No. 18-60868

In the United States Court of Appeals for the Fifth Circuit

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients; SACHEEN CARR-ELLIS, M.D., M.P.H., on behalf of herself and her patients,

Plaintiffs – Appellees,

v.

THOMAS E. DOBBS, M.D., M.P.H., in his official capacity as State Health Officer of the Mississippi Department of Health; KENNETH CLEVELAND, M.D., in his official capacity as Executive Director of the Mississippi State Board of Medical Licensure,

Defendants – Appellants.

On Appeal from the United States District Court
for the Southern District of Mississippi
No. 3:18-CV-171-CWR-FKB

BRIEF OF THE STATES OF LOUISIANA AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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Elizabeth Murrill, Counsel for *Amici Curiae*

/s/ Elizabeth B. Murrill
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INTRODUCTION AND INTEREST OF *AMICI*

The panel opinion affirms an injunction of a Mississippi abortion regulation without holding the law unduly burdens any woman's right to choose abortion. It did so based on a mistaken interpretation of Supreme Court precedent, in conflict with decisions of this Court, and without acknowledging a circuit split. Undisputed facts suggest the Mississippi law is *not* facially unconstitutional under the undue-burden test, yet the panel affirmed the district court's decision to deny discovery: Mississippi cannot even develop a record to support *changing* the applicable test. The panel's analysis threatens long-accepted abortion regulations while simultaneously suppressing and thereby crippling States' ability to defend their laws. These circumstances call for *en banc* rehearing.

Louisiana and Texas, like Mississippi, regulate abortion for many reasons, including protecting women's health, ensuring informed consent, establishing ethical standards, expressing respect for unborn life, and reducing the suffering of fetuses during abortions. Many of those laws are being challenged in courts of this Circuit. *See, e.g.*, *June Med. Servs. v. Gee*, No. 3:16-cv-444 (M.D. La.); *June Med. Servs. v. Gee*, No. 3:17-cv-404 (M.D. La.). Louisiana has an abortion regulation modeled on

the Mississippi law at issue here. *See* Act 468, 2018 Regular Session; La. Rev. Stat. 14:87(F).

Louisiana and Texas therefore have an interest in ensuring federal courts analyze abortion regulations under correct standards and that district courts do not arbitrarily limit discovery based on errors of law. *Amici* urge that this Court grant rehearing *en banc* to secure the uniformity of this Court's decisions on a matter of exceptional public importance.

STATEMENT OF THE ISSUES

Whether States are categorically forbidden to enact regulations that prevent any pre-viability abortions, even when the plaintiff does not prove an undue burden on the right of any woman to choose an abortion.

Whether a State may be foreclosed from developing an evidentiary record to establish the interests served by a challenged abortion regulation.

Whether a decision premised on an error of law constitutes an abuse of discretion.

ARGUMENT

I. THE PANEL OPINION'S ARTIFICIAL DISTINCTION BETWEEN "BANS" AND "REGULATIONS" IS INCONSISTENT WITH SUPREME COURT AND FIFTH CIRCUIT PRECEDENT.

The panel majority relied on a distinction between "bans" and "regulations" of pre-viability abortion. Op. 8. Because the Mississippi law "undisputedly prevents the abortions of some non-viable fetuses," Op. 10, the panel held it *categorically* violates *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), regardless of whether it unduly burdens any woman's right to choose abortion. That misconstrues *Casey*, committing this Court to an incorrect and unworkable test that conflicts with Supreme Court and Fifth Circuit precedent.

A. *Casey* Establishes An "Undue Burden" Test Applicable To All Laws Related To Pre-Viability Abortions.

The panel's fundamental premise—that *Casey* adopted a categorical rule against laws "prevent[ing]" the abortion of any "non-viable fetus[]," Op. 10—is inconsistent with *Casey*, which established an "undue burden" test for *all* laws governing pre-viability abortions. Even where a law prevents some pre-viability abortions, the question is not

whether the law can be characterized as a "ban," Op. 8, *but whether a woman's right to choose is unduly burdened.*

The abortion right is not a right of *access* at every point pre-viability. Rather, *Casey* provides that "before [viability] the woman has a right to choose to terminate her pregnancy." 505 U.S. at 870.[1] A law that "prohibit[s] any woman from making the ultimate decision to terminate her pregnancy" is unconstitutional. *Id.* at 879; *see also id.* at 875, 877. The right, in other words, is that of an individual woman to choose abortion before the fetus attains viability. Nothing in *Casey* (or *Roe,* for that matter) guarantees that abortion must be available at *every point in time* up until viability, in every circumstance the woman might prefer. If the woman is not "deprived … of the ultimate decision," regulation is permitted. *Id.* at 875.

