IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

LITTLE ROCK FAMILY PLANNING SERVICES, *ET AL.*, PLAINTIFFS

V. CASE NO. 4:21-CV-00453-KGB

LARRY JEGLEY, IN HIS OFFICIAL CAPACITY AS THE PROSECUTING ATTORNEY OF PULASKI COUNTY, *ET AL.*, DEFENDANTS

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Comes now Defendants Larry Jegley, in his official capacity as the prosecuting attorney of Pulaski County, Arkansas, *et. al.*, (hereinafter collectively referred to as "Defendants") by and through their attorneys, Attorney General Leslie Rutledge and Assistant Attorney General Maryna Jackson, and for their Response in Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction herein state and allege:

I. INTRODUCTION AND FACTS

On March 9, 2021, Governor Hutchinson signed Act 309 (hereinafter referred to as "Act" or "Act 309") which prohibits abortion "except to save the life of a pregnant woman in a medical emergency." 2021 Ark. Act 309 (2021) (to be codified at Ark. Code Ann. §§ 5-61-401-404), § 404(a). Unless the General Assembly reconvenes on or before July 27, 2021, Act 309 shall become effective on July 28, 2021. *See* Ark. Att'y Gen. Op. No. 2021-029 (May 20, 2021). Under the Act, the following actions do not

constitute abortion: if the pregnancy is terminated with purpose to (i) save the life or preserve the health of the unborn child; (ii) remove a dead unborn child caused by spontaneous abortion; or (iii) remove an ectopic pregnancy. Act 309, § 403(1)(B). "Medical emergency" means a condition in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. *Id.*, § 403(3). The General Assembly made the following findings:

> (1) It is time for the United States Supreme Court to redress and correct the grave injustice and the crime against humanity which is being perpetuated by its decisions in *Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood v. Casey*;
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> (2) The United States Supreme Court committed a grave injustice and a crime against humanity in the *Dred Scott* decision by denying personhood to a class of human beings, African-Americans;
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> (3) The United States Supreme Court also committed a grave injustice and a crime against humanity by upholding the "separate but equal" doctrine in *Plessy v. Ferguson*, which withdrew legal protection from a class of human beings who were persons under the United States Constitution, African-Americans;
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> (4) A crime against humanity occurs when a government withdraws legal protection from a class of human beings, resulting in severe deprivation of their rights, up to and including death;
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> (5) In *Brown v. Board of Education*, the United States Supreme Court corrected its own grave injustice and crime against humanity created in *Plessy v. Ferguson* by overruling and abolishing the fifty-eight-year-old "separate but equal" doctrine, thus giving equal legal rights to African-Americans;
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> (6) Under the doctrine of stare decisis, the three (3) abortion cases mentioned in subdivision (a)(1) of this section meet the test for when a case should be overturned by the United States Supreme Court because of

significant changes in facts or laws, including without limitation the following:

(A) The cases have not been accepted by scholars, judges, and the American people, as witnessed to by the fact that these cases are still the most intensely controversial cases in American history and at the present time;

(B) New scientific advances have demonstrated since 1973 that life begins at the moment of conception and that the child in a woman's womb is a human being;

(C) Scientific evidence and personal testimonies document the massive harm that abortion causes to women;

(D) The laws in all fifty (50) states have now changed through "Safe Haven" laws to eliminate all burden of child care from women who do not want to care for a child; and

(E) Public attitudes favoring adoption have created a culture of adoption in the United States, with many families waiting long periods of time to adopt newborn infants;

(7) Before the United States Supreme Court decision of *Roe v. Wade*, Arkansas had already enacted prohibitions on abortions under § 5–61–101 et seq., and authorized the refusal to perform, participate, consent or submit to an abortion under § 20–16–601;

(8) Arkansas Constitution, Amendment 68, states that the policy of Arkansas is to protect the life of every unborn child from conception until birth and that public funds shall not be used to pay for any abortion, except to save the life of the mother;

(9) Arkansas passed the Arkansas Human Heartbeat Protection Act, § 20–16–1301 et seq., in 2013, which shows the will of the Arkansas people to save the lives of unborn children;

(10) Arkansas has continued to pass additional legislation in 2015, 2017, and 2019 that further shows the will of the Arkansas people to save the lives of unborn children;

(11)(A) Since the decision of *Roe v. Wade*, approximately sixty million, sixty-nine thousand, nine hundred and seventy-one (60,069,971) abortions have ended the lives of unborn children.

