, the Court is back in the same position, and the States continue to struggle under the yoke of an increasingly obsolete rule. "We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.'" *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

II. FEDERAL COURTS HAVE MISTAKENLY INTERPRETED THE VIABILITY LINE AS A CATEGORICAL PROHIBITION ON THE REGULATION

---

[24] See *Gonzales*, 550 U.S. at 145–46 ("assum[ing] [*Casey*'s] principles for the purposes of this opinion," but recognizing those principles "did not find support from all those who join the instant opinion"); see also *id*. at 186–87 (Ginsburg, J., dissenting) (stating that "[t]he Court's hostility to the right *Roe* and *Casey* secured" is evident in the fact that the Court "merely assume[d] for the moment, rather than 'retained' or 'reaffirmed'" *Casey*'s principles).

[25] *Id*. at 147.

OF ABORTION, INHIBITING ELECTED LAWMAKERS FROM FURTHERING CRITICAL STATE INTERESTS.

While *Casey* theoretically affirmed States' authority to regulate abortion in furtherance of their important interests, accord *Gonzales*, in practice the viability line has proven an insurmountable obstacle to full legislative expression of those interests. Among the principles the *Casey* court laid out are women's right to obtain an abortion prior to viability without undue interference from the State as well as States' legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus.[26] *Casey*, 505 U.S. at 846. Though the Court asserted that these principles do not contradict one another, the case before the Court makes it clear a direct conflict in need of resolution exists.

Since *Casey*, a chorus of federal appellate courts increasingly has held that the viability line serves as a categorical prohibition on any substantial abortion restrictions that operate prior to the gestational age of viability.[27] In *Sojourner T. v. Edwards*, the Fifth

---

[26] *Casey*, 505 U.S. at 846.

[27] See *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128 (D. Idaho 2013), aff'd, *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 628 (M.D.N.C. 2019) (ruling a state is never allowed to prohibit any swath of previability abortions outright, no matter how strenuously it may believe such a ban is in the best interests of its citizens or how minimal it may find the burden to women seeking an abortion); *Pre-Term Cleveland v. Yost*, 394 F. Supp. 3d 796, 801 (S.D. Ohio 2019); *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019) ("[U]nlike laws that regulate the performance of pre-viability abortion, bans on pre-viability abortion require

Circuit, without attempting to assess the strength of Louisiana's interests at various gestational stages in a law restricting abortion at all gestational stages, summarily concluded that *Casey* held that before the viability line, "a State's interests are not strong enough to support a prohibition of abortion,"[28] thus "the Louisiana statute, on its face, is plainly unconstitutional under *Casey* because the statute imposes an undue burden on women seeking an abortion before viability."[29] Circuit Judge Emilio Garza agreed with the conclusion, but expressed "concerns" about *Casey*, invoking Justice Scalia's dissent in that case:

> In essence, *Casey* is not about abortion; it is about power. . . .Two essential facts seem apparent: "[T]he Constitution says absolutely nothing about [abortion], and . . . the longstanding traditions of American society have permitted [abortion] to be legally proscribed." *Casey* "decorate[s] a value judgment and conceal[s] a political choice."[30]

"Because the decision to permit or proscribe abortion is a political choice, I would allow the

---

no balancing at all. . . ."); *Pre-Term Cleveland v. Himes*, 294 F. Supp. 3d 746 (S.D. Ohio 2018) (declaring Ohio's interest "not strong enough").

[28] 974 F.2d 27, 30 (5th Cir. 1992), cert. denied, 507 U.S. 972 (1993).

[29] *Id*. at 31.

[30] *Id*. (first alteration added) (remaining alterations in original) (quoting *Casey*, 505 U.S. at 980–81 (Scalia, J., dissenting) (citations omitted)).

people of the State of Louisiana to decide this issue for themselves," Judge Garza concluded.[31]

The Ninth Circuit, in *Guam Society of Obstetricians & Gynecologists v. Ada*, addressed Guam's restrictions on abortion at all gestational ages, ultimately dismissing Guam's expressed interest in preserving prenatal human life previability.[32] Then in *Isaacson v. Horne,* the Ninth Circuit perceived viability to be "the 'critical fact' that controls constitutionality," although one member of the panel criticized it as an "odd rule" dependent on changing medical technology. 716 F.3d 1213, 1233 (9th Cir. 2013) (Kleinfeld, J., concurring). "The briefs make good arguments for why viability should not have the constitutional significance it does, but under controlling Supreme Court decisions, it does indeed have that significance." *Id*. Although *Casey* was "a plurality opinion leaving some room for interpretation," the concurring judge concluded that "a majority of the Supreme Court in *Gonzales* spoke clearly, albeit partially in dicta, as to the current state of the law." *Id*. The Seventh Circuit has also adhered to a rigid view of the viability line, though not without vociferous dissents from some judges.[33] Federal trial

---

[31] *Id*. at 32.

[32] 962 F.2d 1366, 1368–69 (9th Cir. 1992), cert. denied, 506 U.S. 1011 (1992); See also *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996) (invalidating a law that limited abortion previability); see also *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015) (ruling the State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability).

