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

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, CENTER FOR INQUIRY, AND AMERICAN ATHEISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The Freedom From Religion Foundation ("FFRF")—a national educational nonprofit organization based in Madison, Wisconsin—is the largest association of freethinkers in the United States, representing more than 35,000 atheists, agnostics, and other nonreligious Americans. Along with its current dues-paying membership, FFRF represents the interests of the largest single group by religious identification—the "nones." More Americans identify as having no religion than being Roman Catholic, Southern Baptist or any other particular religious denomination. Today nearly one in four U.S. adults identifies as religiously unaffiliated.[2] Founded nationally in 1978, FFRF has members in every state, the District of Columbia, and Puerto Rico. FFRF's two primary purposes are to educate the public about nontheism and to defend the constitutional principle of separation between state and church.

FFRF's interest in this case arises from its position that religious ideology has always been and remains the primary threat to reproductive freedom in the United States. Reproductive freedom is

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[1] Counsel of record for the parties have given consent for *amicus* briefs. Pursuant to Supreme Court Rule 37.6, counsel of record for *amici* curiae discloses that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. Moreover, no person or entity, other than *amici* curiae, its members, or its counsel, made a monetary contribution intended to fund this brief's preparation or submission.

[2] Robert P. Jones & Daniel Cox, *America's Changing Religious Identity*, Public Religion Research Institute (Sept. 6, 2017) www.prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf.

fundamental to FFRF's origin, as two of its principal founders, Anne Nicol Gaylor and Annie Laurie Gaylor, formed the organization partly in response to unwarranted governmental and religious intrusion into women's reproductive health decisions. As early abortion rights advocates, they realized the necessity of upholding the separation between religion and government to secure reproductive liberty. Thus, FFRF was organized in part to challenge what it considers the root cause of the denial of women's reproductive rights—patriarchal religion and its influence over our secular laws. Today almost all of FFRF's members consider reproductive rights a vital secular policy issue. A recent membership survey showed that 98.8 percent of FFRF members support the constitutional right to legal abortion embodied in *Roe v. Wade*. FFRF members and nonreligious Americans reject the concept of "ensoulment" at conception, knowing that it is a matter of faith not fact. Religious liberty demands that religious ideology may not, in a secular nation, be the basis of any legislation, especially that which denies people the freedom to decide whether to end or continue a pregnancy.

The Center for Inquiry (CFI) is a nonprofit educational organization dedicated to promoting and defending science, reason, humanist values, and freedom of inquiry. Through education, research, publishing, social services; and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine, health, religion, and ethics. CFI advocates for public policy rooted in science, evidence, and objective truth, and works to protect the

freedom of inquiry that is vital to a free society. CFI seeks to prevent religious and pseudoscientific misinformation from influencing the debate on abortion.

American Atheists, Inc. is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to foster an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, advocacy, and community-building and work to end the stigma associated with being an atheist in America. American Atheists, Inc. is a 501(c)(3) nonprofit corporation with members nationwide.

SUMMARY OF ARGUMENT

Since 1973, when this Court ruled that the Constitution protects the fundamental right to choose an abortion before viability, the law has been clearly understood and uniformly applied by lower courts. *See Roe v. Wade*, 410 U.S. 113 (1973). Despite constant attempts by anti-abortion activists to bait this Court into overturning *Roe v. Wade* by passing clearly unconstitutional bans, it has held firm to the principle that the state may not force a person to carry a pregnancy to term by outlawing the choice to terminate a pregnancy before viability.

As the Fifth Circuit noted in its opinion in this case, it is well-settled law that total bans on abortion before viability violate the Constitution. "[T]he Supreme Court's viability framework has already balanced the state's asserted interests and found them wanting: Until viability, it is for the woman, not the state, to weigh any risks to maternal health and to consider personal values and beliefs in deciding whether to have an abortion." *Jackson Women's Health v. Dobbs*, 945 F.3d 265, 274 (5th Cir. 2019) (*citing Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 853 (1992)).

This rule has been both workable and necessary, primarily because state actors passing pre-viability bans on abortion engage in acrobatics to obfuscate their true legislative motivation and intent—imposing a particular religious ideology upon other citizens.

In this case, the state of Mississippi asks the Court to overrule its holding that viability marks the time before which the decision-making autonomy of a pregnant person (in consultation with a physician) outweighs any purported interests of the state in banning abortion. (Petition for Writ of Certiorari p. 15). The state is urging the Court to overrule *Roe*, and instead hold 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." (Petition for Writ of Certiorari p. 34).

