No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., IN HIS OFFICIAL CAPACITY AS STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ON BEHALF OF ITSELF AND ITS PATIENTS, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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

September 2, 2020

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

REPLY ARGUMENT SUMMARY

In opposing Mississippi's petition, Respondents ignore altogether the second question presented: "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." Pet i.

That omission is telling, because Respondents filed their brief after this Court's opinion in *June Medical Services*, *L.L.C.* v. *Ruso*, 140 S. Ct. 2103 (2020)—and subsequent lower-court ruling interpreting it—decisions that have highlighted and created a circuit split on that very question. Compare *June Medical*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting) (in light of the Chief Justice's separate opinion, "five members of the Court reject the *Whole Woman's Health* cost-benefit standard"), and *Hopkins* v. *Jegley*, __ F.3d __, 2020 WL 4557687 (8th Cir. Aug. 7, 2020) (vacating a district court's preliminary injunction and remanding for reconsideration in light of Chief Justice Roberts' *June Medical* concurrence), with *Whole Woman's Health* v. *Paxton*, 2020 U.S. App. LEXIS 26378 (5th Cir. Aug. 21, 2020) (disagreeing with *Hopkins*), *id.* at *11–12 (Willett, J., dissenting) (agreeing with *Hopkins*), and *American College of Obstretricians & Gynecologists* v. *United States FDA*, 2020 U.S. Dist. LEXIS 122017 (D. Md. July 13, 2020) (rejecting the Chief Justice's concurrence and applying *Hellerstedt*'s test instead).

There are dozens of cases involving abortion regulations in the federal courts, all dependent on the proper test to apply. This Court's instant review is critical.

While Respondents do discuss whether all pre-viability regulations regarding elective abortions are

unconstitutional, Pet. i, their main argument is inapposite. Respondents create a strawman, claiming more than two dozen times that the Gestational Age Act violates *Casey*'s viability line as a "pre-viability abortion *ban*." *E.g.*, Br. In Opp'n ("Opp.") 1, 6, 10, 12, 13, etc. (emphasis added). But Mississippi's law is not a flat prohibition on all pre-viability abortions; it only prohibits abortion after 15 weeks and includes exceptions for the mother's and growing baby's life and health. The question is whether that restriction unduly interferes with a right to an abortion because it is a substantial obstacle. And answering that question requires an assessment of the facts, which the district court failed to do. Under Respondents' "test," the Gestational Age Act would be unconstitutional even if no Mississippi mother *ever* sought an abortion after 15 weeks.

More fundamentally, this Court in *Casey* never once refers to its holding as a "ban" on pre-viability abortion regulations. And the Court has not treated *Casey* as an outright ban in any event. That is why the Court in *Gonzales* v. *Carhart*, 550 U.S. 124 (2007), upheld the federal Partial-Birth Abortion Ban Act, even though that Act restricts certain abortion procedures pre-viability. It is also why the Court acknowledged in *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 518 (1989), 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 regulations after viability but prohibiting it before viability." This case is an ideal vehicle to make that acknowledgment a holding.

ARGUMENT

I. The Court should review and resolve what test will guide lower courts' analyses of abortion regulations.

The petition squarely presents a question regarding what test lower courts should apply to abortion regulations, *Casey*'s "undue burden" standard, or *Hellerstedt*'s balancing of benefits and burdens. Pet. i. Yet Respondents fail to address this issue at all. That failure is particularly striking given the circuit split that has developed on that very issue in the immediate aftermath of this Court's decision in *June Medical*.

A. The Court's *June Medical* decision holds that the governing test for reviewing abortion regulations is *Casey*'s "undue burden" standard.

On June 29, 2020, this Court issued its opinion in *June Medical Services* and held unconstitutional a Louisiana admitting-privileges law. Writing for the plurality, Justice Breyer concluded that the outcome was controlled by the Court's invalidation of a similar Texas law in *Whole Woman's Health*. *Id.* at 2113.

