No. 19-___

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.*,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

LYNN FITCH
Attorney General of Mississippi

WHITNEY LIPSCOMB
Deputy Attorney General

PAUL E. BARNES
Counsel of Record

WILSON MINOR
Special Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 220
Jackson, Mississippi 39205-0220
(601) 359-4072
pbarn@ago.ms.gov

Counsel for Petitioners

June 15, 2020

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether all pre-viability prohibitions on elective abortions are unconstitutional.

2. Whether the validity of a pre-viability law that protects women's health, the dignity of unborn children, and the integrity of the medical profession and society should be analyzed under *Casey*'s "undue burden" standard or *Hellerstedt*'s balancing of benefits and burdens.

3. Whether abortion providers have third-party standing to invalidate a law that protects women's health from the dangers of late-term abortions.

PARTIES TO THE PROCEEDING

Petitioners are Thomas Dobbs, M.D., M.P.H., in his official capacity as State Health Officer of the Mississippi Department of Health, and Kenneth Cleveland, M.D., in his official capacity as Executive Director of the Mississippi State Board of Medical Licensure.

Respondents are Jackson Women's Health Organization, on behalf of itself and its patients, and Sacheen Carr-Ellis, M.D., on behalf of herself and her patients.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit, No. 18-60868, *Jackson Women's Health Organization* v. *Dobbs*, judgment entered December 13, 2019.

U.S. District Court for the Southern District Mississippi, No. 3:18-cv-171, *Jackson Women's Health Organization* v. *Dobbs*, final judgment entered November 20, 2018.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DECISIONS BELOW

The district court's decision granting Respondents' motion for summary judgment is reported at *Jackson Women's Health Org. v. Currier*, 349 F.Supp.3d 536 (S.D. Miss. 2018) and reprinted at Pet. App.4a-55a. The district court's orders granting Respondents' motions for temporary restraining order and to limit discovery, Pet.App.58a-63a, are not reported.

The Fifth Circuit's ruling is reported at *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019) and reprinted at Pet.App.1a-37a. The Fifth Circuit's order denying Mississippi's petition for rehearing en banc, Pet.App.38a-39a, is not reported.

STATEMENT OF JURISDICTION

On December 13, 2019, the Fifth Circuit issued its opinion affirming the district court's grant of summary judgment to Respondents, and on January 17, 2020, the Fifth Circuit denied rehearing en banc. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and the Fifth Circuit under 28 U.S.C. § 1292(a)(1). On March 19, 2020, Justice Alito extended the time to file a petition for a writ of certiorari to June 15, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves United States Constitution amendment XIV, § 1, and Mississippi's House Bill 1510, Pet.App.65a-74a.

INTRODUCTION

In 2018, Mississippi enacted the Gestational Age Act. The law protects the health of mothers, the dignity of unborn children, and the integrity of the medical profession and society by allowing abortions after

15 weeks' gestational age only in medical emergencies or for severe fetal abnormality. These interests are well supported by medical science:

- Any surgical abortion taking place after 15 weeks' gestation carries inherent medical threats to the mother. The risk of a mother's death from abortion at 16 to 20 weeks' gestation is 35 times more likely than at eight weeks, and the relative risk of mortality increases by 38% for each additional week at higher gestations.
- It is undisputed in the medical literature that a human fetus develops neural circuitry capable of detecting and responding to pain by 10–12 weeks after the last menstrual period (LMP). At 14–20 weeks, spinothalamic circuitry develops that can support a conscious awareness of pain. Accordingly, during the time the Act covers, the human fetus is likely capable of conscious pain perception in a manner that becomes increasingly complex over time.
- The Act appropriately regulates inhumane procedures. It prohibits abortions six weeks *after* a fetus's basic physiological functions are all present, five weeks *after* the child's vital organs begin to function, and three weeks *after* the child can open and close his or her fingers, make sucking motions, and sense stimuli from outside the womb.

Given these important interests, Mississippi's Gestational Age Act brings into sharp focus the conflict between this Court's suggestion that states cannot prohibit pre-viability abortions, *Roe* v. *Wade*, 410 U.S. 113, 163–65 (1973), and the Court's repeated admonition that states have legitimate interests "*from the outset*

of the pregnancy in protecting [1] the health of the mother and [2] the life of the fetus that may become a child," *Gonzales* v. *Carhart*, 550 U.S. 124, 145 (2007) (citing *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 846 (1992) (emphasis added)), and [3] avoiding "coarsen[ing] society to the humanity of not only newborns, but all vulnerable and innocent life," *id.* at 157 (cleaned up). Because of that conflict, "good reasons exist for the Court to reevaluate its jurisprudence." *MKB Mgmt. Corp.* v. *Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015).

First, "the Court's viability standard has proven unsatisfactory." *Id.* at 774. As Justice O'Connor explained, "potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. . . . 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. . . . [T]he State's interest in protecting potential human life exists throughout the pregnancy." *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting). See also *id.* at 458 (viability rule is "on a collision course with itself").

Second, a strict viability line ties "a state's interest in unborn children to developments in obstetrics, not to developments in the unborn. This leads to troubling consequences for states seeking to protect unborn children." *MKB Mgmt.*, 795 F.3d at 774.

For example, in the 1970s, Mississippi could not have prohibited abortion of a 24-week-old fetus because that fetus would not have been viable. Today, Mississippi could enact such a law. Tomorrow, development of an artificial womb will inevitably move the "viability" line to the moment of conception. "How it is consistent with

a state's interest in protecting unborn children that the same fetus would be deserving of state protection in one year but undeserving of state protection in another is not clear." *Ibid.*

Third, imposing an inflexible viability standard eviscerates "the states' ability to account for 'advances in medical and scientific technology [that] have greatly expanded our knowledge of prenatal life.'" *Ibid.* (quoting *Hamilton* v. *Scott*, 97 So. 3d 728, 742 (Ala. 2012) (Parker, J., concurring specially)). These advances include new knowledge that "a baby develops sensitivity to external stimuli and to pain much earlier than was" believed at the time of *Roe*. *McCorvey* v. *Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring). See also *Bryant* v. *Woodall*, 2017 WL 1292378, at *7 (M.D.N.C. Apr. 7, 2017) (allowing discovery to "show that an infant *in utero* begins to feel pain quite probably by the twenty-week gestational age point") (cleaned up).

