No. 19-1392

In The
Supreme Court of the United States

THOMAS E. DOBBS, State Health Officer of the Mississippi Department of Health, et al.,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, et al.,

Respondents.

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

BRIEF IN OPPOSITION

CLAUDIA HAMMERMAN
ALEXIA D. KORBERG
AARON S. DELANEY
CAITLIN GRUSAUSKAS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Ave of the Americas
New York, NY 10019
(212) 373-3000

CRYSTAL JOHNSON
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
2001 K Street, NW
Washington, DC 20006
(202) 223-7316

HILLARY SCHNELLER
Counsel of Record
JULIE RIKELMAN
MICHELLE MORIARTY
JENNY MA
FRANCESCA COCUZZA
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street
New York, NY 10038
(917) 637-3777
hschneller@reprorights.org

ROBERT B. MCDUFF
MISSISSIPPI CENTER FOR JUSTICE
767 North Congress Street
Jackson, MS 39202
(601) 969-0802

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether the Fifth Circuit correctly concluded that a Mississippi statute banning abortion after 15 weeks—months before viability—is unconstitutional under nearly fifty years of precedent holding that it is unconstitutional to ban abortion before viability, including *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

2. Whether Petitioners' challenge to Respondents' third-party standing fails because, as this Court recently reaffirmed in *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), (a) Petitioners waived their challenge by failing to present it below, and (b) regardless, Respondents, who are abortion providers directly regulated by the challenged statute, have third-party standing to assert the rights of their patients.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Thomas Dobbs, M.D., M.P.H., in his official capacity as State Health Officer of the Mississippi State 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., M.P.H., on behalf of herself and her patients (collectively, "the Clinic").

No respondent has a parent corporation and no publicly held company owns 10% or more of any respondent corporation's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

OTHER

TABLE OF AUTHORITIES—Continued

Page

INTRODUCTION

In an unbroken line of decisions over the last fifty years, this Court has held that the Constitution guarantees each person the right to decide whether to continue a pre-viability pregnancy. Yet Mississippi passed a law banning abortion after 15 weeks of pregnancy—*months* prior to viability. Both the United States Court of Appeals for the Fifth Circuit and the district court correctly held that this unconstitutional law cannot stand. The decision below properly applies this Court's precedent and does not conflict with the decision of any other court. Nothing about this case warrants this Court's intervention.

Mississippi urges this Court to take this case because of a non-existent conflict in this Court's own abortion precedent. The State's argument should be rejected, and the petition denied, because it is based on a misunderstanding of the core principle of those decisions: that, while the State has interests throughout pregnancy, "[b]efore viability, the State's interests are not strong enough to support a *prohibition* of abortion." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (emphasis added); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (reaffirming robust constitutional guarantee of the right to pre-viability abortion); *Roe v. Wade*, 410 U.S. 173 (1973) (recognizing right to pre-viability abortion). *Roe* and *Casey*, and the Court's subsequent cases, are clear that, before viability, it is for the pregnant person, and not the State, to make the ultimate decision whether to continue a pregnancy. A pre-viability abortion ban

unquestionably contravenes this fundamental tenet of the Court's abortion jurisprudence.

The State's belated objection to the Clinic's third-party standing should likewise be denied. Mississippi waived this challenge—it was not raised below and the State, in fact, conceded jurisdiction and does so again in its petition. Additionally, the State's arguments on third-party standing are identical to those the Court addressed and rejected in *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103, 2117-20 (2020) (plurality opinion); *id*. at 2139 n.4 (Roberts, C.J., concurring in the judgment).

COUNTER-STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

For nearly fifty years, this Court has recognized that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879 (reaffirming the "central holding" of *Roe*). Viability is the point in pregnancy when "there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." *Colautti v. Franklin*, 439 U.S. 379, 388 (1979); *see also Roe*, 410 U.S. at 163. Before viability, the State's interests, whatever they may be, cannot override a pregnant person's interests in their liberty and autonomy over their own body.

In March 2018, Mississippi enacted H.B. 1510, which bans abortion after 15 weeks of pregnancy.[1] H.B. 1510, Miss. Laws 2018 (codified at Miss. Code Ann. § 41-41-191) (the "Act"). The Act subjects abortion providers to severe penalties, including license suspension or revocation, and permits the Attorney General to enforce its provisions through actions on behalf of the State Department of Health or the State Board of Medical Licensure. Pet. App. 71a-72a.