The state is asking the Court to toss out the decades-long safeguard of choice before viability, and require courts to engage in fact-finding and searching

analysis of state interests in order to judge them compelling enough to justify abortion *bans*.[3] But doing away with the viability framework and asking courts to review and weigh state interests before viability will require courts to address the underlying purpose of such abortion bans—to enshrine into civil law a religious belief about when personhood begins.

ARGUMENT

I. Religion has always been at the heart of anti-abortion legislation

Throughout history, as issues involving sex became the subject of public debate, "political, legal, and constitutional battles over obscenity, contraception, abortion, sodomy, and same-sex marriage sharply divided Americans along religious lines."[4] Religious organizations and churches became the primary force arguing that religious moralism required the government to restrict certain conduct, including abortion. "Although the dominant influence of religion in these controversies has been pervasive, the justices of the

[3] The state tries to tempt the Court into avoiding overruling *Roe v. Wade* and decades of precedent by simply pretending that a *total ban* on abortion after 15 weeks is merely a *regulation* on abortion before viability and can be analyzed as such under *Casey* rather than struck down. We assume the Court will reject this pretense, but the state's argument proves the point. As Orwell wrote, "The great enemy of clear language is insincerity." George Orwell, "Politics and the English Language" (1946).

[4] Geoffrey Stone, *Sex and the Constitution*, p.532 (2017).

Supreme Court have been reluctant to invoke the Establishment Clause to invalidate such laws."[5]

As was recently pointed out by Linda Greenhouse, the Pulitzer Prize-winning journalist who reported on the Supreme Court for The New York Times from 1978 to 2008:

> There was once a robust Establishment Clause conversation surrounding restrictions on abortion. In 1976, just three years after the Supreme Court decided *Roe v. Wade*, Congress enacted the Hyde Amendment, cutting off abortion coverage for poor women under the Medicaid program. The legislative debate was replete with references to the "immortal soul" of a fetus and even to Herod's "slaughter of the innocents." A representative of the United States Catholic Conference was highly visible as an adviser to the members of the House of Representatives who were negotiating with senators on the amendment's final form. The lawsuit that abortion rights groups filed immediately after the law's passage prominently included the Establishment Clause in contending that the amendment was unconstitutional. But that argument never got traction, either with the federal district judge who declared the Hyde Amendment unconstitutional or with the Supreme Court, which reversed

[5] *Id.* p.532-33.

that decision and upheld the amendment in 1980.[6]

While Establishment Clause objections to anti-abortion laws have not been thoroughly litigated, they have been noted by some judges, most prominently, Justice Stevens. In a 1989 case involving an anti-abortion law that included a preamble adopting the religious view that a human being begins at conception, he wrote in a concurrence:

> I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions . . . or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some, but by no means all, Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause. *Webster v. Reproductive Health Services*, 492 U.S. 490, 566 (1989) (citations omitted).

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[6] Linda Greenhouse, *Let's Not Forget the Establishment Clause*, N.Y. Times (May 23, 2019) https://www.nytimes.com/2019/05/23/opinion/abortion-supreme-court-religion.html.

Justice Stevens went on to acknowledge what we all know to be true—that public debate around the issue of abortion has always been predominantly influenced by religion. The Establishment Clause argument was bolstered by "the fact that the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate." *Id.* at 571; *see also id.* n.16 (citing specific examples of *amici* from the "No fewer than 67 religious organizations" that submitted *amicus* briefs).

When *Roe v. Wade* acknowledged a fundamental right belonging to pregnant persons to choose whether or not to end a pregnancy, religious groups were galvanized into organized political action to undermine the right. "In the years after *Roe*, the involvement of the Catholic hierarchy in American politics increased to an unprecedented level, with bishops devoting more time, energy, and money to abortion than to any other issue."[7]

While *Roe* firmly rejected laws that *ban* abortion before viability, it acknowledged that states may pass limited *regulations* on abortion depending on the stage of pregnancy. States regularly passed laws restricting abortion access, with the obvious purpose and effect of creating obstacles to obtaining an abortion at any stage of pregnancy. In 1992, the Court developed its analysis for such pre-viability regulations, using the undue burden test to judge whether a pre-viability regulation violates the Constitution. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833. In

[7] Geoffrey Stone, *Sex and the Constitution*, p.396 (2017).