Mississippi attempted to introduce these advances below. But the district court disregarded them as irrelevant considering the viability standard. Yet "if courts were to delve into the facts underlying *Roe* . . . with present-day knowledge, they might conclude that the woman's 'choice' is far more risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew." *McCorvey*, 385 F.3d at 852 (Jones, J., concurring).

In light of all the foregoing, this Court was right when it acknowledged three decades ago that it could "not see why the State's interest in protecting 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." *Webster* v. *Reproductive*

Health Servs., 492 U.S. 490, 518 (1989). This case is an ideal vehicle to make that acknowledgment a holding and reconsider the bright-line viability rule.

This case also presents an opportunity to reconcile *Casey* and *Whole Women's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), specifically, this Court's conflicting statements regarding the test to apply when analyzing the validity of a pre-viability law that protects women's health, the dignity of unborn children, and the integrity of the medical profession and society.

In *Casey*, the Court said such a law must yield when it imposes an "undue burden," i.e., "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878. In *Hellerstedt*—without overruling *Casey*—the Court did not consider whether the burden of "increased driving distances" was a substantial obstacle but instead weighed that burden against the law's benefits. 136 S. Ct. at 2313. What's more, the Court required the state to *prove* those benefits. *E.g.*, *id.* at 2314. As a result, the *Hellerstedt* analysis was akin to strict scrutiny, a standard that *Casey* rejected in favor of the undue-burden standard because states have significant, legitimate reasons for regulating abortion. *Casey*, 505 U.S. 873–79. As with the Court's conflicting statements regarding viability, this case is an ideal opportunity to resolve the confusion.

To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*. They merely asks the Court to reconcile a conflict in its own precedents.[1] "It is troubling enough to many

[1] If the Court determines that it cannot reconcile *Roe* and *Casey* with other precedents or scientific advancements showing a compelling state interest in fetal life far earlier in pregnancy than

Americans of good faith that federal courts, without any basis in constitutional text or original meaning, restrict the ability of states to regulate in the area of abortion." Pet.App.37a (Ho., J., concurring). But it is downright demeaning to states and their role in the federalist system to not know in advance how courts will evaluate the validity of their laws protecting mothers, unborn infants, and the medical community and society.

Finally, this case provides the Court with yet another opportunity to clarify its third-party standing doctrine in the abortion context. Abortion clinics and providers should not be excluded from having to satisfy the same rigorous third-party standing requirements as litigants in any other matter.

For all these reasons, Mississippi respectfully requests that the Court grant the petition.

STATEMENT OF THE CASE

A. Mississippi HB 1510

In 2018, the Mississippi Legislature passed House Bill 1510, the "Gestational Age Act." Miss. Gen. Laws 2018, ch. 393 (codified at Miss. Code Ann. 41-41-191). The law protects the health of the mother, the dignity of the unborn child, and the integrity of the medical profession by allowing abortions after 15 weeks' gestational age only in medical emergencies or severe fetal abnormality. Pet.App.65a-74a. Governor Phil Bryant signed the bill into law on March 19, 2018, and it took effect immediately.

---

those cases contemplate, the Court should not retain erroneous precedent. *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944).

H.B. 1510 contains detailed factual findings about fetal development based on medical and other authorities. These findings include:

- "Between five (5) and six (6) weeks' gestation, an unborn human being's heart begins beating."
- "An unborn human being begins to move about in the womb at approximately eight (8) weeks' gestation."
- "At nine (9) weeks' gestation, all basic physiological functions are present. Teeth and eyes are present, as well as external genitalia."
- "An unborn human being's vital organs begin to function at ten (10) weeks' gestation. Hair, fingernails, and toenails also begin to form."
- "At eleven (11) weeks' gestation, an unborn human being's diaphragm is developing, and he or she may even hiccup. He or she is beginning to move about freely in the womb."
- "At twelve (12) weeks' gestation, an unborn human being can open and close his or her fingers, starts to make sucking motions, and senses stimulation from the world outside the womb. Importantly, he or she has taken on "the human form" in all relevant aspects. Gonzales v. Carhart, 550 U.S. 124, 160 (2007)."
- "The majority of abortion procedures performed after fifteen (15) weeks' gestation are dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb. The Legislature finds that the intentional commitment of such acts for nontherapeutic or elective

reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession."

- "Most obstetricians and gynecologists practicing in the State of Mississippi do not offer or perform nontherapeutic or elective abortions. Even fewer offer or perform the dilation and evacuation abortion procedure even though it is within their scope of practice."
- "Abortion carries significant physical and psychological risks to the maternal patient, and these physical and psychological risks increase with gestational 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)."
- "[A]s 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."
- "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."

- "The United States is one (1) of only seven (7) nations in the world that permits nontherapeutic or elective abortion-on-demand after the twentieth week of gestation. In fact, fully seventy-five percent (75%) of all nations do not permit abortion after twelve (12) weeks' gestation, except (in most instances) to save the life and to preserve the physical health of the mother." Pet.App.65a-74a.

Based on these findings, the law requires a physician to determine a baby's probable gestational age before performing an abortion. Pet.App.70a. And it prohibits someone from intentionally or knowingly performing, inducing, or attempting to perform or induce an abortion if the probable gestational age is greater than 15 weeks. *Id.*

B. District court proceedings

Respondents—Jackson Women's Health Organization, Mississippi's only abortion clinic and one of its providers, Dr. Sacheen Carr-Ellis—filed suit in federal court to challenge H.B. 1510 the day the law took effect. Respondents only provide abortions up to 16 weeks' gestation. Pet.App.19a. They did not allege that the law violates their own constitutional rights but rather that the law bans pre-viability abortions in violation of their *clients'* rights. They requested a temporary restraining order that the district court granted the very next day. Pet.App.62a-64a.