Mississippi concedes that no fetus is viable at 15 weeks. *See* Pet. App. 45a (district court opinion); *id.* 8a (Fifth Circuit opinion) (noting that there was "no dispute that the Act prohibited pre-viability abortions"). And because Mississippi already bans abortion after 20 weeks (also prior to viability), *see* Miss. Code Ann. § 41-41-137, the only practical application of the Act is to prohibit pre-viability abortions.

II. PROCEEDINGS BELOW

A. Proceedings in the district court

The day the Act was signed into law, Respondents Jackson Women's Health Organization, the only licensed abortion facility in the State of Mississippi, and the Clinic's medical director, Sacheen Carr-Ellis, M.D., M.P.H., challenged the Act on behalf of themselves and their patients as applied to pre-viability abortions. Pet.

---

[1] Gestational age is measured from the first day of a patient's last menstrual period ("lmp"). *See* Pet. App. 69a.

App. 41a-42a. The district court entered a temporary restraining order. *Id.* 62a-64a.

Adhering to this Court's unambiguous precedent, the district court concluded that the Act's "lawfulness hinges on a single question: whether the 15-week mark is before or after viability." Pet. App. 60a. The court accordingly limited discovery to that single issue and did not consider evidence irrelevant to that question. *Id.* 56a, 60a-61a.

Following discovery, the district court granted summary judgment to the Clinic and entered a permanent injunction, holding that the Act violates the due process rights of people seeking pre-viability abortions in Mississippi. Pet. App. 54a-55a. The district court held that, under this Court's precedent, "States may not ban abortions prior to viability," and, since "15 weeks lmp is prior to viability, . . . the Act is unlawful." *Id.* 45a.

B. Proceedings in the court of appeals

The Fifth Circuit affirmed, concluding that "[t]he Act is a ban on certain pre-viability abortions, which *Casey* does not tolerate." Pet. App. 13a. The Fifth Circuit correctly reasoned that "[p]rohibitions on pre-viability abortions . . . are unconstitutional regardless of the State's interests because 'a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.'" *Id.* 10a (quoting *Casey*, 505 U.S. at 879). Judge Ho concurred in the judgment, explaining that the Fifth Circuit was

"duty bound to affirm the judgment of the district court." *Id.* 22a.[2]

The Fifth Circuit denied Mississippi's petition for rehearing en banc, and not a single judge requested a poll. Pet. App. 39a.

Throughout the proceedings in the district court and the Fifth Circuit, Mississippi did not dispute the Clinic's third-party standing. *See* Defs.' Opp'n to Mot. Summ. J., ECF No. 85; Br. of Defs.-Appellants 1. Mississippi also did not raise the issue in its petition for rehearing en banc, which it filed months after this Court granted review in *June Medical* to answer the same question Mississippi raises here. *See* Defs.' Pet. for Reh'g En Banc. The petition's statement of the case makes no mention of these failures to challenge the Clinic's third-party standing below.

In fact, Mississippi conceded before the Fifth Circuit that jurisdiction in the federal courts exists. Br. of Defs.-Appellants 1 ("The district court had federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331. . . . This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1)."). And the State again concedes this Court has jurisdiction in its petition. Pet. 1 ("The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and the Fifth Circuit under

---

[2] The Fifth Circuit also affirmed the district court's discovery ruling. Pet. App. 14a ("Bound as the district court was by the viability framework, it was within its discretion to exclude this evidence."). Mississippi does not seek review of that ruling here.

28 U.S.C. § 1292(a)(1). . . . This Court has jurisdiction under 28 U.S.C. § 1254(1).").

REASONS FOR DENYING THE PETITION

I. WHETHER MISSISSIPPI'S BAN ON ABORTION AFTER 15 WEEKS IS UNCONSTITUTIONAL IS NOT A QUESTION WARRANTING THIS COURT'S INTERVENTION.

There is no conflict of authority for this Court to resolve, and the Fifth Circuit faithfully applied this Court's well-settled precedent that pre-viability abortion bans are unconstitutional.