2016, the Court further clarified that in analyzing whether a regulation constitutes an undue burden, courts must meaningfully review the purported state interests in passing laws that restrict abortion, instead of deferring to legislatures. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In the past few years more than ever, states have continued to pass abortion bans long before viability in open defiance of these precedents. Both anti-abortion lawmakers and federal courts have been eager to avoid analysis of abortion bans that invokes the Establishment Clause. This has led to a 50-year game by lawmakers to invent phony medical and scientific "state interests" in prohibiting abortion that could outweigh a patient's right to be the ultimate decision-maker on whether to end a pregnancy before viability.

While states have developed ever more creative legislative rationales for abortion prohibitions, legislators themselves are brazenly candid about the religious purpose and influence on their anti-abortion legislation. For example, during debate on Montana's House Bill 136 (signed into law in April 2021), bill sponsor Representative Lola Sheldon-Galloway said on the floor of the legislature, "I stand today as a witness that this practice of infants dying because they are not wanted or not planned is an abomination in God's eyes, and I will continue to fight for the most invulnerable."[8] At the March 2021 signing of South Dakota's House Bill 1110, which prohibits abortion

[8] Zack Kaplan, *Abortion-related bills move closer to governor's desk* (April 21, 2021) https://www.kulr8.com/regional/abortion-related-bills-move-closer-to-governors-desk/article_cfc681b6-19fb-5697-864f-f2971d989034.html.

based on a diagnosis of certain fetal chromosomal abnormalities, Governor Kristi Noem said, "God created each of us and endowed all of us with the right to life."[9]

Arkansas Senate Bill 6, a flagrantly unconstitutional near-total abortion ban with no exceptions for rape or incest, was signed into law in March 2021. During debate, lead sponsor Senator Jason Rapert cited the bible as justification for the bill, stating, "There's six things God hates, and one of those is people who shed innocent blood. I'm not going to be a part of any of that."[10] Similarly, in May 2019, Alabama passed a clearly unconstitutional abortion ban with no exceptions for rape or incest. In defense of the bill, co-sponsor Senator Clyde Chambliss said, "I believe that if we terminate the life of an unborn child, we are putting ourselves in God's place."[11] At the signing of the bill, Alabama Governor Kay Ivey released a statement confirming, "To the bill's many supporters, this legislation stands as a powerful testament to Alabamians' deeply

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[9] *Governor Noem Signs Pro-Life Bills into Law*, South Dakota State News (March 26, 2021) https://news.sd.gov/newsitem.aspx?id=27855.

[10] Austin Bailey, *Arkansas senators pass near-total abortion ban; it now goes to House*, Ark Times (February 22, 2021) https://arktimes.com/arkansas-blog/2021/02/22/arkansas-senators-pass-near-total-abortion-ban-it-now-goes-to-house.

[11] Rachel Laser, *Abortion bans are a result of the crumbling of church-state separation*, Chicago Tribune (May 27, 2019) https://www.chicagotribune.com/opinion/commentary/ct-perspec-abortion-laws-separation-church-state-20190523-story.html.

held belief that every life is precious and that every life is a sacred gift from God."[12]

II. Mississippi House Bill 1510 is likewise motivated by religious ideology

A. The legislative intent of the bill is clear by its own language and by the unambiguous statements of its authors

Although the language of the bill is careful not to include religious references, the Mississippi legislators who authored and proposed the law at issue in this case, House Bill 1510, the "Gestational Age Act," have clearly stated that religious ideology is both the motivation for and the purpose of the law.

During floor debate on the bill in the Mississippi statehouse, co-author Representative Becky Currie argued, "I believe that life is precious and children are a gift from God."[13] Another of the bill's co-authors, Representative Dan Eubanks, spoke about his religious motivations in a prior floor debate about an amendment to cut Medicaid funding for family planning services in Mississippi. He said at the time:

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[12] *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act* (May 15, 2019) https://governor.alabama.gov/newsroom/2019/05/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act/.

[13] Larrison Campbell, *Abortions banned after 15 weeks by the House*, Mississippi Today (February 2, 2018) https://mississippitoday.org/2018/02/02/house-passes-ban-abortion-15-weeks/.

> We like to sterilize the word and call it family planning and choice, and God had a lot to say about the people who sacrificed their children to the god of Molech and of the pagan communities throughout the Bible, but we sacrifice our children to the gods of selfishness by the millions in this country.