[33] See *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018)

courts generally have followed the Circuit Courts' errant view.[34]

Previability jurisprudence is so sweeping it invalidates regulatory measures that do not amount to prohibitions. Recently, in *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Parson*, the Eighth Circuit struck down Arkansas' Down syndrome law after deeming it a previability ban rather than a regulation.[35] Judge Stras observed, "We have not made it easy to tell the difference between the two . . . a ban 'prohibits women from making the ultimate decision to terminate a pregnancy.' A regulation, by contrast, has only an 'incidental effect' on the decision by 'making it more

---

(Easterbrook, J., joined by Barrett, J., dissenting from the denial of rehearing en banc) (criticizing the invalidation of an anti-eugenics law that would prohibit certain previability abortions given *Casey* only addressed the constitutionality of provisions pertaining to informed consent, waiting periods, spousal notification and parental consent, and did not consider the validity of anti-eugenics laws).

[34] See *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128 (D. Idaho 2013), aff'd, *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015); *Bryant*, 363 F. Supp. 3d at 628 (ruling "a state is never allowed to prohibit any swath of previability abortions outright, no matter how strenuously it may believe such a ban is in the best interests of its citizens or how minimal it may find the burden to women seeking an abortion"); *Pre-Term Cleveland*, 394 F. Supp. 3d at 801; *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019) ("[U]nlike laws that regulate the performance of pre-viability abortion, bans on pre-viability abortion require no balancing at all. . . ."); *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 1056 (S.D. Ohio 2018) (declaring Ohio's interest "not strong enough").

[35] 1 F.4th 552, 557 (8th Cir. 2021).

difficult or more expensive to procure an abortion.'"[36] Judge Stras would have read the Down Syndrome provision as a regulation because "all it does is limit the reasons for an abortion in certain narrow circumstances."[37]

Federal courts have exercised undue political power to grant primacy of previability abortion rights over State interests in protecting prenatal life and women's health. The *Roe* court stated that "the judiciary . . . is not in a position to speculate as to the answer [to the question of when life begins]." 410 U.S. at 159. States have the power and prerogative to answer that question and to legislate accordingly, but *Casey*'s rigid viability line has prevented them from doing so. At present, States can legally interfere with a woman's right to abortion after a fetus reaches a gestational age at which point it is no longer dependent on its mother for immediate survival, but they cannot do so during the period of weeks when it is vitally necessary to a fetus' survival that it remains in the womb. This makes the previability ban an "odd rule" for more reasons than one. See *Isaacson,* 716 F.3d at 1233.

The Court should set aside the viability rule which nullifies important state interests, including restricting late-term abortions of pain-capable fetuses, procedures that are dangerous to women's health, and late-term abortion methods the Court recognizes as "gruesome." *Gonzales,* 550 U.S. at 124.

---

[36] *Id.* at 569 (quoting *Edwards v. Beck*, 786 F.3d 1113, 1116 (8th Cir. 2015); *Gonzales,* 550 U.S. at 158).
[37] *Id.*

Returning the political choice to regulate abortion to States, as a reflection of the will of the People, accords with the principles of Federalism.

III. THE COURTS' PERCEPTION OF THE VIABILITY LINE AS A CATEGORICAL PROHIBITION HAMSTRINGS THE STATES FROM BRINGING CRITICAL EVIDENCE INTO COURT.

The *Casey* viability standard—as interpreted by numerous federal courts—binds the States in a one-sided constitutional tug-of-war in which they are subject to intense factual scrutiny on the abortion advocates' issues but unable to establish the factual basis of their own vital interests. Because trial courts understand viability as the categorical line before which no restriction on abortion can be constitutional, they allow no discovery on, or the introduction of evidence about, the State's purpose or interests in regulating previability abortions. Rather, discovery is limited to the issue of viability.[38] However, the courts still allow abortion advocates to bring evidence supporting their interests. This one-sided approach is problematic for two reasons.

---

[38] See *SisterSong Women of Color Reproductive Justice Collective v. Kemp*, 472 F. Supp. 3d 1297, 1313 (N.D. Ga. 2020) ("[A]ny discovery that the State Defendants seek to proffer regarding the purported state interests underlying H.B. 481 is irrelevant under the current Supreme Court viability framework."); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 & n.4 (8th Cir. 2015); *Jackson Women's Health Org. v. Currier*, 320 F. Supp. 3d 828 (S.D. Miss. 2018) (limiting discovery in a challenge to a fifteen-week abortion ban and holding that evidence about "any other issue" than "whether the 15-week mark is before or after viability" was irrelevant).

First, the viability line is a problem for States looking to advance the legitimate interests in the health of mother and child. When courts do not allow discovery or evidence on any issue other than viability, States only have this one factor to prove their case. However, this Court has said "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." *Danforth*, 428 U.S. at 64. As a result, the States have no means to defend their efforts to advance their legitimate interests in the health of the mother and the life of the child pre-viability.

Second, the State has no way of showing that the laws and the purposes behind those laws are legitimate because they are denied discovery. Even when States include "findings" in law, as Mississippi HB 1510 did, district judges may ignore them, leaving the laws defenseless to attacks interpreting the statute's purpose as placing an undue burden on the acquisition of an abortion, which in turn leaves it vulnerable to claims it violates the *Casey* standard. 505 U.S. at 877.