Respondents later amended their complaint to add claims attacking the constitutionality of virtually every Mississippi abortion law and regulation in existence.

The district court bifurcated the case, *sua sponte*, severing the challenge to the 15-week law.

Over Mississippi's objections, the district court adopted Respondents' proposed discovery schedule for the 15-week-law portion of the case and limited discovery to only one issue: "whether the 15-week mark is before or after viability." Pet.App.60a. According to the district court, "evidence about any other issue . . . is irrelevant." *Id.*

Accordingly, the district court refused to consider any of Mississippi's interests advanced by the 15-week law. This ignored the law's three explicit justifications, all set forth in the statutory text: Mississippi's "interest in protecting the life of the unborn;" in safeguarding and regulating the medical profession, including prevention of "barbaric practice[s], [that are] dangerous for the maternal patient, and demeaning to the medical profession; and "protecting the health of women." Pet.App.66a-67a.

In support of the State's interest in protecting unborn life, Petitioners proffered Dr. Maureen Condic, an expert in neurobiology, anatomy, and embryology, to opine on the ability of a fetus to experience pain. Dr. Condic explained that:

- "The scientific evidence regarding the development of human brain structures is entirely uncontested in the literature and unambiguously indicates that by [10-12 weeks LMP], a human fetus develops neural circuitry capable of detecting and responding to pain." Pet.App.75a at ¶ 3.
- "During the period from [14-20 weeks LMP], spinothalamic circuitry develops that is capable of supporting a conscious awareness of pain." *Id.*

- "During the time period covered by the Gestational Age Act, the human fetus is producing neural structures that enable a conscious perception of pain, with development of these structures being substantially complete by the" 20th week LMP. Pet.App.77a at ¶ 6. "Thus, during the time period covered by the Gestational Age Act, the human fetus is likely to be capable of conscious pain perception in a manner that becomes increasingly complex over time." *Id.* ¶ 7.
- "[*T*]*he scientific evidence regarding development of pain circuitry is entirely undisputed*, and has been reported in every modern review of fetal pain." Pet.App.78a-79a at ¶ 11 (citations omitted).
- "The neural circuitry responsible for the most primitive response to pain, the spinal reflex, is in place by" 10 weeks LMP. "This is the earliest point at which the fetus is capable of detecting and reacting to painful stimuli in any capacity. And a fetus responds just as humans at later stages of development respond[:] by actively withdrawing from the painful stimulus." Pet.App.80a-81a at ¶ 15.
- And the "rapid improvement in survival of human infants born at increasingly younger ages strongly suggests that in the relatively near future, infants born prior to the 19th week of development may prove to be 'viable,' due to technical advances." Pet.App.81a-83 at ¶ 17.

The district court ruled Dr. Condic's expert medical and scientific opinions irrelevant and inadmissible. Pet.App.56a-57a.

Following very limited discovery, the district court granted summary judgment to Respondents and perma-

nently enjoined Mississippi's 15-week law. Pet.App.58a-61a. The district court held that under controlling precedent, the 15-week law is unconstitutional because it would "ban" pre-viability abortions. Pet.App.55a. The district court did not apply the undue burden test, and it refused to consider any of the legitimate government interests furthered by the 15-week law. Instead, the district court disparaged Mississippi's acknowledged interest in women's health as "pure gaslighting" and criticized Mississippi for following the lead of many states who declined to expand Medicaid following enactment of the federal Affordable Care Act. Pet.App.46a.

The district court's diatribe did not stop there. The court accused the State's political leaders of being "proud to challenge *Roe*" while choosing "not to lift a finger to address the tragedies lurking on the other side of the delivery room." Pet.App.46a. It compared H.B. 1510 "to the old Mississippi—the Mississippi bent on controlling women and minorities. The Mississippi that, just a few decades ago, barred women from serving on juries so they may continue their service as mothers, wives, and homemakers." Pet.App.47a (quotation omitted). "The Mississippi that, in Fannie Lou Hamer's reporting, sterilized six out of ten black women in Sunflower County at the local hospital—against their will." Pet.App.47a(citation omitted). "And the Mississippi that, in the early 1980s, was the last State to ratify the 19th Amendment." Pet.App.47a (citation omitted). "The Mississippi Legislature," the court proclaimed, "has a history of disregarding the constitutional right of its citizens." Pet.App.50a.

C. Fifth Circuit ruling

The Fifth Circuit affirmed. It held that this Court's precedent creates a categorical right to a pre-viability

abortion, and the 15-week law infringes that right because it is a "ban on certain pre-viability abortions[.]" Pet.App.13a. Construing that right as inviolable, the Fifth Circuit agreed that the district court was not required to apply the undue burden test or consider the strength of Mississippi's interests that the law served. Pet.App.12a. The court also affirmed the district court's discovery and evidentiary rulings, explaining that this "result . . . flows from our holding that the Act unconstitutionally bans pre-viability abortions." Pet.App.14a. And it rejected Mississippi's standing argument. Pet.App.15a.

Judge Ho concurred in affirming the judgment of the district court because a "good faith reading" of this Court's precedents required it. Pet.App.20a. But he stated that he could not affirm the district court's opinion because he was "deeply troubled by how the district court handled this case." Pet.App.21a. The district court's opinion "displays an alarming disrespect for the millions of Americans who believe that babies deserve legal protection during pregnancy as well as after birth, and that abortion is the immoral, tragic, and violent taking of innocent human life." Pet.App.21a. "Instead of respecting all sides," Judge Ho continued, "the district court opinion disparages the Mississippi legislation," "equates a belief in the sanctity of life with sexism," and "smears Mississippi legislators by linking House Bill 1510 to the state's tragic history of race relations, while ignoring abortion's own checkered racial past." Pet.App.21a. "It is troubling," Judge Ho concluded, "that federal courts, without any basis in constitutional text or original meaning, restrict the ability of states to regulate in the area of abortion." Pet.App.37a.