> (B) In 2015, six hundred thirty-eight thousand, one hundred and sixty-nine (638,169) legal induced abortions were reported to the Centers for Disease Control and Prevention from forty-nine (49) reporting areas in the United States.
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> (C) The Department of Health reports that two thousand, nine hundred and sixty-three (2,963) abortions took place in Arkansas during 2019, including abortions performed on out-of-state residents; and
>
> (12) The State of Arkansas urgently pleads with the United States Supreme Court to do the right thing, as they did in one of their greatest cases, *Brown v. Board of Education*, which overturned a fifty-eight-year-old precedent of the United States, and reverse, cancel, overturn, and annul *Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood v. Casey*.

Id, § 402. At issue here is whether the Constitution forbids the State of Arkansas from protecting the lives of unborn children. Common law criminalized many abortions, and by the time the Fourteenth Amendment was adopted, "at least 28 of the then-37 States and 8 Territories" protected unborn human life through "statutes banning or limiting abortion." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 952 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

By any plausible interpretation of the Constitution, the Act should be upheld. After all, "(1) the Constitution says absolutely nothing about [abortion], and (2) the long-standing traditions of American society have permitted it to be legally proscribed." *Id.*at 980 (Scalia, J., concurring in the judgment in part and dissenting in part). But the Supreme Court, in *Roe v. Wade*, found "in the penumbras of the Bill of Rights" a "fundamental" right to abortion. 410 U.S. 113, 152 (1973). *Roe* was

subject to immediate criticism by scholars and jurists;[1] its standard proved unworkable; *see Casey*, 505 U.S. at 876 (plurality op.) (recognizing inadequacy of *Roe*'s trimester framework); and numerous parties, including the United States at least six times, have asked the Court to overrule *Roe*. *See id.* at 844. But in *Casey*, the Supreme Court jettisoned much of *Roe*'s reasoning while purporting to uphold the decision on stare decisis grounds.

The plurality opinion in *Casey* set viability as the crucial moment where a state's interest in protecting life *alone* becomes compelling and in-and-of itself is sufficient to justify a total ban. Indeed, once the unborn child is capable of surviving outside the womb, the State can protect it from abortion, unless abortion "is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 879.

As numerous Justices have recognized, "[t]he standard set forth in the *Casey* plurality has no historical or doctrinal pedigree." *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting). Rather, that "standard is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace." *Id.* Indeed, even one the authors of the *Casey* plurality has recognized that "[t]he choice of viability as the point at which the

[1] *See, e.g.*, Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 7 (1973) ("One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."); *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 935-937 (1973).

state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting).

Even so, that arbitrary distinction about when protecting life itself becomes compelling is currently the law. Under *Casey*, viability is the point at which the States' interest in protecting the sanctity of life in-and-of itself becomes so compelling that the States may bar abortion solely for that reason. For those unborn children who are viable, the State may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Casey*, 530 U.S. at 879 (quoting *Roe*, 410 U.S. at 165).

The State's interest in preserving and protecting the potentiality of human life is well-established. *Roe* itself acknowledged the "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162. As did *Casey*: "the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." 505 U.S. at 846. Justices O'Connor, Kennedy, and Souter referred to that interest as "profound," *id.* at 877, and criticized abortion jurisprudence for giving "too little acknowledgment" of "the interest of the State in the protection of potential life." *Id.* at 871. Chief Justice Rehnquist, with Justices White and Kennedy, wrote that "[t]he State's interest, if compelling after viability, is equally compelling before viability." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519 (1989) (quotation omitted); *see also MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (the "viability standard has proven

unsatisfactory because it gives too little consideration to the 'substantial state interest in potential life throughout the pregnancy'") (internal citation omitted)).

Although courts have made viability a pivotal question in cases that involve total bans like the Act at issue here, they have also recognized that states can—and should— legislate to protect life. In recognition of, and consistent with its interest in protecting fetal life, the General Assembly passed Act 309. Regulating abortions, as the Act does, is a logical expansion of Arkansas's legislative authority and its well-established interest in protecting the unborn.

Furthermore, Plaintiffs do not assert that they are performing post-viability abortions and, at a minimum, they lack standing to seek an injunction against application of the Act to post-viability abortions. Nor for that matter, even under their framing, is a law barring post-viable abortions or abortions performed at any stage of pregnancy by non-physicians unconstitutional, and this Court undisputedly lacks the power to broadly enjoin Arkansas's law.

II. STANDARD OF REVIEW

The Supreme Court and the Eighth Circuit have made clear that injunctive relief is an extraordinary and drastic remedy and should not be granted unless the plaintiff has clearly carried her burden of persuasion. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.") (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, 129-30 (2d ed. 1995));

Sanborn Mfg. Co., Inc. v. Campbell/Hausfield Scott Fetzer Co., 997 F.2d 484, 486 (8th Cir. 1993) (noting the burden on the movant "is a heavy one") (citing *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991)).