In *Whole Woman's Health v. Hellerstedt*, the Court reiterated the established principle that when constitutional rights are at stake, the "Court retains an independent constitutional duty to review factual findings."[39] *Hellerstedt* holds that in the context of a constitutional challenge to an abortion law, courts are to "place[] considerable weight upon evidence and

[39] 136 S. Ct. 2292, 2310 (2016).

argument presented in judicial proceedings,"[40] and "not only to scrutinize the reasons given for a state action, but also the evidence provided by the state supporting its action."[41] Thus, district courts have a responsibility to hear and consider evidence from the State regarding its interests.[42]

The *Hellerstedt* Court also "explained the importance of the judiciary's role when invidious state purposes are alleged."[43] When applying *Casey*'s undue burden balancing test, courts should consider the evidence in the record and not blindly accept the State's articulated reasons for acting.[44] Prior to *Hellerstedt*, the Seventh Circuit suggested that a purpose-prong "challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose."[45] In *Whole Woman's Health Alliance v. Hill*, however, the Seventh Circuit held that the State's excessive requests and demands throughout the

---

[40] *Id.*

[41] *Whole Woman's Health Alliance v. Hill*, 937 F.3d 864, 877 (7th Cir. 2019).

[42] Cf. *Sendak v. Arnold*, 429 U.S. 968, 971 (1976) (White, J., dissenting from denial of cert.) ("Here there was no trial, there were no facts presented to the District Court in any other form, and no finding that the requirement of Indiana law is unreasonable.").

[43] *Hill*, 937 F.3d at 877 (discussing *Hellerstedt*).

[44] *Hellerstedt*, 136 S. Ct. at 2309–10.

[45] *Karlin v. Foust*, 188 F.3d 446, 493 (7th Cir. 1999); *id.* at 496 ("Absent some evidence demonstrating that the stated purpose is pretextual, our inquiry into the legislative purpose is necessarily deferential and limited.").

abortion clinic's license application process had "gone beyond constitutional boundaries."[46]

The district courts' trend of disallowing any discovery or evidence apart from the viability issue undermines the States' ability to make the case that they have both a legitimate interest and a constitutionally valid purpose in their regulations and that those regulations do not impose an undue burden on the acquisition of abortions. A State's interests can be totally separate from the viability of the unborn child, yet that is all that is considered if any part of the law touches the first half of pregnancy.

The ability of both parties to bring evidence is essential to a well-considered case. In *June Medical Services v. Russo*, Justice Kavanaugh argued the factual record regarding whether the abortion providers' evidence of their efforts to obtain admitting privileges was too thin to substantiate their claims.[47] In his view, "additional factfinding [wa]s necessary to properly evaluate Louisiana's law."[48]

The courts' interpretation of the viability standard prevents States from creating a robust factual record and precludes them from bringing to

---

[46] 937 F.3d at 878.

[47] 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., concurring in part and dissenting in part).

[48] *Id.*; see also *id.* at 2165 (Alito, J., dissenting) ("[I]t is apparent that the record does not come close to showing that [the plaintiffs] made the sort of effort that one would expect if their ability to continue performing abortions had depended on success. . . .It follows that the District Court's finding on Act 620's likely effects cannot stand.").

trial evidence on the risks of abortion, its use as a tool of eugenics and gender discrimination, and the barbaric nature of late-term abortion—evidence which is crucial to demonstrate that the States have a legitimate interest in the promulgation of these laws.

IV. THE STATES HAVE NUMEROUS CRITICAL INTERESTS IN REGULATING ABORTION THAT ARISE IN THE FIRST HALF OF PREGNANCY, THE PERIOD CURRENTLY TIED UP IN THE *CASEY* VIABILITY STANDARD.

A. The Viability Standard Hinders States from Protecting Women from Greatly Increased Physical Risks that Accompany Later-Term Abortions.

Abortion carries a higher medical risk when performed later in pregnancy. The nation's largest abortion business, Planned Parenthood Federation of America, acknowledges on its website that "[t]he chances of problems gets higher the later you get the abortion, and if you have sedation or general anesthesia" which is necessary for an abortion at or after 20 weeks' gestation.[49]

Gestational age is the strongest risk factor for abortion-related mortality, and the incidence of major complications steadily increases later in the

---

[49] Planned Parenthood, *How Safe Is An In-Clinic Abortion?*, https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/how-safe-is-an-in-clinic-abortion (last visited June 15, 2021).

pregnancy.[50] Compared to an abortion at 8 weeks' gestation, the relative risk of mortality rises by 38 percent for each additional week at higher gestations.[51] The risk of death at 8 weeks is reported to be one death per one million abortions, rising to 1 per every 29,000 abortions at 16 to 20 weeks, and 1 per every 11,000 abortions at 21 weeks or more.[52]

Researchers have concluded it may not be possible to reduce the risk of death in later-term abortions because of the "inherently greater technical complexity of later abortions."[53] This is because in later-term abortions there is a greater degree of cervical dilation needed, the increased blood flow predisposes to hemorrhage, and the myometrium is relaxed and more subject to perforation.[54]

Later-term abortions also pose an increased risk to maternal health. Some immediate complications

---

[50] Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology 729, 731 (2004); Janet P. Pregler & Alan H. DeCherney, WOMEN'S HEALTH: PRINCIPLES AND CLINICAL PRACTICE 232 (2002). See also Slava V. Gauferg, *Abortion Complications*, Medscape (updated June 24, 2016), https://emedicine.medscape.com/article/795001-overview. (revealing that abortions after the first trimester pose more serious risks to women's physical health than first trimester abortions).