A. The Court's precedent that bans on abortion before viability cannot stand is clear.

Mississippi asserts that *Roe*'s central holding—that an individual has the right to decide whether to continue a pre-viability pregnancy—is inconsistent with this Court's recognition that states have legitimate interests in maternal health, potential life, and the integrity and ethics of the medical profession. Pet. 2-3, 15. That is incorrect. This Court's decisions have already accounted for these interests, and affirmed that they "do not contradict" the principle that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846.

The State contends that its own interests should override the liberty and autonomy interests inherent in an individual's right to decide whether to continue a pre-viability pregnancy. Indeed, Mississippi's petition entirely ignores the pregnant person's autonomy and liberty interests, which are central to the Court's holdings.

The Court has been presented with state interests, including potential life, medical ethics, and maternal health, as reasons to override a person's fundamental right to decide whether to continue a pregnancy before viability. The Court has considered and rejected these arguments numerous times and has consistently reaffirmed the constitutional guarantee of an individual's right to pre-viability abortion.

Casey recognized that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," but held that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846. That is, before viability, the Constitution guarantees an individual's liberty to weigh all possible interests—including interests related to health, potential life, and other factors—and ultimately to decide for themself whether to continue a pregnancy.

Viability is a "clear" line, which helps ensure that an individual's right to "retain the ultimate control over her destiny and her body" is not "extinguished." *Casey*, 505 U.S. at 869. In reaffirming the

constitutional significance of the viability line, the Court explained that it "is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." *Id.* at 870. Nothing "ha[s] rendered viability more or less appropriate as the point at which the balance of interest tips." *Id.* at 861. This is so regardless of ongoing medical advances, *see*, *e.g.*, Pet. 18, of which the Court was well aware in *Casey*. *See* 505 U.S. at 860 ("[T]he divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding. . . .").[3]

Additionally, far from being "arbitrary," "unsatisfactory," or a "moving target" as Mississippi asserts, Pet. 3, 14, 18, the viability line has proved enduringly "workable," "representing as it does a simple limitation beyond which a state law is unenforceable." *Casey*, 505 U.S. at 855. In fact, undisputed evidence here shows that viability has not moved—and instead has remained the same—since 1992, when this Court decided *Casey*. At that time, the Court noted that

---

[3] Throughout its petition, Mississippi mistakenly characterizes facts it raised below relating to the State's interests. *See*, *e.g.*, Pet. 10-11, 21. The "facts" to which it refers were irrelevant, not uncontested or undisputed, and the district court made no findings regarding these facts because they were immaterial to its ruling on summary judgment. Additionally, the Clinic made clear that it did not waive the right to contest these facts should they ever become material to the case. *See* Pls.' Reply in Supp. of Mot. Summ. J. 8 n.4, ECF No. 86.

viability in a normally progressing pregnancy occurred at approximately 23 to 24 weeks, *id.* at 860, and that is where it remains today. *See* Pet. App. 44a.

In reaffirming the viability line, this Court considered and rejected the arguments Mississippi makes here. With regard to maternal health, the Court has held that, until viability, it is for a pregnant person, and not the State, to compare the risks of pregnancy, childbirth, and abortion, among other factors, in deciding whether to terminate or continue a pregnancy. *See Casey*, 505 U.S. at 846, 852 (stating that before viability, the State cannot "insist [a woman] make the sacrifice" to undergo the "anxieties, [ ] physical constraints, [and] pain that only she must bear" in pregnancy and childbirth). Mississippi's assertion that the Court has not "grapple[d] with [the viability line's] implications for maternal health," Pet. 16, ignores this reasoning in *Casey*.