Another co-author, Representative Andy Gipson, in debate on yet another prior anti-abortion bill providing for abortion providers to be prosecuted, said, "I am not God, but I serve a God who says life is in the blood. And this bill will protect those lives."[14] In 2017, co-sponsor of H.B. 1510 Representative Robert Foster sent an official letter from his office to the governor, lieutenant governor, state senate and his fellow members of the state house of representatives, urging the legislatures to pass a bill "outlawing abortion after a heartbeat is detected, with the only exception being if the life of the mother is at risk." In the letter he argued:

> It is our duty as men and women of Christ to stand in the gap between tyranny and evil and those who are unable to defend themselves. There is one set of laws above all others and that is God's law . . . we must uphold God's law in our land as well as the Constitution—for the latter cannot exist without the blessing of the first.[15]

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[14] *Abortion Providers Could Face Jail Under MS Bill*, Associated Press (April 11, 2012) https://www.wbbjtv.com/2012/04/11/abortion-providers-could-face-jail-under-ms-bill/.

[15] https://www.facebook.com/foster4ms/photos/a.490150341122878/897429890394919/?type=3.

The legislation itself uses language that adopts a particular religious viewpoint on when personhood begins. For instance, the Act's legislative findings refer to an embryo and fetus as an "unborn human being," such as, "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 . . . An unborn human being's vital organs begin to function at ten (10) weeks' gestation."[16] The Act goes on to define "human being" as "an individual member of the species Homo sapiens, from and after the point of conception."[17] The adoption of this definition by the Mississippi legislature evinces a religious value judgment undergirding the law. As Justice Stevens noted in *Webster*, courts should not ignore "the absence of any secular purpose for the legislative declarations that life begins at conception."[18]

B. The *amici* briefs in support of the state reveal the religious intent behind abortion restrictions

There is hardly a secular veil to the religious intent and positions of individuals, churches, and state actors in their attempts to limit access to abortion. One need look no further than the *amici* filing briefs in support of Mississippi in this case to see the strong

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[16] Gestational Age Act, Miss. Code Ann. § 41–41–191(2)(b)(i).

[17] Gestational Age Act, Miss. Code Ann. § 41–41–191(3)(g).

[18] 492 U.S. at 566.

religious convictions motivating abortion restrictions. Religious organizations seeking to limit abortion access filed at least 16 separate *amici* briefs.[19] Many

[19] Briefs filed in support of petitions included:

- *Amicus Curiae* Brief Of Jewish Pro-life Foundation, The Coalition For Jewish Values, Rabbi Yakov David Cohen, Rabbi Chananya Weissman, And Bonnie Chernin (President, Jewish Life League)
- Brief Of *Amicus Curiae* Jewish Coalition For Religious Liberty
- Brief Of The Catholic Medical Association, The National Association Of Catholic Nurses-USA, Idaho Chooses Life And Texas Alliance For Life
- Brief For *Amici Curiae* African-American, Hispanic, Roman Catholic And Protestant Religious And Civil Rights Organizations And Leaders
- Brief *Amici Curiae* Of United States Conference Of Catholic Bishops And Other Religious Organizations
- Brief For The Lonang Institute As *Amicus Curiae*
- Brief Of *Amicus Curiae* Priests For Life
- Brief Of *Amici Curiae* Christian Legal Society And Robertson Center For Constitutional Law
- Brief For *Amici Curiae* Foundation For Moral Law & Lutherans For Life
- Brief Of *Amicus Curiae* Family Research Council
- Brief *Amicus Curiae* Of Intercessors For America Including Its Intercessor Prayer Partners
- Brief Of *Amici Curiae* The National Catholic Bioethics Center, Pro-life Obstetricians-gynecologists Gianina Cazan-London M.D. And Melissa Halvorson M.D. And Right To Life Of Michigan, Inc.
- Brief Of *Amicus Curiae* Catholicvote.Org Education Fund
- Brief Of *Amici Curiae* World Faith Foundation And Institute For Faith And Family

other briefs in support of Mississippi were filed on behalf of organizations that are faith-based and opposed to abortion or organizations that focus on free exercise of religion.