[51] Bartlett, *supra* note 50; Professional Ethics Comm. of Am. Assoc. of Pro-Life Obstetricians & Gynecologists, *Induced Abortion & the Increased Risk of Maternal Mortality*, Comm. Op. 6 (Aug. 13, 2019).

[52] Bartlett, *supra* note 50.

[53] *Id.* at 735.

[54] *Id.*

from abortion include blood clots, hemorrhage, incomplete abortions, infection, and injury to the cervix and other organs.[55] Immediate complications affect approximately 10% of women undergoing abortion, while approximately one-fifth of these complications are life-threatening.[56] This Court should revisit the viability standard so the States may continue to pass laws defending women's health from such well-recognized risks.

B. The Viability Standard Hinders States from Protecting Infants in the Second Trimester and Above from the Pain Suffered During the Abortion Procedure.

There is substantial medical evidence that an unborn child is capable of experiencing pain by at least 20 weeks post-fertilization, if not earlier.[57] One study found that the earlier infants are delivered, the stronger their response to pain[58] because the "neural mechanisms that inhibit pain sensations do not begin to develop until 34–36 weeks[] and are not complete until a significant time after birth."[59] As a result, unborn children display a "hyperresponsiveness" to

---

[55] See Planned Parenthood, *supra* note 49.

[56] E. Shadigian, *Reviewing the Medical Evidence: Short and Long-Term Physical Consequences of Induced Abortion,* Testimony before the South Dakota Task Force to Study Abortion, Pierre, South Dakota (Sept. 21, 2005).

[57] In 2019, scientists found evidence of fetal pain as early as 12 weeks' gestation. Stuart W.G. Derbyshire & John C. Bockmann, *Reconsidering Fetal Pain*, 46 J. of Med. Ethics 3 (2020).

[58] Lina Kurdahi Badr et al., *Determinants of Premature Infant Pain Responses to Heel Sticks*, 36 Pediatric Nursing 129 (2010).

[59] R. Brusseau and L.A. Bulich, *Anesthesia for Fetal Intervention*, ESSENTIAL CLINICAL ANESTHESIA 772–76, (July 2011).

pain.[60] So for "*wanted*" pregnancies, it is "critical in open fetal surgery procedures" that the child directly receive anesthesia to mitigate pain.[61]

For some States that have sought to limit abortion at or before the 20-week gestational mark to prevent fetal pain, the *Casey* viability limit has stopped them even though fetal welfare is within the government's legitimate interests.[62] These are: Arizona,[63] Idaho,[64] Missouri,[65] North Carolina,[66] Tennessee,[67] and Utah.[68] While these lower court judges may recognize the State's "legitimate public health interest in

---

[60] Christine Greco and Soorena Khojasteh, *Pediatric, Infant, and Fetal Pain*, CASE STUDIES IN PAIN MANAGEMENT 379 (2014).

[61] Maria J. Mayorga-Buiza et al., *Management of Fetal Pain During Invasive Fetal Procedures. Lessons Learned from a Sentinel Event*, 31 European J. of Anaesthesiology 188 (2014).

[62] *Casey*, 505 U.S. at 846; *Gonzales*, 550 U.S. at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.").

[63] Ariz. Rev. Stat. § 36-2159 (enjoined in *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013)).

[64] Idaho Code § 18-501 et seq. (enjoined in *McCormack v. Hiedeman*, 788 F.3d 1017 (9th Cir. 2015)).

[65] Mo. Rev. Stat. § 188.375 (enjoined in *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631 (W.D. Mo. 2019)).

[66] N.C. Gen. Stat. § 14-45.1(b) (enjoined in *Bryant*, 363 F. Supp. 3d 611).

[67] Tenn. Code Ann. § 39-15-216 (enjoined in *Memphis Ctr. for Reprod. Health v. Slatery*, No. 3:20-cv-00501, 2020 WL 4274198 (M.D. Tenn. July 24, 2020).