Mississippi is also incorrect to assert that the viability line does not account for the State's interests in potential life, including its purported interest in preventing pain pre-viability, or "[p]rotection of the medical profession and society." Pet. 25. Arguments about these interests were before the Court in *Roe* and *Casey*. *See Casey*, 505 U.S. at 852, 870-71; *Roe*, 410 U.S. at 164-65.[4] The Court has repeatedly acknowledged that the

[4] *See*, *e.g.*, Brief of the American Ass'n of Prolife Obstetricians & Gynecologists (AAPLOG), et al., as Amici Curiae in Support of Respondents, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006428 (discussing medical ethics); Brief of the American Academy of

State's interest in protecting life exists throughout pregnancy, yet does not permit a State to *ban* previability abortion. *E.g.*, *Casey*, 505 U.S. at 846, 860, 869. The Court considered both these state interests as well as an individual's interests in autonomy and liberty. It concluded that, until viability, the decision to continue or end a pregnancy must be left to each pregnant person to make based on their own values and beliefs as it involves "personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it." *Id.* at 853; *see also id*. (recognizing that individuals hold competing views, with some believing that "the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent").

Casey thus held that states can promote their "profound interest in potential life[] throughout pregnancy" by "tak[ing] measures to ensure that the

---

Medical Ethics as Amicus Curiae in Support of Respondents & Cross-Petitioners Robert P. Casey et al., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006419 (urging Court to reconsider abortion jurisprudence in light of advancements in medical technology); Motion and Brief Amicus Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1971 WL 128057 (discussing fetal development, capacity of fetus to perceive pain, and maternal health); *see also*, *e.g.*, Brief for Bernard N. Nathanson, M.D. as Amicus Curiae Supporting Appellants, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605), 1988 WL 1026213 (addressing fetal development, including fetal pain perception, and medical ethics).

woman's choice is informed," and "may enact regulations to further the health or safety of a woman seeking an abortion." 505 U.S. at 878. What states cannot do before viability is "resolve the[] philosophic questions in such a definitive way that a woman lacks all choice in the matter," *id*. at 850, nor can they force a person to remain pregnant for months and experience labor and delivery against their will, including the substantial pain and medical risk for the pregnant person that entails, *see id.* at 852. This is precisely what the Act does.[5]

Mississippi also asks this Court to "reconcile" its decisions in *Casey* and *Whole Woman's Health*. Pet. 5, 14, 26-27. There is nothing to reconcile, and certainly nothing that would alter the outcome here. The cases the State cites address abortion regulations, each of which could conceivably be justified by a legitimate state interest, so long as the regulation does not impose a substantial obstacle in the path of an individual

[5] In this way, the Court's approach to abortion cases is consistent with its approach in other constitutional contexts where it has struck down laws that strike at the core of a given constitutional right as opposed to placing regulations on its exercise. For example, under the Second Amendment, the Court struck down a prohibition of handguns held and used for self-defense in the home, noting that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). Similarly, the Court has struck down bans on certain categories of speech after finding that no government interests are sufficient to justify them. *See*, *e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989) (prohibition on flag-burning); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (ban on pharmacist advertising of prescription drug prices).

seeking a pre-viability abortion. *See Whole Woman's Health*, 136 S. Ct. at 2309 ("[A] statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." (quoting *Casey*, 505 U.S. at 877)); *Casey*, 505 U.S. at 877; *see also June Med. Servs.*, 140 S. Ct. at 2120 (plurality opinion); *id*. at 2138 (Roberts, C.J., concurring in the judgment) ("We should respect the statement in *Whole Woman's Health* that it was applying the undue burden standard of *Casey*."). They "do[] not disturb the central holding of *Roe*"—that there is no state interest strong enough to justify a pre-viability abortion ban, which controls the outcome here. *Casey*, 505 U.S. at 879; *see also*, *e.g.*, *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) ("*Casey* reaffirmed 'the most central principle of *Roe v. Wade*,' 'a woman's right to terminate her pregnancy before viability.'" (quoting *Casey*, 505 U.S. at 871)). The Act directly contravenes this "central holding" and cannot stand. *Casey*, 505 U.S. at 860.

Regardless, the Act at issue here is an outright ban—it necessarily imposes a "substantial obstacle" in the path of a pregnant person seeking a pre-viability abortion. The Act prohibits an individual from making the decision to terminate a pre-viability pregnancy after 15 weeks. Under *Casey*, *Whole Woman's Health*, and the Court's recent decision in *June Medical*, the Act imposes, by definition, an undue burden. It places a complete and insurmountable obstacle in the path of every

person seeking a pre-viability abortion after 15 weeks who does not fall within its limited exceptions. It is unconstitutional by any measure.