Casey's reasoning confirms that while States are foreclosed from banning "*abortions* prior to viability," 505 U.S. at 871 (emphasis added); *see also Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992), they need not ensure every possible pre-viability *abortion*. Indeed, *Casey* pointed out that "not every law which makes a right more difficult to

[1] All citations to *Casey* are to the joint opinion unless otherwise noted.

exercise is, *ipso facto*, an infringement of" the abortion right. 505 U.S. at 873. "Incidental effect[s]" that "mak[e] it more difficult or more expensive to procure an abortion cannot be enough to invalidate" an abortion regulation, other than a law "designed to strike at the right itself." *Id.* at 874. Any law could place some pre-viability abortion out of reach—or "prevent[] the abortions of some non-viable fetuses," Op. 10—but *Casey* did not make laws categorically unconstitutional on that ground.

Casey rejected *Roe v. Wade*'s rigid trimester-based framework for abortion regulation. 410 U.S. 113 (1973). *Roe* "forb[ade] any regulation of abortion designed to advance [the State's interest in unborn life] before viability." *Casey*, 505 U.S. at 876. But *Casey* abrogated that rule as "incompatible" with the "substantial state interest in potential life *throughout* pregnancy." *Id.* (emphasis added). A threshold before which no abortion can ever be "prevent[ed]" conflicts with *Casey*.

Casey's rejection of a challenge to a 24-hour pre-abortion informed consent period is especially instructive. Such a law prohibits certain 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, 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," *id.* at 885. Similar laws have been upheld ever since.

Gonzales v. Carhart reaffirmed States have legitimate interests that attach prior to viability that may impact some pre-viability abortions. 550 U.S. 124, 157–58 (2007). These interests include "protecting the integrity and ethics of the medical profession." *Id.* at 157 (quoting *Washington v. Glucksberg,* 521 U.S. 702, 731 (1997) and *Barsky v. Bd. of Regents of Univ. of N.Y.,* 347 U.S. 442, 451 (1954) (State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine)). In upholding a restriction on a particular method of abortion (partial birth abortions), the Court also confirmed that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of [*Casey*] was that "the Court's precedents after *Roe* had 'undervalue[d] the State's interest in potential life.'" *Gonzales*, 550 U.S. at 157 (quoting *Casey*, 505 U.S. at 873). Even though the law in *Gonzales*

restricted some second-trimester abortions, the Court nevertheless applied the undue-burden test.

It therefore is error to ask whether a law "prevents" a pre-viability abortion. Op. 10. A court must instead evaluate whether the law unduly burdens exercise of the right. *Casey*, 505 U.S. at 877; *Sojourner T*, 974 F.2d at 30.

The "substantial obstacle" formulation *Casey* articulated for the undue-burden test is incompatible with the panel's reasoning. If the *ultimate* question of the undue-burden test is whether a law poses a "substantial obstacle" to a woman's choice, it makes no sense to *bypass the test* based on a *threshold* determination that a law "prevents" some pre-viability abortions. Op. 10. The panel's test substitutes an abstract legal pre-determination for what should be a fact-sensitive application of law to an evidentiary record developed by the parties in advance of the ultimate decision.

The real question, then, is whether a woman's right to choose abortion before viability is unduly burdened by a law requiring most women to make that decision before 15 weeks. The panel acknowledged that the Mississippi abortion clinic does not perform abortions after 16

weeks, Op. 9, and that fewer than 100 women per year choose abortion in Mississippi after 15 weeks, Op. 10 n.31. It is unlikely under *Casey* that the Mississippi law creates an undue burden, and even less likely that it is *facially* unconstitutional.

The panel also overlooked a circuit split over its interpretation of *Casey*. The Ninth Circuit, like the panel, has treated *Casey* as categorically prohibiting "ban[s]" on categories of pre-viability abortions. *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013). But another Circuit—cited by the panel—applied the undue-burden test, just as Mississippi urged. *Jane L. v. Bangerter*, 102 F.3d 1112, 1118 (10th Cir. 1996); *see* Op. 7–8. The fact that the panel adopted a questionable interpretation of *Casey and* deepened a circuit split it failed to acknowledge justifies *en banc* rehearing.

B. The Panel's Test Is Unworkable And Inconsistent With Fifth Circuit Precedent.

The panel's view that abortion "ban[s]" which "prevent[] the abortions of some non-viable fetuses" are forbidden (Op. 10) is unworkable in practice and contrary to this Court's precedents.

The panel considered abortion regulations "distinct … from [laws] that prevent women from choosing to have abortions before viability." Op.

10. In reality, the difference is arbitrary and impossible to police: Every "regulation" of conduct is also a "ban" on nonconforming conduct. A rule permitting courts to invalidate abortion laws *without* identifying an undue burden, merely by identifying pre-viability abortions that the law "prevents," is subjective and manipulable. This Court accordingly applies *Casey*'s undue-burden framework rather than asking whether a law prevents abortion of non-viable fetuses. *E.g.*, *Sojourner T*, 974 F.2d at 30.

Louisiana abortion regulations underscore the unworkability of the panel's test and its inconsistency with past cases. One example is Louisiana's 72-hour pre-abortion informed consent period. *See* La. Rev. Stat. 40:1061.17. *Casey* does not treat waiting periods as bans, and this Court has upheld waiting periods under the undue-burden test. *See Casey*, 505 U.S. at 885; *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992). But the panel opinion suggests such laws could be *characterized* as "bans" on abortion of non-viable fetuses within 72 hours of viability.