In resolving both motions for preliminary injunctions and motions for temporary restraining orders, courts consider: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on the other litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc); *S.B. McLaughlin & Co. v. Tudor Oaks Condo. Project*, 877 F.2d 707, 708 (8th Cir. 1989) (noting *Dataphase* standard generally governs TRO motions).

Where, like here, "a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute," a movant must first make a rigorous showing of likelihood of success on the merits. *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc); *see also Mazurek*, 520 U.S. at 972 (movant must carry a burden greater than that required on summary judgment). That heightened standard "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Rounds*, 530 F.3d at 732 (quoting *Able v. United States,* 44 F.3d 128, 131 (2d Cir. 1995)). Accordingly, only if a party makes that showing should a court proceed to weigh the other factors. *Id.* Plaintiffs don't even

acknowledge that heavy burden, let alone claim to have met that demanding standard.

III. ARGUMENT

The goal of preliminary relief "is to maintain the status quo." *Kelley v. First Westroads Bank*, 840 F.2d 554, 558 (8th Cir. 1988) (TRO); *see also Butler v. Fed. Nat'l Mortg. Ass'n*, 557 F. App'x 593, 596 (8th Cir. 2014) ("A temporary restraining order is just that: it merely preserves the status quo for a short time."); *Kansas City S. Transp. Co. v. Teamsters Local Union #41*, 126 F.3d 1059, 1066 (8th Cir. 1997) ("The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full, effective relief."). Here, to the extent Plaintiffs seeks to enjoin Defendants from enforcing the Act, Plaintiff's request would not preserve the status quo. It would up end it.

Because the Supreme Court's abortion precedents are binding on this Court, Plaintiffs' challenge to the Act as applied to abortions of unborn children who have not reached viability is sadly likely to succeed in *this* Court. But Defendants will show that these cases were wrongly decided, as they rest on: (1) an improper and incomplete history of the protection afforded fetal human life under the common law and state statutes from the mid-nineteenth century up until *Roe*, (2) an arbitrary "viability" line for which neither the constitutional text nor structure provide any support, and (3) the demonstrably false proposition that it is unclear whether a fetus is a human life. *Roe*, 410 U.S. at 159 ("We need not resolve the difficult question of

when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."). But while Defendants will ask the Supreme Court to overrule these obviously and tragically wrong decisions, until those decisions are overruled, Plaintiffs are likely to prevail in this Court on their challenge to the Act as applied to abortions of pre-viability children. And next term, the Supreme Court will be presented with an opportunity—that it should take—to do just that. See *Dobbs v. Jackson Women's Health*, Case No. 19-1392, Cert. Granted May 17, 2021.

As to the application of the statute to abortions post-viability, Plaintiffs have *not* demonstrated a likelihood of success on the merits. A temporary restraining order or preliminary injunction as it pertains to post-viability abortions is inappropriate because the State's interest in protecting human life in-and-of itself after viability is undisputedly—as Plaintiffs themselves must concede—sufficient to uphold the Act. *Casey* recognizes as much. Since Plaintiffs do not claim they perform post-viability abortions, there is no basis for enjoining the challenged Act after viability. In fact, Plaintiffs' memorandum in support of their motion for a temporary restraining order and preliminary injunction focuses exclusively on *Roe* and its progeny "before viability," and the argument that, before that point, "the State has no interest sufficient to justify an abortion ban." Doc. 13 p. 9. Plaintiffs thus have failed to meet their heavy burden of establishing an entitlement to the extraordinary remedy of a preliminary injunction. *Sanborn,* 997 F.2d 486. Thus, even on Plaintiffs' view,

this Court lacks the authority to enter a facial injunction or in any way enjoin the act as to post-viable abortions.

A. Plaintiffs lack standing to raise the rights of third parties.

Plaintiffs lack standing to bring their complaint and thus cannot demonstrate a likelihood of success on the merits. In *Singleton v. Wulff*, 428 U.S. 106, 118 (1976), a plurality of the Supreme Court fashioned a blanket rule allowing third-party standing in abortion cases. Unlike any other area of the law, that plurality opinion allows abortion clinics and abortion doctors to assert constitutional claims (the purported right to an abortion) that do not belong to them.

A litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (citation omitted) (internal quotation marks omitted). Litigants may assert the rights of third parties only when: (1) the litigant has a "'close' relationship" with the third party; and (2) there is a "hindrance" to the third party's ability to protect his or her own interests. *Id.* at 130.

In *Kowalski*, the Supreme Court held that attorneys did not have third-party standing to assert a constitutional challenge on behalf of hypothetical future clients. *Id*. at 134. In reaching that conclusion, the Court discussed a long line of authorities and observed that third-party standing has been approved only when the litigant asserts the rights of *known* claimants. *Id.* at 131, 134. Third-party standing is not appropriate when the litigant purports to assert the rights of *hypothetical* future claimants because there is "no relationship at all" between them. *Id*. at 131; *but see*

Singleton, 428 U.S. at 118 (concluding that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision"); *Hellerstedt*, 136 S. Ct. at 2323 (Thomas, J., dissenting) (criticizing *Singleton* as being inconsistent with general standing principles, but noting that the Court apparently "does not question whether doctors and clinics should be allowed to sue on behalf of Texas women seeking abortions as a matter of course," and concluding that "[t]hey should not.").

Applying those general standing principles, Plaintiffs lack standing to assert the third-party rights of their hypothetical future patients. Plaintiffs do not identify any facts demonstrating their "close relationship" with women in this instance, nor any evidence of women's "hindrance" in protecting their own interests. *Kowalski*, 543 U.S. at 130. The Supreme Court "has never relaxed enforcement of the ordinary third-party-standing requirements" in cases like this, "where the regulated third party's interests potentially diverge from the interests of the right-holders." Br. for the United States as Amicus Curiae Supporting Vacatur for Lack of Third-Party Standing or Affirmance on the Merits, No. 18-1323, *June Med. Servs. L.L.C. v. Gee*, and No. 18-1460, *Gee v. June Med. Servs. L.L.C.*, 2020 WL 58244, at *8 (Jan. 2, 2020).

Plaintiffs also cannot bring a first-party undue-burden challenge because they "do not have a Fourteenth Amendment right to perform abortions." *Planned Parenthood of Greater Oh. v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc). Insofar as they assert first-party standing based on their status as regulated parties, their claims are subject only to rational-basis review. *Williamson v. Lee Optical of*

Okla., Inc., 348 U.S. 483, 487-88 (1955); *see also Kowalski,* 543 U.S. at 135 (Thomas, J., concurring) (noting that third-party standing is disallowed when the litigants "may have very different interests from the individuals whose rights they are raising"); *Canfield Aviation, Inc. v. Nat'l Transp. Safety Bd.*, 854 F.2d 745, 748 (5th Cir. 1988) ("[C]ourts must be sure [] that the litigant and the person whose rights he asserts have interests which are aligned.").

When a state enacts regulations to protect the health and safety of abortion patients and to promote dignity and respect for the unborn child, the interests of physicians and patients diverge. Abortion providers will understandably oppose any law that limits their freedom to practice their trade, imposes additional regulatory compliance requirements, or increases their liability exposure. An abortion provider cannot claim to act on behalf of his patients when he sues to invalidate laws designed to protect patients at the provider's expense. To hold otherwise would be akin to allowing merchants to challenge consumer protection laws by invoking the constitutional rights of their customers, or allowing employers to challenge workplace safety laws by invoking the constitutional rights of their employees. That is not, and should not be, the law.

Any assumption of a close connection between women and abortionists that might support an inference of commonality of interests is unproven at best and is certainly not a basis for preliminary relief. Thus, Plaintiffs' request fails as a matter of law and should be rejected.

Further, at a minimum, Plaintiffs lack standing to pursue any claim—let alone obtain preliminary relief—with respect to post-viability abortions because they do not claim to perform such abortions.

B. Plaintiffs cannot prevail on the merits of their claim for an overbroad injunction.

Plaintiffs make three arguments in their Memorandum that demand specific responses. First, Plaintiffs contend that Act 309, prohibiting abortion unless necessary to preserve the life or health of the mother is "outrageous." Doc. 13, p. 1. When viewed in the context of both the protection afforded fetal human life under the common law and statutory prohibitions of abortion that long pre-dated *Roe*, the Act is nothing of the sort. What is outrageous is the alleged right to abortion on demand that the Supreme Court, on Plaintiffs view, invented in *Roe*.

But at a minimum, the result in *Roe* is not supported by any plausible argument from constitutional text, structure, or history. Unfettered abortion was not traditional at the time of the Founding. As James Wilson—one of George Washington's Supreme Court appointees and a signatory to the Constitution—wrote: "With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law." James Wilson, The Works Of James Wilson, 596-97 (R.G. McCloskey ed., 1967). Similarly, Samuel Farr confirmed in *Elements of Medical Jurisprudence* (1787) that at the founding, life was thought to begin at conception and "nothing but the arbitrary forms of human institutions can make it otherwise."