REASONS FOR GRANTING THE WRIT

In *Gonzales*, this Court recognized that an unborn child "is a living organism while within the womb, whether or not it is viable outside the womb." 550 U.S. at 147. As a result, that child is entitled to "respect for the dignity of [its] human life." *Id.* at 157.

Conversely, *Roe*'s viability line is arbitrary, constantly moves as medical knowledge increases, and fails to honor the reality that states have substantial interests of their own beginning "from the outset of the pregnancy." *Id.* at 145. Indeed, by 15 weeks, a baby's development is so great—and the likelihood of her eventual live and healthy birth so high—that it makes little sense to say a state has *no* interest in protecting the infant's life, not to mention the state's substantial interests in the mother's life and safety, the baby's pain and suffering, and the "coarsen[ing of] society to the humanity of . . . all vulnerable and innocent human life." *Id.* at 157 (cleaned up).

Given the conflict in this Court's precedents and the advances in medical and scientific knowledge, certiorari is warranted to clarify whether abortion prohibitions before viability are always unconstitutional. The Court should grant the petition, hold that it is illogical to impose a "rigid line allowing state regulation after viability but prohibiting it before viability," *Webster*, 492 U.S. at 518, and uphold the Gestational Age Act. In so doing, the Court should clarify whether the *Casey* undue-burden test or the *Hellerstedt* balancing framework should be applied. And the Court should hold that abortion clinics and doctors lack third-party standing to assert the rights of their clients, bringing standing in abortion cases into conformance with all other areas of the law.

I. The Court should grant certiorari and clarify that the right to a pre-viability abortion is not absolute.

The only legal and factual issue the district court considered was whether a baby is viable at 15 weeks. Pet.App.40a-55a. This was error and conflicts with this Court's nuanced and evolving abortion jurisprudence. Just as this Court rejected *Roe*'s trimester framework in *Casey*, the Court should grant review and reject "viability" as the bright line for determining when a state may legislate to advance its substantial interests in health, safety, and dignity.

A. "Viability" is not an appropriate standard for assessing the constitutionality of a law regulating abortion.

The Court has already held that states have legitimate interests in protecting the health of the mother, the life and dignity of the developing baby, and society's sensitivity to the importance of all human life. *Gonzales*, 550 U.S. at 145, 157. The Court also recognizes these interests exist "from the outset of the pregnancy." *Id.* at 145 (citing *Casey*, 505 U.S. at 846). But that recognition conflicts with *Roe*'s suggestion that a mother has a right to terminate her baby's life up to viability. *Roe*, 410 U.S. at 163–65. There are many reasons to revisit the bright-line viability rule.

1. Neither the Texas statute challenged in *Roe* nor the Georgia statute at issue in *Doe* v. *Bolton*, 410 U.S. 179 (1973), included a gestational age limit. So, the lower courts did not rule on viability in either case, and no party or amicus asked the Court to adopt a bright-line viability rule—or even to extend the abortion right to viability.

As such, basing its holding on fetal viability was "self-conscious dictum" from the get-go. Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework*, 51 Am. J. Legal Hist. 505 (2011). And members of the Court have commented on the arbitrariness of using viability as the marker to evaluate the strength of state interests. Justice O'Connor explained in *Akron* that the "choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." 462 U.S. at 461. And the Court in *Webster* saw no reason "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." 492 U.S. at 519. *Webster* cited favorably to the dissent in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), noting that a state's "'compelling interest' in protecting human life throughout pregnancy," if "compelling after viability, is equally compelling before viability." *Id.* (quoting *Thornburgh*, 476 U.S. at 795 (White, J., dissenting)). Accord *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring) (state's interest increases with the baby's "capacity to feel pain").

2. When adopting the viability rule, the *Roe* opinion did not grapple with its implications for maternal health, nor could it; since the issue had not been briefed or argued, the Court lacked a record to consider those implications. With the benefit of additional experience and study, it is now apparent that allowing abortion until viability risks the mother's health in multiple ways. Linda Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Ob. & Gyn. 729 (2004) ("Compared

with women whose abortions were performed at or before 8 weeks of gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes."). More on this below. The point here is that it is difficult to reconcile a bright-line viability rule and the state's interest in protecting maternal health. That explains why Mississippi has an existing 20-weeks law that is still in effect, Miss. Code Ann. 41-41-141, and why, as of January 1, 2020, 17 states—Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin—are enforcing 22-weeks laws.

3. *Roe*'s viability rule is outdated. Most states reject viability as the rule for determining when prenatal injuries are actionable. Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law*, 6 U. St. Thomas J. Law & Pub. Pol'y 141, 146–48 (2012) (*Linton*). Courts and legislatures routinely reject viability as the standard for wrongful-death actions. *E.g.*, *Hudak* v. *Gregory*, 634 A.2d 600, 602 (Pa. 1993) ("[N]o jurisdiction accepts the . . . assertion that a child must be viable at the time of birth in order to maintain an action in wrongful death."); *Hamilton* v. *Scott*, 97 So.3d 728, 735 (Ala. 2012) ("Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child, even when the child dies before reaching viability.") And states reject the rule for fetal homicides. *Linton* 143–46. Outside abortion, "viability is purely an arbitrary milestone from which to reckon a child's legal existence." *Wiersma* v. *Maple Leaf Farms*, 543 N.W.2d 787, 792 (S.D. 1996).

4. A strict viability line ties "a state's interest in unborn children to developments in obstetrics, not to developments in the unborn. This leads to troubling consequences for states seeking to protect unborn children." *MKB Mgmt.*, 795 F.3d at 774. To begin, medical advances make viability itself a moving target. What Mississippi could not prohibit in 1973, it can prohibit today. And what Mississippi cannot regulate today, it will be able to regulate in the future. Given the many medical advances our scientific community is constantly achieving, it is only a matter of time before development of an artificial womb moves "viability" all the way back to the moment of conception.