[68] Utah Code Ann. § 76-7-302.5 (Utah agreed not to enforce its law pending ongoing litigation. Previously, Utah passed a 20-week law, Utah Code Ann. § 76-7-302(3), which was struck down in *Bangerter*, 102 F.3d 1112).

banning post-twenty-week abortions,"[69] they have held that there is no "such legal right in the Federal Court system for preserving the potential lives of non-viable fetuses."[70]

Yet, one-third of the States do maintain enforceable limitations on abortion at or near 20 weeks post-fertilization, largely because these laws have not been challenged. These are: Alabama,[71] Arkansas,[72] Georgia,[73] Indiana,[74] Iowa,[75] Kansas,[76] Kentucky,[77] Louisiana,[78] Mississippi,[79] Nebraska,[80] North Dakota,[81] Ohio,[82] Oklahoma,[83] South Carolina,[84] South Dakota,[85] Texas,[86] West Virginia,[87] and Wisconsin.[88] Virtually all of these laws, including

---

[69] *Bryant*, 363 F. Supp. 3d 611.
[70] *Parson*, 389 F. Supp. 3d 631.
[71] Ala. Code § 26-23B-1 et seq.
[72] Ark. Code Ann. § 20-16-1401 et seq.
[73] Ga. Code Ann. § 16-12-141.
[74] Ind. Code § 16-34-2-1(a)(3).
[75] Iowa Code § 146B.2.
[76] Kan. Stat. Ann. § 65-6703(c).
[77] Ky. Rev. Stat. § 311.782.
[78] La. Rev. Stat. Ann. § 40:1061.1.
[79] Miss. Code § 41-41-137.
[80] Neb. Rev. Stat. § 28-3,102 et seq.
[81] N.D. Cent. Code § 14-02.1-05.3.
[82] Ohio Rev. Code § 2919.201.
[83] Okla. Stat. tit. 63, § 1-745.1 et seq.
[84] S.C. Code Ann. § 44-41-410 et seq.
[85] S.D. Codified Laws §§ 34-23A-67 to-70.
[86] Tex. Health & Safety Code § 171.044.
[87] W. Va. Code § 16-2M-1 et seq.
[88] Wis. Stat. § 253.107.

a Montana law that will take effect later this year,[89] contain legislative findings documenting fetal pain.[90]

At present, the government's ability to enact laws preventing fetal pain hinges on the litigiousness of those who oppose the law. No amount of scientific evidence or public outcry can move a judge bound by the viability line of *Casey,* an untenable standard that should be revisited.

C. The Viability Standard Hinders States from Protecting the Medical Profession and the Public from the Horror of Dismemberment Abortion.

It is generally understood that "95% of second-trimester abortions in the United States are performed using the D & E procedure."[91] Dilation and evacuation (D & E, or dismemberment) abortion "involve[s] the use of surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb."[92] Mississippi cited opposition to this "barbaric practice" as one of the several reasons it sought to limit elective abortions at 15 weeks' gestation.[93]

---

[89] H.B. 136, 67th Leg., Reg. Sess. (Mont. 2021).
[90] Thomas M. Messner & Amanda Stirone, *Legislative and Litigation Overview of Five-Month Abortion Laws Enacted Before or After 2010*, 34 On Point 1 (Aug. 2019).
[91] *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 467 (Kan. 2019).
[92] Miss. H.B. 1510 § 1(2)(b)(i)(8) (2018).
[93] *Id*.

Thirteen States, including Mississippi,[94] have sought to prohibit this procedure because it causes fetal pain and degrades the medical profession's duty to "do no harm." The most recent of these was passed in Nebraska in 2020 and is one of three dismemberment laws currently in effect.[95]

For the remaining States,[96] the courts have refused to permit them to enforce duly enacted legislation regardless of the States' interests. Because dismemberment abortion is the most commonly used method of aborting a child in the second trimester, courts have found that such laws "effectively terminate[] the right to abortion for . . . women at 15

---

[94] Miss. Code § 41-41-155.

[95] Miss. Code § 41-41-155; Neb. Rev. Stat. § 28-347.04; W. Va. Code § 16-2O-1.

[96] Ala. Code § 26-23G-1-9 (enjoined in *W. Ala. Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1253 (M.D. Ala. 2017)); Ark. Code Ann. § 20-16-1803 (enjoined in *Hopkins v. Jegley*, No. 4:17-cv-00404-KGB, at *65 (E.D. Ark. Dec. 22, 2020)); Ind. Code § 16-18-2-96.4 (enjoined in *Bernard v. Individual Members of the Ind. Med. Licensing Bd.*, 392 F. Supp. 3d 935 (S.D. Ind. 2019)); Kan. Stat. Ann. § 65-6743 (enjoined in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019)); Ky. Rev. Stat. § 311.787 (enjoined in *EMW Women's Surgical Ctr. v. Friedlander*, No. 19-5516 (6th Cir. June 2, 2020)); La. Stat. Ann. § 40:1061.1.1 (enjoined in *June Medical Servs. v. Gee*, No. 16-cv-444 (M.D. La. Nov. 16, 2017)); N.D. Cent. Code § 14-02.1-04.2 (contingently enacted); Ohio Rev. Code § 2919.15 (enjoined in *Planned Parenthood Sw. Ohio Region v. Yost* (S.D. Ohio No. 19-118)); Okla. Stat. tit. 63, § 1-737.9 (enjoined in *Nova Health Sys. v. Pruitt*, No. CV-2015-1838 (Okla. County Dist. Ct. Oct. 28, 2015)); Tex. Health & Safety Code § 171.152 (enjoined in *Whole Woman's Health v. Paxton*, No. 17-51060, at *2 (5th Cir. Oct. 13, 2020)); W. Va. Code § 16-2O-1.

weeks,"[97] well ahead of *Casey*'s "pre-viability" limit. Yet this rule does not provide any deference to the State's or the public's interests. If no Mississippi doctor wished to perform dismemberment abortions, the voluntary refusal of the State's medical professionals as a group would not constitute an "undue burden" requiring a court-imposed solution. Cf. *Currier v. Jackson Women's Health Org.*, 940 F. Supp. 2d 416, 422 (S. D. Miss. 2013) (granting an injunction on an admitting privileges law in favor of the only remaining abortion clinic in Mississippi) ("Closing its doors would . . . force Mississippi women to leave Mississippi to obtain a legal abortion.").