B. The federal courts of appeal uniformly agree that bans on abortion before viability are unconstitutional.

Although Mississippi suggests that this Court's cases have somehow created confusion, Pet. 5-6, no courts of appeal have had trouble applying those decisions in numerous cases involving a pre-viability abortion ban. *Cf. id.* 27 (citing one case addressing constitutionality of an abortion regulation, not a pre-viability ban, where en banc review was denied).

As a result, Mississippi points to no conflict among the decisions of the federal courts of appeal for this Court to resolve. *See* U.S. Sup. Ct. R. 10(a). There is none. Since this Court reaffirmed *Roe*'s central holding in *Casey*, every single federal appellate court to consider a law prohibiting abortion before viability, with or without exceptions, has struck it down as a violation of the Fourteenth Amendment, and this Court has either affirmed or denied certiorari in each case it has been asked to review. *See*, *e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (striking down ban on pre-viability abortions at 6 weeks with exceptions), *cert. denied*, 136 S. Ct. 981 (2016); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (striking down ban on pre-viability abortions at 20 weeks with exceptions); *Edwards v. Beck*, 786 F.3d

1113, 1117 (8th Cir. 2015) (striking down ban on pre-viability abortions at 12 weeks with exceptions), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013) (striking down ban on abortions at 20 weeks with exceptions because it prohibits abortions in "the period between twenty weeks gestation and fetal viability" and therefore deprives people "of the ultimate decision to terminate their pregnancies prior to fetal viability"), *cert. denied*, 571 U.S. 1127 (2014); *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999) (striking down ban on "the most common procedure" used to perform abortions after 13 weeks), *aff'd*, 530 U.S. 914, 922 (2000); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) (same), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117-18 (10th Cir. 1996) (striking down ban on pre-viability abortions at 22 weeks with exceptions), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (striking down ban on all abortions with exceptions), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368-69, 1373 & n.8 (9th Cir.) (same), *cert. denied*, 506 U.S. 1011 (1992).

The Fifth Circuit's decision is entirely consistent with these previous decisions addressing bans on abortion before viability.

C. The Fifth Circuit faithfully applied this Court's binding precedent.

The Fifth Circuit correctly applied this Court's precedent, and its decision does not merit further review. This Court is explicit that a "woman has a right to choose to terminate her pregnancy" before viability, *Casey*, 505 U.S. at 869-70, and that long-standing principle is consistent in an unbroken line of cases since *Roe*. *See*, *e.g.*, *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) (noting that *Casey* "reaffirmed" this "most central principle of *Roe v. Wade*" (quoting *Casey*, 505 U.S. at 871)); *Whole Woman's Health*, 136 S. Ct. at 2299 (reiterating that state law is invalid if it places "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("assum[ing]" the principle that, "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy' " (quoting *Casey*, 505 U.S. at 879)); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declining to "revisit" the legal principle reaffirmed in *Casey* that "before 'viability . . . the woman has a right to choose to terminate her pregnancy' " (quoting *Casey*, 505 U.S. at 870)).

A ban on abortion at any point prior to viability directly contravenes this precedent. "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879; *see also*

id. at 846 (same). Nor can a State diminish this protection by "proclaim[ing] . . . weeks of gestation . . . or any other single factor" as the point at which the State has an overriding "interest in the life or health of the fetus. Viability is the critical point." *Colautti*, 439 U.S. at 388-89.

Because the Act bans abortion months before viability, the Fifth Circuit could reach no other conclusion. *See* Pet. App. 11a-13a. This Court's decisions drawing the line at viability compel this result, and there is no need for further review.

Mississippi incorrectly argues that the right to pre-viability abortion recognized in *Roe*, affirmed in *Casey*, and reaffirmed time and again since, is mere dictum. Pet. 15-16. For decades, this Court has described a "woman's right to terminate her pregnancy before viability" as "the most central principle of *Roe v. Wade*." *Casey*, 505 U.S. at 871; *see also June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) (same); *Casey*, 505 U.S. at 846 ("*Roe*'s essential holding . . . is a recognition of the right of the woman to choose to have an abortion before viability. . . ."); *id.* at 860 (describing the viability line as "*Roe*'s central holding"); *id.* at 864 (same); *id.* at 865 (same); *id.* at 870 (the viability line is the "essential holding of *Roe*"); *id.* at 879 (reaffirming the "central holding of *Roe v. Wade*," that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability").