A number of *amici* discuss theology. A brief by LONANG Institute discusses the fable of Adam and Eve in this way: "At issue in that case, *In Re: Adam, Eve & the Devil*, 3 Genesis 1 (0001), was the intent and meaning of a statute prohibiting consumption of fruit from a specific tree in a Garden in Eden."[20] A brief by the Foundation for Moral Law & Lutherans for Life discusses what the bible purportedly says about abortion.[21] A brief on behalf of Intercessors for America warns:

> Lastly, the Court should be aware that the fabric of the nation seems to many to be unraveling. The point is that God rules in the affairs of men, and He cannot ignore the shedding of innocent blood. Holy Writ provides many illustrations of how the righteous

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- Brief Of *Amici Curiae* Billy Graham Evangelistic Association, Samaritan's Purse, Illinois Family Institute, Family Watch International, National Legal Foundation, International Conference Of Evangelical Chaplain Endorsers, And Founding Freedoms Law Center
- Brief Of *Amicus Curiae* Good Counsel, Inc.

[20] Brief for The LONANG Institute as *Amicus Curiae* 2.

[21] Brief for Foundation for Moral Law, Lutherans for Life as *Amicus Curiae* 16 ("The Bible treats the preborn child as a living human being.").

> judgment of a Holy God can be triggered against the people of a land.[22]

What Justice Stevens noted in 1989 is still true today: the many religious arguments advanced by *amici* illustrate the "intensely divisive character of much of the national debate over the abortion issue" and "reflects the deeply held religious convictions of many participants in the debate."[23] And as he concluded about the legislature in *Webster*, the Mississippi legislature "may not inject its endorsement of a particular religious tradition into this debate."[24]

III. Judicial review of pre-viability prohibitions is hampered by governments that obscure their purpose in adopting abortion prohibitions

The constitutional analysis of previability abortion restrictions weighs the purported state interests furthered by the restriction weighed against the fundamental right of the pregnant person to determine whether or not to carry a pregnancy to term. When the law is not a previability regulation but a previability ban on abortion, the analysis is simple—the pregnant person's rights outweigh any state interests. On the other hand, states have been permitted to restrict or ban post-viability abortion, other than those

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[22] Brief for Intercessors for America including its Intercessor Prayer Partners as *amicus curiae* p.7.

[23] 492 U.S. 571.

[24] *Id.*

"necessary to preserve the life or health" of the pregnant person as determined by the person's physician. *Doe v. Bolton*, 410 U.S. 179 (1973). The Court has recognized that state interests at that point may equal or outweigh the rights of the pregnant person and their doctor. When regulations rather than outright bans of abortion have been challenged, the Court's "undue burden" standard has provided a clear framework for courts to balance the interests of the state and pregnant people affected by the restriction. *Casey*, 505 U.S. 833.

This Court must recognize the reality that religious teachings about the beginning of life and when personhood begins—not compelling secular state interests—underlie abortion bans. The religiously-neutral state interests argued in litigation have been developed over decades to obfuscate these motivations. The Court must confront this reality because stated reasons for abortion restrictions are not easily judicially reviewed when they are insincere and developed for litigation posturing.

State actors are keenly aware of this too. Mississippi's stated interests were engineered to defend its abortion ban in court, but do not stand up to scientific or medical scrutiny. This is why it is asking the Court not only to overrule *Roe* by allowing states to ban abortions before viability, but also to "clarify" (overrule) *Whole Woman's Health v. Hellerstedt* and simply defer to legislatures' judgment that their stated interests are more compelling than a pregnant person's

constitutional right to make the ultimate decision whether to terminate a pregnancy.

Mississippi would like to convince the Court that more than four decades of consistent jurisprudence applying these standards is somehow "conflicting" or "unworkable." But lower appellate courts have had no problem consistently applying these rules of law with uniform and predictable results. *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013), *cert. denied*, 571 U.S. 1127, 134 S.Ct. 905, 187 L.Ed.2d 778 (2014); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015); *MKB Management Corporation v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (affirming a grant of summary judgment because a 6-week ban "generally prohibits abortions before viability"), *cert. denied*, ___ U.S. ___, 136 S. Ct. 981, 194 L.Ed.2d 4 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) ("By banning abortions after 12 weeks' gestation, the Act prohibits women from making the ultimate decision to terminate a pregnancy at a point before viability."), *cert. denied*, ___ U.S. ___, 136 S. Ct. 895, 193 L.Ed.2d 789 (2016); *Jane v. Bangerter*, 102 F.3d 1112, 1115 (10th Cir. 1996) ("It is indisputable that section 302(3) of the Utah abortion statute, which effectively defines viability as occurring at twenty weeks gestational age, is directly contrary to the Supreme Court authority set out above"), *cert. denied*, 520 U.S. 1274. District courts have been similarly consistent. *See Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 801 (S.D. Ohio 2019) (enjoining Ohio's 6-week ban); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178, 2019 WL

1233575, at *2 (W.D. Ky. Mar. 15, 2019) (enjoining Kentucky's 6-week ban); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 629-32 (M.D.N.C. 2019) (invalidating North Carolina's 20-week ban); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1220-21 (E.D. Ark. Aug. 6, 2019) (enjoining Arkansas's 18-week ban).