At present, Mississippi law has prohibited dismemberment abortion since 2016,[98] which, according to the courts, has the same effect as HB 1510. Allowing this law to go into effect would not materially change the current state of the law, but it would permit Mississippi to address its corresponding concerns for maternal health and prohibiting discrimination. This Court should revisit the pre-viability standard which prevents States from enacting policy furthering their interests in protecting fetal dignity and maintaining the prestige of the medical profession.

D. The Viability Standard Hinders States from Protecting Children Diagnosed With Down Syndrome and Other Developmental Disabilities from Being Aborted.

---

[97] *Miller*, 299 F. Supp. 3d at 1267.
[98] Miss. Code § 41-41-155.

The United States has a "'lengthy and tragic history' . . . of segregation and discrimination [against persons with disabilities] that can only be called grotesque."[99] Disability discrimination was systematic in the United States and "until the twentieth century our legal system was more likely to be used to legitimize discrimination than to prevent it."[100]

Legislation is an effective tool in preventing disability stigma and prejudice. As the Court recognized, "How this large and diversified group [of persons with disabilities] is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."[101]

States have passed disability rights statutes protecting persons with disabilities as a class.[102] As these statutes recognize, "Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society."[103] However, in the United States, the

---

[99] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 461 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (citation omitted).

[100] Ruth Colker & Paul D. Grossman, THE LAW OF DISABILITY DISCRIMINATION 1 (8th ed. 2013); see also *Buck v. Bell*, 274 U.S. 200, 208 (1927) (upholding Virginia's forced sterilization of a "feeble-minded" woman because "[t]hree generations of imbeciles are enough").

[101] *City of Cleburne*, 473 U.S. at 442–43.

[102] See, e.g., Ark. Code Ann. § 16-123-105.

[103] 20 U.S.C. § 1400(c)(1).

abortion rate for unborn children diagnosed with Down syndrome is 67%.[104] Too often, abortion is presented as a "solution" to the "problem" of a prenatal diagnosis. The American College of Obstetricians and Gynecologists' 2007 revised policy "and the publicity it garnered has given Down syndrome an unfortunate notoriety; high-lighting it in the minds of expectant parents as the disability to universally consider avoiding."[105]

Abortions based on Down syndrome are fueled by disability prejudice because, by definition, the abortion is solely based upon a disability diagnosis. Eleven States, including Mississippi, have passed laws preventing discriminatory abortions based on a diagnosis of Down syndrome or fetal anomaly.[106] Mississippi's and four other States' laws are currently in effect,[107] with Arizona's going into effect later this year.

As stated in *Gonzales*, the Court "has confirmed the validity of drawing boundaries to prevent

---

[104] *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1791 (2019) (Thomas, J., concurring); The rate is higher in some European countries, from 77% in France to almost 100% in Iceland. *Id*. at 1790–91.

[105] Kruti Acharya, *Prenatal Testing for Intellectual Disability: Misperceptions and Reality With Lessons from Down Syndrome*, 17 Developmental Disabilities Rsch. Revs. 27, 28 (2011).

[106] Ariz. Rev. Stat. § 13-3603.02; Ark. Code § 20-16-2101 et seq.; Ind. Code § 16-34-4-1 et seq.; Ky. Rev. Stat. § 311.731; La. Rev. Stat. Ann. § 40:1061.1.2; Mo. Rev. Stat. § 188.038; Miss. Code § 41-41-401 et seq.; N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code § 2919.10; S.D. Codified Laws §§ 34-23A-89 to -93; Tenn. Code § 39-15-217.

[107] These are North Dakota, Ohio, South Dakota, and Tennessee.

practices that extinguish life and are close to actions that are condemned." 550 U.S. at 128. "The right to an abortion before viability is not absolute. The '[S]tate may regulate abortion *before viability* as long as it does not impose an undue burden on a woman's right to terminate her pregnancy.'"[108] State laws regulating abortions based solely on Down syndrome diagnoses prevent prejudice and stigma against the Down syndrome community, and the greater community of individuals with disabilities, yet lower courts are split on whether these crucial interests may be heard solely because of the viability rule.[109]

V. IF NECESSARY TO ENABLE THE PEOPLE'S REPRESENTATIVES TO FURTHER VITAL INTERESTS IN PUBLIC SAFETY, EQUALITY, AND THE INTEGRITY OF THE MEDICAL PROFESSION, *ROE* AND *CASEY* SHOULD BE RECONSIDERED AND, IF APPROPRIATE, WHOLLY OR PARTIALLY OVERRULED.