Moreover, a strict viability rule does not account for what medicine and science have taught us since 1973. *Ibid.* "The development of ultrasound technology has enhanced medical and public understanding, allowing us to watch the growth and development of the unborn child in a way previous generations could never have imagined." *Hamilton*, 97 So. 3d at 742 (Parker, J., concurring specially). "Similarly, advances in genetics and related fields make clear that a new and unique human being is formed at the moment of conception, when two cells, incapable of independent life, merge to form a single, individual human entity." *Ibid.* There is also the development of in vitro fertilization which has established for many, lay and scientific alike, that conception is the moment when human life begins. Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and the Terminology Revisited*, 8 U. St. Thomas J. L. & Pub. Pol'y 44 (2013).

5. Finally, this Court's *Gonzales* decision has already called the viability rule into serious question. Crediting Congress's policy judgment that "the practice of performing a partial-birth abortion . . . is[a gruesome and

inhuman procedure that is never medically necessary and should be prohibited," the Court upheld a complete ban on partial-birth abortion, except when "necessary to save the life of the mother." 550 U.S. at 141, 142, 158. The ban applied "both previability and postviability because, by common understanding and scientific terminology," "a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Id.* at 147. Accord, *e.g.*, *id.* at 156 (posing the central question as "whether the [federal partial-birth abortion ban] Act . . . imposes a substantial obstacle to late-term, *but pre-viability*, abortions," and concluding that it does not) (emphasis added). Significantly, the district court decision this Court reversed in *Gonzales* used the same viability line treated as dispositive by the district court here.

Justice Ginsburg's *Gonzales* dissent criticized the majority because it "blurs the line" "between previability and postviability." *Id.* at 171, 186 (Ginsburg, J., dissenting). She was right. Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 Wash. & Lee L. Rev. 915, 941 (2010) (*Gonzales* "can be read to eliminate the significance of viability as a marker, and therefore eliminate the significance of the distinction between the pre-viable and post-viable stages of pregnancy"); Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 Nw. U. L. Rev. 249, 253, 276 n.152 (2009) (explaining that *Gonzales* "undermines *Casey*'s attempted defense of the viability rule").

In sum, the viability rule was created outside the ordinary crucible of litigation, failed to take account of the state's accepted interest in maternal health and fetal pain, is increasingly out of step with other areas

of the law, rejects science and common sense, and is shaky precedent at best. The Court should revisit it.

B. Courts should consider a state's legitimate interests when assessing pre-viability abortion regulation.

As noted, this Court has recognized Mississippi's legitimate interests in protecting maternal health, safeguarding unborn babies, and promoting respect for innocent and vulnerable life. The district court failed to consider those interests, deeming them irrelevant under the dubious viability rule. But these strong interests show why the viability standard cannot survive (or at a minimum, why it cannot be a bright-line rule).

1. Maternal health

a. Abortion can cause serious physical and psychological (both short- and long-term) complications for mothers, including uterine perforation, uterine scarring, cervical perforation or other injury, infection, bleeding, hemorrhage, blood clots, failure to actually terminate the pregnancy, incomplete abortion (retained tissue), pelvic inflammatory disease, endometritis, missed ectopic pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic disorder, shock, embolism, coma, placenta previa in subsequent pregnancies, preterm birth in subsequent pregnancies, free fluid in the abdomen, organ damage, adverse reactions to anesthesia and other drugs, psychological or emotional complications including depression, anxiety, sleeping disorders, an increased risk of breast cancer, and death. *E.g.*, P.K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995-2009*, 199 Brit. J. Of Psychiatry 180-86 (2011); P. Shah et al., *Induced termination of*

pregnancy and low birth weight and preterm birth: a systematic review and meta-analysis, 116, B.J.O.G. 1425 (2009); H.M. Swingle et al., *Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review and Meta-Analysis*, 54, J. Reprod. Med. 95 (2009); R.H. van Oppenraaij et al., *Predicting adverse obstetric outcome after early pregnancy events and complications: a review*, 15, Human Reprod. Update Advance Access 409 (2009); J.M. Thorp et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58, Obstet. & Gynecol. Survey 67, 75 (2003); J.M. Barrett, *Induced Abortion: A Risk Factor for Placenta Previa*, 141 Am. J. Obstet. & Gynecol. 769 (1981).

It is undisputed that abortion has a higher medical risk when the procedure is performed later in pregnancy. Compared to abortion at eight weeks gestation, the relative risk of mortality increases by 38% for each additional week at higher gestations. L. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Ob. & Gyn. 729 (2004). For example, the risk of death at eight weeks' gestation is one death per one million abortions; at 16 to 20 weeks, that risk rises to one death per 29,000 abortions; and at 21 weeks' gestation or later, the risk of death is one per every 11,000 abortions. *Id*. So, a woman seeking an abortion at 20 weeks is 35 times more likely to die from the abortion than she was in the first trimester.

Researchers in the Bartlett study concluded that 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." *Id*. at 735. This is because later-term abortions require a greater degree of cervical dilation, an increased blood flow later in pregnancy predisposes the woman to hemorrhage, and

the myometrium is relaxed and more subject to perforation. *Id*. Abortion procedures performed after the first trimester account for "a disproportionate amount of abortion-related morbidity and mortality." E.M. Johnson, *The Reality of Late-Term Abortion Procedures*, Charlotte Lozier Institute (Jan. 20, 2015), at 6.

b. Any surgical abortion taking place after 15 weeks' gestation carries inherent risks of infection, bleeding, damage to other genitourinary and gastrointestinal organs, incomplete emptying of the uterus, cervical laceration, and uterine perforation. L. Bartlett et. al., at 729; C. Hammond, *Recent advances in second trimester abortion: an evidence-based review*, 200 Am. J. Obstet. Gynecol. 347 2009;200(4): 347–56; J. Diedrich et al., *Complications of Surgical Abortion*, 52 Clin. Obstet. Gynecol. 205 (2009);52(2):205-212. During the second trimester, the uterus thins and softens significantly and there is an increased risk of perforating or puncturing the uterine wall with instruments. Testimony of Anthony Levatino, M.D., *Hearing on District of Columbia Pain-Capable Unborn Child Protection Act, H.R. 1797*, before the Subcomm. on the Constitution and Civil Justice, H. Comm. on the Judiciary, 113th Cong. (May 23, 2013). And every type of dilator used in such an abortion "can migrate into the uterine cavity resulting in ongoing pain, bleeding, or infection." *Id*. at 163.