Chief Justice Roberts provided the necessary fifth vote to strike down Louisiana's law. But his concurring opinion did not join the plurality's reasoning, only the result: "Louisiana's law cannot stand under [the Court's] precedents." *Id.* at 2134 (Robert, C.J., concurring). Critically, Chief Justice Roberts' opinion rejected the plurality's "observation" that *Casey*"s "undue burden standard requires courts to weigh the law's asserted benefits against the burdens it imposes on abortion access." *Id.* at 1235 (internal quotation omitted). Chief Justice Roberts explained that the appropriate *Casey* inquiry is whether an abortion regulation poses "a

substantial obstacle" or "substantial burden, *not* whether benefits outweighed burdens." *Id.* at 2137 (emphasis added). Provided that a state or local government shows that it had a "legitimate purpose" in enacting a law, and the law is "reasonably related to that goal," "the only question for a court is whether a law has the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 2138 (cleaned up). Nothing in *Casey*, he wrote, required "consideration of a regulation's benefits." *Id.* at 2139.

Chief Justice Roberts' vote was essential to hold Louisiana's admitting-privileges law unconstitutional, so his concurrence should control. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (when "no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'") (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, J.J.). Moreover, when considering the Chief Justice's concurring opinion with the multiple *June Medical* dissents, "five Members of the Court reject[ed] the *Whole Woman's Health* cost-benefit standard." *June Med. Servs.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting). Finally, the Chief Justice's rejecting of the *Whole Woman's Health* balancing test must be considered the most narrow ground for the *June Medical* result, since the four-Justice plurality voted to strike down Louisiana's law, and the four dissenting Justices all voted to uphold it.

B. The circuits have divided over *June Medical*'s meaning and the test that decision instructs lower courts to follow.

The Chief Justice's *June Medical* concurrence should have resolved the second question that Mississippi presents in its petition here. But it has not. Lower courts have now divided over the concurrence's authority.

In *Hopkins v. Jegley*, __ F.3d __; 2020 WL 4557687 (8th Cir. 2020), the Eighth Circuit gave the Chief Justice's opinion the weight to which it is entitled under *Marks*. 2020 WL 4557687, at *1–2. Specifically, the Eighth Circuit held that "Chief Justice Roberts' vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling." *Id.* at *2 (citing *Marks*, 430 U.S. at 193). As a result, the court reversed and remanded a district-court decision enjoining a series of Arkansas abortion regulations. *Id.* at *3. This was necessary, said the Eighth Circuit, because "the district court—without the benefit of Chief Justice Roberts's separate opinion in *June Medical*—applied the *Whole Woman's Health* cost-benefit standard to the challenged laws." *Id.* at *2 (citations omitted).

Further, the Eighth Circuit observed, "the district court relied on *Whole Woman's Health*'s holding that the statement that legislatures, and not courts, must resolve questions of medical uncertainty." *Id.* at *2 (cleaned up). In contrast, Chief Justice Roberts' concurrence "emphasized the 'wide discretion' that courts must afford to legislatures in areas of medical uncertainty." *Id.* (quoting *June Med. Servs.*, 140 S. Ct. at 2136 (Robert, C.J., concurring)).

Accordingly, the Eighth Circuit remanded for reconsideration "in light of Chief Justice Roberts's separate

opinion in *June Medical*, *which is controlling*." *Id.* at *3 (emphasis added).

A Fifth Circuit panel majority reached the exact opposite conclusion in *Whole Woman's Health* v. *Paxton*, 2020 U.S. App. LEXIS 26378 (5th Cir. Aug. 21, 2020). Like *Hopkins*, *Paxton* involved an appellate motion to stay a district-court order enjoining a state law regulating pre-viability abortion. This time, the court denied the motion, concluding that the *Marks* "narrowest ground" rule only works if there is a "common denominator upon which all of the justices of the majority can agree." *Id.* at *6–7 (quotation omitted)). And "the only common denominator between the plurality and the concurrence," explained the panel majority, "is their shared conclusion that the challenged Louisiana law constituted an undue burden." *Id.* at *7.