Another example is Louisiana's requirement that minors seeking abortions obtain parental consent or a judicial bypass. *See* La. Rev. Stat. 40:1061.14. *Casey* upheld such a law and so has this Court, applying the undue-burden standard. *Casey*, 505 U.S. at 885; *Barnes v. State of Miss.*,

992 F.2d 1335, 1343 (5th Cir. 1993). But under the panel's reasoning, such laws might be characterized as "bans" on abortions of non-viable fetuses whose mothers do not satisfy the statute's requirements.

More broadly, any regulations on who can perform pre-viability abortions or the means they use could be characterized as "bans" on non-conforming abortions. This Court recently applied the undue-burden framework to uphold such a law. *See June Med. Servs. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted,* 140 S. Ct. 35 (2019), *and cert. granted,* 140 S. Ct. 35 (2019). But if such laws "mak[e] it more difficult or more expensive" for a woman to obtain an abortion, *Casey*, 505 U.S. at 874, the panel seems to call for a *threshold* determination of whether women experience an "incidental" effect of a regulation, or a "ban."

The panel opinion's categorical threshold inquiry into whether an abortion regulation "prevents" any pre-viability abortions is inconsistent with precedent. Op. 10. But even if not foreclosed, these examples show the question whether an abortion-related regulation is a "ban" is incapable of principled or consistent application. Superimposing a new rule that the undue burden test only applies to "regulations" rather than

"bans" invents rather than applies precedent and only works more mischief with abortion jurisprudence.

II. THE PANEL ERRED IN DENYING MISSISSIPPI DISCOVERY TO DEVELOP A COMPLETE RECORD.

The panel opinion's legal error in failing to apply *Casey*'s undue-burden standard led to another egregiously prejudicial error: its refusal to permit Mississippi to even obtain discovery or develop an evidentiary record related to the State's interests in the law. A decision premised on an error of law constitutes an abuse of discretion. *See, e.g., In re Deepwater Horizon,* 785 F.3d 986 (2015*)* (remanding categorical preclusion of certain cases from judicial review); *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005) ("Because a court, by definition, abuses its discretion when it makes an error of law, an appellate court may correct such mistakes.").

The panel's decision to affirm the district court's denial of discovery rested entirely on the mistaken holding that the Mississippi law is a categorically unconstitutional "ban" on pre-viability abortion. Op. 12. If the panel was wrong as a matter of law in bypassing the undue-burden

test—and it was—it was "by definition" an abuse of discretion to deny discovery on that basis. *Jethroe*, 412 F. 3d at 600.

The undue-burden test is factually intensive. An evidentiary record on the Mississippi law would likely show that the law protects the health of Mississippi women, prevents fetal suffering, reduces the psychological impacts to staff, and places little burden on women's choice. Denial of discovery based on an error of law was an abuse of discretion that prejudices Mississippi's substantial rights and similarly threatens *amici* in defending attacks on State lawOp. 12 (citing *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 261 (5th Cir. 2011)).

Even if the panel *correctly* interpreted *Casey*, it still abused its discretion to deny discovery by arbitrarily limiting Mississippi's defense. Assuming, *arguendo,* the only relevant factual question under *Casey* is the point of fetal viability, Mississippi's defense rests on an argument for "extending, modifying, or reversing existing law or for establishing new law" by recognizing State interests previous cases failed to appreciate. Fed. R. Civ. P. 11(b)(2); *see also* Fed. R. Civ. P. 26(g)(1)(B)(i). But the only way for Mississippi to make that argument is by showing its interests—for example, prevention of fetal pain—are factually justified. That

requires an evidentiary record, the insufficiency of which can be fatal to the States' defense of its laws. Though Mississippi's arguments are clearly not frivolous, the panel nevertheless put the State in a bind: Mississippi cannot obtain discovery because the district court declared its interests and defenses irrelevant and it cannot obtain recognition of its interests and defenses because the district court put discovery out of reach.

It is no answer to say that the district court may grant or deny discovery in its discretion. Op. 22, 25. The exercise of discretion is *necessarily* premised upon an accurate assessment of the parties' claims and defenses and the law that applies. *Jethroe*, 412 F. 3d at 600. Moreover, State laws carry a presumption of constitutionality. *See, e.g.*, *League of United Latin Am. Citizens v. Edwards Aquifer Auth.*, 937 F.3d 457, 471 (5th Cir. 2019). If that presumption carries any weight, States should be able to pursue any good-faith argument to defend their laws. The district court, however, handcuffed the State while simultaneously bringing into the case *sua sponte* extra-record evidence and irrelevant policy pronouncements, Op. 25–31 (Ho, J., concurring in the judgment). At the very least, the district court's expressions of contempt for

Mississippi's democratic process shows its denial of discovery was an abuse of discretion. *United States v. Lipscomb*, 299 F.3d 303, 339 (5th Cir. 2002). The panel opinion's failure to ensure States' ability to defend their laws deserves review.

CONCLUSION

This Court should grant *en banc* review and reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2020, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 2,544 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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