Inserting dilators also increases the risk that a woman "will experience spontaneous rupture of membranes during or after osmotic dilator insertion," which can lead to infection and fever. *Id*. Insertion can "traumatiz[e] the cervix" or "creat[e] a false channel"—that is, it can form a hole or fracture in vaginal or cervical tissue where there should not be one. *Id*.

Between 5% and 20% of women will suffer vasovagal symptoms—fainting, nausea, blurred vision, lighthead-

edness, cold sweats, weak pulse, a drop in blood pressure, low heart rate, and more— because of the dilation procedures. *Id*. at 164. Leaving the dilators in for multiple days also poses the risk that the woman (and the baby) will contract a serious infection. *Id*. at 163, 165. The most common dilators are natural products, derived from seaweed and algae, and can harbor genital pathogens even after sterilization. *Id*. at 164. And some women suffer anaphylaxis in response to luminaria insertion. *Id*. at 165. This is "a severe, potentially life-threatening allergic reaction" characterized by vomiting, dizziness, hives, hypotension, airway constriction, and a weak and rapid pulse. *See* Mayo Clinic, *Anaphylaxis*, https://mayocl.in/2GYVjoL (Sept. 14, 2019).

c. In 1973, this Court could not have known of the psychological and physiological harms that legalized abortion could cause women. Today, "the one fact that seems nearly axiomatic in psychological literature on abortion is that the later in pregnancy one aborts, the greater the woman's risk for negative emotional sequelae." Brian D. Wassom, *The Exception That Swallowed the Rule?:* Women's Professional Corp. v. Voinovich *and the Mental Health Exception to Post-Viability Abortion Bans*, 49 Case W. Res. L. Rev. 799, 853 (1999).

One peer-reviewed study—led by a pro-abortion researcher—demonstrated that the risk of suicide was three times greater for women who aborted than for women who carried their pregnancies to term. D.M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. Child Psychology & Psychiatry 16 (2006). Another peer-reviewed study demonstrates that women whose first pregnancies ended in abortion were 65% more likely to score in the

"high risk" range for clinical depression than women whose first pregnancies resulted in a birth, even after controlling for age, race, marital status, divorce history, education, income, and pre-pregnancy psychological state. J.R. Cougle et al., *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, 9 Med. Sci. Monitor 157 (2003).

In short, growing medical evidence supports Mississippi's interest in and responsibility to protect women from the dangers inherent in abortion, especially abortions at or after 15 weeks. This is a significant state interest that the district court erroneously disregarded.

2. Concern for the growing baby

a. By 12 weeks' gestation, an unborn child has taken on "the human form" in all relevant aspects. *Gonzales*, 550 U.S. at 160. This reality is confirmed in the Gestational Age Act's legislative findings, recited above.

b. Dr. Condic's expert proffer also explains that an unborn child can suffer pain by 15 weeks' gestation. "The earliest 'rudiment' of the human nervous system forms by" six weeks after the last menstrual period. Pet.App.79a-80a at ¶ 13 (citations omitted). "The neural circuitry responsible for the most primitive response to pain, the spinal reflex," is in place by 10 weeks and marks "the earliest point at which the fetus is capable of detecting and reacting to painful stimuli in any capacity." Pet.App.80a-81a at ¶ 15 (citations omitted). By 15 weeks, scientific literature shows that a baby *in utero* does not just detect pain but is capable of suffering. Pet.App.84a-99a at ¶¶ 19–43 (citations omitted). That is why painful stimuli cause a 20-week fetus to exhibit a hormonal stress response. Stuart W.G.

Derbyshire, Can Fetuses Feel Pain?, 332 *Controversy* 909, 910 (2006). And it explains the "clear consensus among professional anesthesiologists that the use of medications to relieve pain is warranted in cases of fetal surgery." Pet.App.97a at ¶ 39 (citations omitted).

A strict viability rule does not consider any of this scientific evidence, despite Mississippi's interest in protecting vulnerable, unborn life. This is a second significant state interest that the district court erroneously disregarded.

3. Protection of the medical profession and society

America cannot be a humane, civilized society if its courts preclude lawmakers from imposing reasonable limits on the taking of innocent human life. Sadly, because of the viability standard, the United States leads the world in allowing nearly fully developed children to be aborted: 26 countries prohibit abortion with no exceptions; 39 do so except when needed to save the mother's life; 36 more add an allowance for the mother's physical health, 24 for the mother's mental health, and 13 for socioeconomic reasons. Only 61 countries allow abortion without restriction as to reason, and of these, most allow abortions *only* during the first trimester or earlier. The only non-U.S. countries that allow abortions up to 24 weeks (viability) or longer are Canada, China, the Netherlands, North Korea, Singapore, and Vietnam. Guttmacher Institute, S. Singh, et al., *Abortion Worldwide 2017: Uneven Progress and Unequal Access*, Guttmacher Institute (2018), *available at* https://www.guttmacher.org/report/abortion-worldwide-2017#. These gruesome, late-term procedures—which typically involve piercing or crushing the growing baby's skull or removing it limb from limb, see generally *Gonzales*, 550 U.S. at 150–51—are precisely those that

are most likely to coarsen medical professionals and society to the value and dignity of human life.

Legislatures must be the vanguards of a humane society. While the judiciary is ill-equipped to make specific and speedy policy decisions in response to constantly advancing medical and scientific data, state legislatures are well-suited to do exactly that. Particularly where there is genuine debate, legislatures can investigate, take testimony, and act promptly on the best information available.