Mississippi is also wrong to suggest that *Gonzales* somehow diminished the import of the viability line.[6] *See* Pet. 18-19. That decision could not have been clearer: The government may "use its voice and its regulatory authority to show its profound respect for the life within the woman"—but if and only if its actions do not "strike at the right itself." *Gonzales*, 550 U.S. at 157-58; *see also id.* at 146 ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" (quoting *Casey*, 550 U.S. at 879)). The Act does precisely that and cannot stand.

II. THERE IS NO REASON TO REVISIT THIS COURT'S WELL-SETTLED PRECEDENT REGARDING ABORTION PROVIDERS' STANDING.

Mississippi's belated objection to the Clinic's third-party standing should be denied under decades of precedent this Court recently reaffirmed in *June Medical*. 140 S. Ct. at 2117-20 (plurality opinion); *id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment) ("For the reasons the plurality explains, . . . the

---

[6] *Gonzales* did not involve a ban on pre-viability abortion; rather, it considered a regulation prohibiting the use of a single *method* of abortion. 550 U.S. at 146-47. *Gonzales* upheld the regulation, which determined *how*—not *whether*—a person could access abortion, because it affected only this method of abortion and specifically did "not proscribe" the most common procedure used at that stage of pregnancy. *Id.* at 164. It provides no support for the State's arguments.

abortion providers in this case have standing to assert the constitutional rights of their patients."). The Court should decline to consider the issue given the State's failure to raise it below. In any event, the State makes no argument the Court has not already considered and rejected in affirming abortion providers' third-party standing.

June Medical reaffirmed that limitations on a litigant's assertion of third-party standing are "prudential," not constitutionally-mandated, and thus "can be forfeited or waived." 140 S. Ct. at 2117 (plurality opinion). Like Louisiana in *June Medical*, Mississippi raised its third-party standing objection for the first time before this Court and repeatedly conceded that the courts below had jurisdiction to address the merits of the Clinic's challenge to the Act, which was based on its assertion of the Fourteenth Amendment rights of its patients. *See supra* at 4. Accordingly, Mississippi has waived this objection.

Regardless, like the Louisiana providers, the Clinic and its medical director have third-party standing to challenge the Act, which imposes licensure penalties for non-compliance. *See June Med. Servs.*, 140 S. Ct. at 2119-20 (plurality opinion) (abortion providers fit squarely within "a long line of well-established precedents" permitting third-party standing because they are "challenging a law that regulates their conduct"); *see also id.* at 2118 (The Court "ha[s] long permitted abortion providers to invoke the rights of their actual

or potential patients in challenges to abortion-related [laws].").

June Medical rejected the argument, which Mississippi also makes here, that the Court should break from this precedent when a challenged abortion law purports to protect patient health, noting that this "is a common feature of cases in which [the Court has] found third-party standing" and is no reason to depart from those cases. *Id.* at 2119. Mississippi's petition adds nothing new for the Court to consider.

In short, this Court should deny Mississippi's request to consider its third-party standing objection based on the State's "waiver and a long line of well-established precedents [that] foreclose its belated challenge to the plaintiffs' standing." *Id.* at 2120.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CLAUDIA HAMMERMAN
ALEXIA D. KORBERG
AARON S. DELANEY
CAITLIN GRUSAUSKAS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON, LLP
1285 Ave of the Americas
New York, NY 10019
(212) 373-3000

CRYSTAL JOHNSON
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON, LLP
2001 K Street, NW
Washington, DC 20006
(202) 223-7316

HILLARY SCHNELLER
Counsel of Record
JULIE RIKELMAN
MICHELLE MORIARTY
JENNY MA
FRANCESCA COCUZZA
CENTER FOR
REPRODUCTIVE RIGHTS
199 Water Street
New York, NY 10038
(917) 637-3777
hschneller@reprorights.org

ROBERT B. MCDUFF
MISSISSIPPI CENTER FOR
JUSTICE
767 North Congress Street
Jackson, MS 39202
(601) 969-0802

Dated: August 19, 2020