The well-developed evidentiary record created during trial and discovery in *Gonzales* resulted in an informed opinion that balanced all interests. The Court reviewed an extensive evidentiary record developed via multiple several-week trials and concluded on the basis of that record that the barbaric practice of partial-birth abortion was unnecessary to further women's health, and that tolerating the

---

[108] *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 520 (6th Cir. 2021) (en banc) (quoting *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 443 (6th Cir. 2003)) (alteration in original).

[109] Compare *Preterm-Cleveland*, 994 F.3d at 517–18 with *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021).

practice impugned the integrity of the medical profession. Like the federal Partial-Birth Abortion Act upheld in *Gonzales*, state and federal abortion regulations should be considered on their respective merits regardless of the viability line, evaluating whether they further a legitimate government interest such as those discussed above. The Supreme Court should now make clear what is only suggested in *Gonzales*: just as state interests inform the analysis in the context of previability restrictions, the viability line is not a barrier to full consideration of those interests pursuant to the *Casey* standard.

CONCLUSION

The Members of Congress respectfully submit that the Court uphold Mississippi's law as effectuating important state interests, or, alternatively, return this case to the lower courts for consideration on a full evidentiary record, recognizing that certain precedents may be reconsidered and, where necessary, be wholly or partially overruled.

Respectfully submitted,

Catherine Glenn Foster
Steven H. Aden
Counsel of Record
Katie Glenn
Natalie Hejran
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave., NW
Suite 500
Washington, D.C. 20036
Steven.Aden@aul.org
(202) 741-4919

July 29, 2021

APPENDIX—LIST OF *AMICI CURIAE*

U.S. SENATE

Roger F. Wicker (MS)	Cindy Hyde-Smith (MS)
John Barrasso (WY)	Marsha Blackburn (TN)
Roy Blunt (MO)	John Boozman (AR)
Mike Braun (IN)	Richard Burr (NC)
Bill Cassidy, M.D. (LA)	John Cornyn (TX)
Tom Cotton (AR)	Kevin Cramer (ND)
Mike Crapo (ID)	Steve Daines (MT)
Joni K. Ernst (IA)	Deb Fischer (NE)
Lindsey O. Graham (SC)	Charles E. Grassley (IA)
Bill Hagerty (TN)	John Hoeven (ND)
James M. Inhofe (OK)	Ron Johnson (WI)
John Kennedy (LA)	James Lankford (OK)

Cynthia M. Lummis (WY)	Roger Marshall, M.D. (KS)
Mitch McConnell (KY)	Jerry Moran (KS)
Rand Paul, M.D. (KY)	Rob Portman (OH)
James E. Risch (ID)	Mitt Romney (UT)
M. Michael Rounds (SD)	Marco Rubio (FL)
Ben Sasse (NE)	Rick Scott (FL)
Tim Scott (SC)	Richard C. Shelby (AL)
Dan Sullivan (AK)	John Thune (SD)
Thom Tillis (NC)	Pat Toomey (PA)
Tommy Tuberville (AL)	Todd Young (IN)

U.S. HOUSE OF REPRESENTATIVES

Christopher H. Smith (NJ-04)	Steve Palazzo (MS-04)
Trent Kelly (MS-01)	Michael Guest (MS-03)
Robert B. Aderholt (AL-04)	Rick W. Allen (GA-12)
Jodey C. Arrington (TX-19)	Kelly Armstrong (ND-AL)
Brian Babin, D.D.S. (TX-36)	Don Bacon (NE-02)
James R. Baird (IN-04)	Troy Balderson (OH-12)
Jim Banks (IN-03)	Andy Barr (KY-06)
Jack Bergman (MI-01)	Stephanie Bice (OK-05)
Andy Biggs (AZ-05)	Gus M. Bilirakis (FL-12)
Dan Bishop (NC-09)	Lauren Boebert (CO-03)
Mike Bost (IL-12)	Kevin Brady (TX-08)
Mo Brooks (AL-05)	Ken Buck (CO-04)

Larry Bucshon, M.D. (IN-08)	Ted Budd (NC-13)
Tim Burchett (TN-02)	Michael C. Burgess, M.D. (TX-26)
Ken Calvert (CA-42)	Kat Cammack (FL-03)
Jerry L. Carl (AL-01)	Earl L. "Buddy" Carter (GA-01)
John R. Carter (TX-31)	Steve Chabot (OH-01)
Liz Cheney (WY-AL)	Ben Cline (VA-06)
Michael Cloud (TX-27)	Andrew S. Clyde (GA-09)
Tom Cole (OK-04)	James Comer (KY-01)
Rick Crawford (AR-01)	Dan Crenshaw (TX-02)
John R. Curtis (UT-03)	Warren Davidson (OH-08)
Rodney Davis (IL-13)	Mario Diaz-Balart (FL-25)
Byron Donalds (FL-19)	Jeff Duncan (SC-03)
Neal P. Dunn, M.D. (FL-02)	Tom Emmer (MN-06)