The viability rule gets these roles backward. If it indeed permits courts to disregard scientific evidence that does not pertain to viability, it hamstrings the States' ability to respond to medical advancements, and simultaneously renders the law incapable of adapting to those changes until this Court grants certiorari to consider the new evidence. This is a third significant state interest that the district court erroneously disregarded. The Court should clarify the rule and direct lower courts to take all state interests into account.

4. The standard for assessing a state's legitimate interests

Finally, as explained above, *Casey*'s undue-burden test and *Hellerstedt*'s balancing approach are irreconcilable. Pet. 6. This has left lower courts flummoxed when trying to assess the validity of laws like Mississippi's, which this Court has never addressed.

For example, in *Planned Parenthood of Ind. & Ky., Inc.* v. *Adams*, 937 F.3d 973 (7th Cir. 2019), the Seventh Circuit considered an Indiana parental-notification law. Though the law comported with *Bellotti* v. *Baird*, 443 U.S. 622 (1979), and *Casey*, 505 U.S. at 895 (opinion of the Court), the panel enjoined

the law by applying *Hellerstedt*, holding that Indiana had failed to prove the law's benefit. The Seventh Circuit declined to hear the case en banc. And in a concurrence in that denial, Judges Easterbrook and Sykes explained the conundrum this Court's abortion jurisprudence has created:

> Only the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute, such as the one Indiana has enacted. Three circuit judges already have guessed how that inquiry would come out; they did not agree. The quality of our work cannot be improved by having eight more circuit judges try the same exercise. It is better to send this dispute on its way to the only institution that can give an authoritative answer. *Planned Parenthood of Ind. & Ky., Inc.* v. *Box*, 949 F.3d 997, 998 (7th Cir. 2019).

Similar examples abound. It is well past time for the Court to clarify how courts should assess the validity of state interests after *Casey* and *Hellerstedt*.

II. The Court should grant certiorari to decide whether abortion providers have standing to challenge laws enacted to protect their clients' health.

Respondents—an abortion clinic and a provider—lack Article III and third-party standing to assert the rights of their patients. The lower courts simply assumed that Respondents have third-party standing to challenge H.B. 1510 on behalf of clients. That was error. Respondents must satisfy the same rigorous third-party standing requirements as other litigants.

In *Singleton* v. *Wulff*, 428 U.S. 106 (1976), the plurality departed from rigorous third-party standing requirements and exempted abortion providers from the rules every other litigant must follow. In *June*

Medical Services, LLC, et al. v. *Gee*, No. 18-1323, this Court agreed to hear a cross-petition on third-party standing: whether abortion providers may assert the legal rights of clients seeking abortions when they challenge state regulation. Here, as in *June Medical*, the purported injury asserted is the right of clients seeking abortions protected by the Due Process Clause. There is no such right for those who provide abortions, and plaintiffs here do not assert one, nor any other claim of their own. Whether in *June Medical* or here, the Court should hold that abortion providers lack third-party standing to sue on behalf of clients.

A. The third-party-standing question is properly before this Court.

The third-party standing issue is properly presented because waiver does not and should not be applied to an Article III issue.

1. Third-party standing is an Article III issue.

While some cases refer to third-party standing as an aspect of prudential standing, *e.g.*, *Kowalski* v. *Tesmer*, 543 U.S. 125, 128–129 (2004), this Court has said that assumption should be reevaluated. In *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014), a unanimous Court recognized that "limitations on third-party standing are hard[ ] to classify" and "that doctrine's proper place in the standing firmament" should be reassessed.

In so doing, the *Lexmark* Court suggested that third-party standing is not prudential. It did so by discussing third-party standing alongside two other concepts—the "zone-of-interest test" and the prohibition on "generalized grievances"—that the Court "previously

classified as . . . aspect[s] of 'prudential standing' but for which, upon closer inspection, [it] found that label inapt." *Ibid.* The Court should take the natural next step and clarify that third-party standing is an Article III issue.

a. Third-party standing fits squarely within modern Article III doctrine. Article III standing analysis is particularized: "the particular plaintiff" must demonstrate standing for each "particular claim[ ] asserted." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006); *accord Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (standing "turns on the nature and source of the claim asserted"). Questions of third-party standing arise when a plaintiff raises a particular claim belonging only to others. Whether that plaintiff may do so falls within this Article III rubric.

b. Third-party standing implicates the core "policies embodied in [the] Article III" case-or-controversy requirement. *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). This Court has recognized that the default rule *against* third-party standing is "closely related to Art. III concerns." *Warth*, 422 U.S. at 500. Those concerns include the need for a full, concrete factual context and "a due regard for the autonomy of those persons likely to be most directly affected by a judicial order," *Valley Forge*, 454 U.S. at 472, 473, and proof of a concrete injury, *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

c. Affirming third-party standing's place within Article III is consistent with the broader move to diminish—if not eradicate—standing doctrines labeled "prudential." In the 1980s, this Court recognized that at least three doctrines—the ban on generalized grievances, the zone-of-interest test, and the default rule against third-party standing—were aspects of

prudential standing. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). But by the time *Lexmark* was decided, the Court had held that two of these three (the generalized-grievances ban and the zone-of-interest test) are not within prudential standing and that the third (third-party standing) is ripe for reconsideration. This trend toward eliminating prudential standing is consistent with this Court's "recent reaffirmation" that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark*, 572 U.S. at 126 (cleaned up).

d. Finally, announcing that third-party standing principles are part of Article III would restore historical practice. "For most of our Nation's history, plaintiffs could not challenge a statute by asserting someone else's constitutional rights." *Hellerstedt*, 136 S. Ct. at 2322 (Thomas, J., dissenting) (citing *Kowalski*, 543 U.S. at 135 (Thomas, J., concurring) (discussing case law)). Article III's original understanding is that a lawsuit "should be brought in the name of the party whose legal right has been affected." *Tyler* v. *Judges of Court of Registration*, 179 U.S. 405, 407 (1900). It is past time to restore third-party standing to its original place under Article III.