"Thus, under [the Fifth] Circuit's reading of the *Marks* principle, that the challenged Louisiana law posed as undue burden on women seeking an abortion is the full extent of *June Medical*'s ratio decidendi." *Id.* at *8. "The decision does *not* furnish a new controlling rule as to how to perform the undue-burden test," and *"Hellerstedt*'s formulation of the test continues to govern this case." *Id.* (emphasis added). Accordingly, the panel majority saw no reason to upset the district court's ruling, which relied on the *Hellerstedt* balancing test. *Id.*

Judge Willett dissented because, while this Court divided 4-1-4 in *June Medical*, "the takeaway seems clear: The three-year-old injunction issued by the district court in this case rests upon a now-invalid legal standard," the *Hellerstedt* balancing of interests. *Id.* at *11–12 (Willett, J., dissenting). Citing the Eighth Circuit's decision in *Hopkins*, Judge Willett would have granted the motion to stay and remanded to the

district court to reconsider the injunction "under the now-governing legal standard." *Id.* at *12.

Joining the Fifth Circuit's 2-1 panel majority is the United States District Court for the District of Maryland, which recently held that "*June Medical Services* is appropriately considered to have been decided without the need to apply or reaffirm the balancing test of *Whole Woman's Health*, not that *Whole Woman's Health* and its balancing test have been overruled." *Am. Coll. Of Obstetricians*, 2020 U.S. Dist. LEXIS 122017, at *61 (D. Md. July 13, 2020).

In sum, less than two months after this Court decided *June Medical*, there has rapidly developed a circuit split over the second question Mississippi presents in its petition. And that split involves a question of immense importance: the proper test for federal courts to apply when deciding the validity of abortion regulations. Absent this Court's immediate intervention, there will be many dozens of cases splitting along the same lines. Only half of them will be correct. This Court should not let the issue percolate even another day. It should grant the petition and clarify for all lower courts and litigants whether *Hellerstedt*'s balancing of benefits and burdens or *Casey*'s "undue burden" standard should control in challenges to abortion regulations, as here.

II. The Court should also grant certiorari to resolve the contradictions in its own decisions over use of "viability" as a bright line for measuring abortion regulations.

This Court's jurisprudence points in different directions when it comes to States' ability to regulate pre-viability abortions. The viability line is an arbitrary line that ignores States' interests pre-viability and

finds no basis in the Constitution. It is illogical to impose a "rigid line allowing state regulation after viability but prohibiting it before viability." *Webster*, 492 U.S. at 518.; Pet. 15–20. This Court should grant certiorari to clarify that *Casey's* "undue burden" standard applies to all abortion regulations, pre- and post-viability.

A. An inflexible viability standard conflicts with this Court's recognition that States have legitimate interests throughout pregnancy.

Mississippi's Gestational Age Act exposes the inconsistencies between the Court's suggestion that States cannot prohibit pre-viability abortions, *Roe* v. *Wade*, 410 U.S. 113, 163–65 (1973), and the Court's recognition 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*, 550 U.S. at 125 (citing *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 846 (1992) (emphasis added). Indeed, this Court has underscored 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*, 492 U.S. at 580.

The viability line that *Roe* articulated was always, as Justice O'Connor recognized, on a collision course with itself for it failed to give full credence to the fact "that the 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); accord, *e.g.*, *Thornburgh* v. *Am. Coll. Of Obstetricians & Gynecol-*

ogists, 476 U.S. 747, 794-795 (1986) (White, J. dissenting). What's more, the issue was not briefed or argued in *Roe*, Pet. 15–16, the Court in *Roe* did not grapple with the risk to a mother's health when an abortion is performed later in a pregnancy, *id.* at 16–17, the viability rule is rejected in all other legal contexts, *id.* at 17, the rule does not account for scientific advances, *id.* at 18, and this Court's previous rulings have already called the rule into serious question, *id.* at 18–19. The petition presents an ideal vehicle to consider and decide whether *Roe*'s viability *dicta* should be validated or repudiated. Either way, the uncertainty in the Court's precedents should be resolved.