Ron Estes (KS-04)	Pat Fallon (TX-04)
Randy Feenstra (IA-04)	A. Drew Ferguson, IV (GA-03)
Michelle Fischbach (MN-07)	Scott Fitzgerald (WI-05)
Chuck Fleischmann (TN-03)	Jeff Fortenberry (NE-01)
Virginia Foxx (NC-05)	C. Scott Franklin (FL-15)
Russ Fulcher (ID-01)	Mike Gallagher (WI-08)
Andrew R. Garbarino (NY-02)	Mike Garcia (CA-25)
Bob Gibbs (OH-07)	Louie Gohmert (TX-01)
Bob Good (VA-05)	Lance Gooden (TX-05)
Tony Gonzales (TX-23)	Paul A. Gosar, D.D.S. (AZ-04)
Kay Granger (TX-12)	Garret Graves (LA-06)

Sam Graves (MO-06)	Mark E. Green, M.D. (TN-07)
H. Morgan Griffith (VA-09)	Glenn Grothman (WI-06)
Brett Guthrie (KY-02)	Jim Hagedorn (MN-01)
Andy Harris, M.D. (MD-01)	Diana Harshbarger (TN-01)
Vicky Hartzler (MO-04)	Kevin Hern (OK-01)
Yvette Herrell (NM-02)	Jaime Herrera Beutler (WA-03)
Jody Hice (GA-10)	Clay Higgins (LA-03)
French Hill (AR-02)	Ashley Hinson (IA-01)
Richard Hudson (NC-08)	Bill Huizenga (MI-02)
Darrell Issa (CA-50)	Ronny L. Jackson (TX-13)
Chris Jacobs (NY-27)	Bill Johnson (OH-06)
Dusty Johnson (SD-AL)	Mike Johnson (LA-04)
Jim Jordan (OH-04)	John Joyce, M.D. (PA-13)

Fred Keller (PA-12)	Mike Kelly (PA-16)
Adam Kinzinger (IL-16)	Darin LaHood (IL-18)
Doug LaMalfa (CA-01)	Doug Lamborn (CO-05)
Robert E. Latta (OH-05)	Jake LaTurner (KS-02)
Debbie Lesko (AZ-08)	Julia Letlow (LA-05)
Billy Long (MO-07)	Barry Loudermilk (GA-11)
Frank D. Lucas (OK-03)	Blaine Luetkemeyer (MO-03)
Tracey Mann (KS-01)	Thomas Massie (KY-04)
Brian Mast (FL-18)	Kevin McCarthy (CA-23)
Lisa McClain (MI-10)	Tom McClintock (CA-04)
Patrick McHenry (NC-10)	David B. McKinley, P.E. (WV-01)
Cathy McMorris Rodgers (WA-05)	Peter Meijer (MI-03)
Carol D. Miller (WV-03)	Mary E. Miller (IL-15)

Mariannette J. Miller-Meeks (IA-02)	John R. Moolenaar (MI-04)
Alex X. Mooney (WV-02)	Barry Moore (AL-02)
Blake Moore (UT-01)	Markwayne Mullin (OK-02)
Gregory F. Murphy, M.D. (NC-03)	Troy E. Nehls (TX-22)
Dan Newhouse (WA-04)	Ralph Norman (SC-05)
Devin Nunes (CA-22)	Burgess Owens (UT-04)
Gary Palmer (AL-06)	Greg Pence (IN-06)
August Pfluger (TX-11)	Bill Posey (FL-08)
Guy Reschenthaler (PA-14)	Tom Rice (SC-07)
Hal Rogers (KY-05)	Mike D. Rogers (AL-03)
John Rose (TN-06)	Matthew Rosendale, Sr. (MT-AL)
David Rouzer (NC-07)	Chip Roy (TX-21)
John H. Rutherford (FL-04)	Steve Scalise (LA-01)

Austin Scott (GA-08)	Pete Sessions (TX-17)
Adrian Smith (NE-03)	Jason Smith (MO-08)
Lloyd Smucker (PA-11)	Victoria Spartz (IN-05)
Pete Stauber (MN-08)	Michelle Steel (CA-48)
Elise Stefanik (NY-21)	Bryan Steil (WI-01)
W. Gregory Steube (FL-17)	Chris Stewart (UT-02)
Van Taylor (TX-03)	Marjorie Taylor Greene (GA-14)
Claudia Tenney (NY-22)	Glenn 'GT' Thompson (PA-15)
Tom Tiffany (WI-07)	William R. Timmons, IV (SC-04)
Michael R. Turner (OH-10)	David G. Valadao (CA-21)
Beth Van Duyne (TX-24)	Ann Wagner (MO-02)
Tim Walberg (MI-07)	Jackie Walorski (IN-02)
Michael Waltz (FL-06)	Randy K. Weber (TX-14)

Daniel Webster (FL-11)	Brad Wenstrup, D.P.M. (OH-02)
Bruce Westerman (AR-04)	Roger Williams (TX-25)
Joe Wilson (SC-02)	Robert J. Wittman (VA-01)
Steve Womack (AR-03)	Lee Zeldin (NY-01)