Groups and individuals who are fundamentally opposed to abortion are unhappy with the viability standard because it prioritizes the rights of pregnant persons during the weeks before fetal viability. But the fact that the Mississippi legislature is strongly opposed to *Roe* does not mean its standard is "unworkable." It is an easily applied and easily understood method of balancing the strong interests of the pregnant person and the state relative to the development of the pregnancy. The proposed alternative constitutional standard will require courts to continue to ignore the obvious religious position—e.g., that "life begins at conception"—underlying state interests in banning abortion before viability. Courts will be asked to ignore the unambiguous religious motivations professed by legislators debating and defending abortion bans *and* to ignore the plain language of such bills that adopt religious conclusions in order to ban previability abortions.

The District Court below made findings to this effect, rejecting the sincerity of the state's purported interests and judging them insufficient to justify banning abortion at 15 weeks. The District Court rightly pointed out that courts must critically evaluate state interests when considering a law that affects

constitutional interests. "The judiciary 'retains an independent constitutional duty to review factual findings [of legislatures] where constitutional rights are at stake . . . In that spirit, this Court concludes that the Mississippi Legislature's professed interest in 'women's health' is pure gaslighting." *Jackson Women's Health Organization v. Currier*, 349 F. Supp. 3d 536, 540 n.22 (S.D. Miss. 2018).

Judge Ho of the Fifth Circuit expressed in his concurrence below, that despite the fact that the District Court faithfully applied decades of Supreme Court precedent in striking down a clearly unconstitutional law, he was "deeply troubled by how the district court handled this case." *Jackson Women's Health Organization v. Dobbs*, 945 F.3d 265, 278 (5th Cir. 2019). In a familiar refrain in cases involving religious motives for clearly unlawful state action, Judge Ho chastised the District Court judge for showing "alarming disrespect for the millions of Americans who believe . . . that abortion is the immoral, tragic, and violent taking of innocent human life." Judge Ho said of the District Court's dismissal of the state's professed interest in women's health as insincere, it "equates a belief in the sanctity of life with sexism." *Id.*

But the District Court's unwillingness to blindly accept the state's purported interests as valid secular interests constitutes appropriate judicial review. It is the court's constitutional duty to review legislative interests that are being offered to justify a law that strips a pregnant person of the constitutional right to decide whether to continue a nonviable pregnancy. The

troubling judicial conduct is Judge Ho's framing of the legislature's motivation as "a belief in the sanctity of life," the corollary of which, of course, is that those who prioritize the pregnant person's right to choose an abortion before viability do not believe in "the sanctity of life." The acceptance of this framing of the issue reflects a belief that personhood begins at conception—a religious conclusion that does not have any secular basis. After clearly revealing a personal religious judgment on the issue, the concurrence complains that judges are not "supposed to decide cases based on personal policy preference. It is because we swear an oath to rule based on legal principle alone." The District Court upheld that oath, applying clearly established "super precedent," while refusing to ignore the fact that the state's professed interests do not ring true and instead belie a commitment to a particular theological view.

The asserted state interests in previability abortion bans have only thinly veiled religious motivations. They rest—as they must—on a conclusion that a strong state interest exists in requiring a person to remain pregnant from the time of conception. This conclusion has no basis in secular facts—it is a religious judgment based on faith.

The government has no business requiring citizens to comply with the religious beliefs of those who are in power. The framers of the Constitution adopted a godless and entirely secular Constitution, in which the only references to religion are exclusionary. The framers abhorred and repudiated the idea of a

theocracy, or a government in which religion would dominate government action. As a personal matter of conscience, the state may not compel obedience with a religious belief on when "personhood" begins. It may be a strongly held religious belief for the minority of Americans who oppose legal abortion, but it is *not* an appropriate legislative purpose or interest.

This Court has wisely avoided having to address the religious judgment that underlies previability abortion bans by setting viability as the dividing line before which the decision-making autonomy must belong to the pregnant person, not the state.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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