B. *Casey's* "undue burden" standard should apply to all abortion regulations.

Instead of Respondents addressing head-on whether all pre-viability regulations regarding elective abortions are unconstitutional, they create a strawman, claiming dozens of times that the Gestational Age Act violates *Casey's* viability line as a "pre-viability abortion *ban*." *E.g.*, Opp. 1, 6, 10, 12, 13, etc. (emphasis added). Repetition does not make reality. Mississippi's law is not a ban on all pre-viability abortions; it allows a woman to have an elective abortion up to 15 weeks lmp and contains exceptions for the mother's and growing baby's life and health. This Court in *Casey* never once refers to its holding as a "ban" on pre-viability abortion regulations. Instead, the question asked in *Casey* is whether the restriction unduly interferes with the right to an abortion because it is a substantial obstacle. And nowhere did the Court hold that the "undue burden" standard only applies to laws that merely regulate abortion, or that laws which limit abortions pre-viability are subject to an absolute prohibition. Instead, the Court emphasized that the

"undue burden" test is a "standard of *general* application[.]" 505 U.S. at 877 (emphasis added).

Casey upheld a statute that required minors to obtain parental consent or a judicial bypass before having an abortion. 505 U.S. at 899-900. Under that statute, if a minor was unable to obtain the permission of her parents or judicial authorization, she was absolutely barred from having a pre-viability abortion. *Cincinnati Women's Servs., Inc.* v. *Taft*, 468 F.3d 361, 374 (6th Cir. 2006) ("The *Casey* Court itself was not persuaded to invalidate Pennsylvania's parental-consent requirement by record evidence showing that it would prevent some women from obtaining an abortion.") (citations omitted); *Planned Parenthood* v. *Casey*, 744 F. Supp. 1323, 1356–57 (E.D.Pa.1990) (where a minor cannot obtain either parental consent or a judicial bypass, the law "may act in such a way as to deprive [the minor] of her right to have an abortion"). If pre-viability abortion regulations are per se unconstitutional, then *Casey* would have invalidated this law.

And *Casey* also upheld a law that required a 24-hour pre-abortion informed consent period. Such a law prohibits some pre-viability abortions: those sought by women on the last day before the fetus is viable. If no prohibition on pre-viability abortions is constitutionally permissible, the 24-hour requirement might be forbidden as a matter of law, or at least as applied to those women. Yet *Casey* considered the law "[i]n theory, at least, . . . a reasonable measure to implement the State's interest in protecting the life of the unborn[.]" 505 U.S. at 885. Because *Casey* held that the States' interests in minors' welfare and the life of the unborn is strong enough to prohibit some pre-viability abortions, it follows that courts must consider the possibility that other governmental interests might justify prohibiting

other categories of pre-viability abortions. In fact, this Court already has recognized other State interests that justify prohibiting pre-viability abortions under certain circumstances.

In *Gonzales* v. *Carhart*, the Court reaffirmed that States have legitimate interests that attach prior to viability. 550 U.S. at 158. *Gonzales* upheld a federal statute prohibiting both pre-viability and post-viability abortions performed using the "partial-birth" procedure. *Gonzales* held that *Casey* "rejected . . . the interpretation of *Roe* that considered all pre-viability regulations of abortion unwarranted." *Id.* at 146. *Gonzales* concluded that the government could prohibit partial-birth abortion because that type of abortion "requires specific regulation because it implicates additional ethical and moral concerns that justify a special procedure." *Id.* at 158. The Court recognized that the "interest in protecting the integrity and ethics of the medical profession" justified prohibiting this kind of abortion, which bears "disturbing similarity to the killing of a newborn infant," *id.* at 157-158, and acknowledged the government interest in protecting fetal life from this "brutal and inhumane procedure," *id.* at 157. *Gonzales* recognized that factors other than viability matter.

Here, the Gestational Age Act advances multiple legitimate interests: protecting maternal health, safeguarding unborn babies, and promoting respect for innocent and vulnerable life. Yet, the district court treated viability as the only relevant factor. The court refused to grapple with *Casey's* question: does the law unduly interfere with a right to an abortion because it is a substantial obstacle? That failure is a result of *Roe*'s loose language. This Court should correct it, grant the petition, and hold that all abortion regula-

tions, involving pre- or post-viability conduct, is subject to *Casey*'s "undue burden" test.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition 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

September 2, 2020