2. This Court should resolve the third-party-standing issue regardless.

This Court should resolve the third-party-standing question for two reasons: (1) waiver does not apply to third-party standing in a case like this, and (2) appellate courts have discretion to excuse waiver and resolve questions "for the first time on appeal" where justice requires, *Singleton*, 428 U.S. at 121 (plurality) (citing *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941)). Under either rationale, two reasons warrant this Court deciding standing here.

First, this case presents an inherent conflict between some interests of Respondents and some of their clients. Mississippi women have compelling interests in protecting their health, which is threatened during late-term abortions. Conversely, Respondents have a vested monetary interest in conducting abortion procedures no matter when they occur.

Such an inherent conflict requires this Court to address the standing issue even if waived below. *Valley Forge*, 454 U.S. at 473. Courts must be vigilant to ensure plaintiffs do not hijack others' rights and undermine their interests. This judicial duty is especially important when health is at stake.

Second, whether doctors may invoke their clients' rights to invalidate regulations that protect those clients' health is a legal question. And courts regularly say that waiver does not apply or is excused when the issue raised is legal. *New Orleans Depot Servs., Inc.* v. *Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 387–88 (5th Cir. 2013) (en banc); *United States* v. *Brunner*, 726 F.3d 299, 304 (2d Cir. 2013).

B. Litigants lack third-party standing when their interests conflict with third parties' interests.

1. There are no exceptions to the bar on third-party standing when there is a conflict of interests. *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1, 15 (2004). In *Elk Grove*, the plaintiff was a father raising his daughter's asserted constitutional interest in objecting to hearing others recite the words "under God" in the Pledge of Allegiance at public school. *Id.* at 5. According to her mother, the daughter had "no objection." *Id.* at 9.

The Court held that the father could not raise the daughter's rights. *Id.* at 15. The father's "standing derives entirely from his relationship with his daughter." *Ibid.* "In marked contrast to our case law on [third-party standing]," the Court said, citing *Singleton*, "the interests of this parent and this child are . . . potentially in conflict." *Ibid.*

Elk Grove reaffirmed that the rules on third-party standing—including *Singleton*'s analysis for abortion providers—are displaced when the interests of the litigant and the third party conflict. Under those circumstances, the litigant cannot assert the third party's rights. *Accord In re Majestic Star Casino, LLC*, 716 F.3d 736, 763 (3d Cir. 2013); *Lepelletier* v. *FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999); *Canfield Aviation, Inc.* v. *Nat'l Transp. Safety Bd.*, 854 F.2d 745, 748 (5th Cir. 1988).

This conflict-of-interest rule fits existing third-party standing doctrine and makes sense in other contexts. No employer could raise its employees' wage-and-hour rights to invalidate an OSHA regulation that limits dangerous tasks to a few hours per week.

2. As explained above, an unavoidable conflict of interests exists here. Respondents' interest in avoiding regulation conflicts with their clients' interests in protecting their health. Yet Respondents are hijacking women's rights to overturn a regulation that helps keep them safe from dangerous, late-term abortion procedures.

3. Allowing Respondents to raise women's abortion interests would turn principles of third-party standing on their head. A conflicted litigant is not a fitting "proponent" for the third party's interest. *Singleton*,

428 U.S. at 115 (plurality). Such a litigant is an advocate who sacrifices the right-holder's interests.

Respondents' decision to sue to invalidate the Gestational Age Act illustrates this. If Respondents cared about their clients' health, they would have worked with Mississippi regulators to ensure an appropriate scope of the Act's exception for a mother's health. Such advocacy would have represented the full panoply of women's interests. But Respondents did not do that.

4. The unavoidable conflict that the Gestational Age Act creates between abortion providers and women distinguishes this case from *Singleton*. The doctors there challenged a state law withholding Medicaid funding for elective abortions. That funding statute—unlike a safety regulation—created no conflict between abortion providers and clients. So even though the plurality allowed third-party standing there, the Court should not here. It is *Elk Grove*'s conflict-of-interest rule, not *Singleton*'s analysis, that controls.

In sum, this Court should apply *Elk Grove*'s conflict-of-interest rule and hold that Respondents lack third-party standing to raise their clients' rights when challenging a law that helps keep women safe when they are considering late-term abortions.

III. This case is an ideal vehicle to resolve the questions presented.

It is well past time for the Court to revisit the wisdom of the viability bright-line rule and the conflict between *Casey* and *Hellerstedt*. Mississippi's Gestational Age Act provides an ideal vehicle to do so.

First, it is not possible to reconcile *Roe*'s viability holding, *Webster*'s observations about that holding's

indefensibility, and *Gonzales*'s discussion of pre-viability state interests. Nor is it possible to reconcile the conflicting tests in *Casey* and *Hellerstedt*. Only this Court can resolve the conflict among these precedents, and further percolation is useless.

Second, a 15-week law is an ideal case for examining a state's pre-viability interests and the proper test for assessing those interests. A 20-, 22-, or 24-week law is too close to the viability line for such an analysis to take place.

Finally, between Dr. Condic's affidavit, the legislative findings, and medical literature, there is adequate information regarding fetal pain, gestational development, and maternal health for the Court to reach a decision. Given how quickly district courts have shut down discovery in cases involving pre-viability regulation, no good will come from waiting for another case with a larger record because there is unlikely to be one without further clarification on the standard from this Court.

At a bare minimum, the Court could simply clarify that the viability line is not categorical, and reverse and remand with instructions for the district court to accept evidence and testimony regarding the important state interests Mississippi advances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LYNN FITCH
Attorney General of Mississippi

WHITNEY LIPSCOMB
Deputy Attorney General

PAUL E. BARNES
Counsel of Record

WILSON MINOR
Special Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 220
Jackson, Mississippi 39205-0220
(601) 359-4072
pbarn@ago.ms.gov

Counsel for Petitioners

June 15, 2020