Id. at 4. In fact, as Farr explained, "there is no doubt" that "abortions, or the destruction of those unborn embryos which were never brought into the world … ought to be considered a capital crime." *Id.* at 69.

At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. J. Mohr, Abortion in America 200 (1978). By the turn of the century, virtually every State had a law prohibiting or restricting abortion on its books. By the middle of this century, a trend of liberalization had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. *Roe*, 410 U.S. at 175-76 n.2 (Rehnquist, J., dissenting). On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment. *Casey*, 505 U.S. at 952-53 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Given all of the state regulations of abortion in place when the Fourteenth Amendment was ratified, that Amendment could not have transferred state power over abortion to the federal judiciary. Rather, "[t]he only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter." *Roe*, 410 U.S. at 177

(Rehnquist, J., dissenting); *see also Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 796 (1986) (White, J., dissenting) ("Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted…. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing.").

Second, Plaintiffs cite "half a century" of Supreme Court precedent, beginning with *Roe* that they claim unequivocally holds that the State may not ban abortion before the point of viability. Doc. 13 p. 9. That's not true, as the State may undisputedly impose restrictions that have the practical effect of preventing women from obtaining abortions *even* before viability. *See Casey*, 505 U.S. at 898-99 (upholding parental consent law and bypass procedure that undisputedly would prevent women from obtaining an abortion); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 504 (1983) (Blackmun, J., concurring in part and dissenting in part) (observing consent and bypass laws "permit[] a parental or judicial veto of a minor's decision to obtain an abortion"). The question instead is whether a regulation imposes an undue burden. *See Casey*, 505 U.S. at 874 ("*Only* where state regulation imposes an undue burden on a woman's ability to [choose abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause." (emphasis added)). Thus, Plaintiffs' claimed right to abortion-on-demand before viability has no basis in case law and should be rejected by the Court.

Moreover, even if Plaintiffs' distorted view of precedent is correct, this line of precedent is hardly a consistent march. Rather than create a clear body of law, the Court has repeatedly changed the applicable standards to prop up a poorly reasoned and unworkable opinion, "jury-rigging new and different justifications to shore up the original mistake." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring).[2] In other words, no one can plausibly contend that *Roe* "is a well-reasoned decision that has caused no serious practical problems in the four decades since" it was decided. *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting).

Without any evidentiary record at all, *Roe* introduced a complex trimester-based scheme and concluded that a woman has a right to terminate her pregnancy up to the point of viability. *Roe* held open the possibility that States might have the authority to regulate abortion pre-viability and even to ban abortion post-viability (subject to a life or health exception), but the Court's subsequent abortion cases struck down most States' efforts to regulate abortion. The plurality in *Casey*, therefore, felt obligated to dramatically alter the constitutional analysis—rejecting strict scrutiny and the trimester framework, overturning *City of Akron* and *Thornburgh*, and instituting a new "undue burden" standard. But this standard also proved to be

[2] There is little wonder that even Plaintiffs' standard is ever-changing when viability itself, as multiple Justices have noted, is an entirely arbitrary line that finds no basis in the Constitution. *See, e.g., City of Akron*, 462 U.S. at 461 (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 794-95 (White, J., dissenting) ("[T]he Court's choice of viability as the point at which the State's interest becomes compelling is entirely arbitrary…. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom.").

problematic, so the Supreme Court adjusted the test yet again, adopting a "large fraction" test. *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring). And when this still failed to provide lower courts and States with predictability and certainty, the Supreme Court fashioned another new interpretation of what constitutes an undue burden, introducing a benefits-and-burdens balancing test—even though *Casey* never engaged in any such balancing. *See Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292, 2324 (2016) (Thomas, J., dissenting) ("[T]he majority's free-form balancing test is contrary to *Casey*. When assessing Pennsylvania's recordkeeping requirements for abortion providers, for instance, *Casey* did not weigh its benefits and burdens…. Contrary to the majority's statements, . . . *Casey* did not balance the benefits and burdens of Pennsylvania's spousal and parental notification provisions, either."). And just last term, the Supreme Court rejected that balancing framework. *See June Medical Services L. L. C. v. Russo*, —— U.S. ——, 140 S. Ct. 2103, 2133-35 (2020) (Roberts, C.J., concurring in judgment); *Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020) (unanimously reversing this Court's use of balancing framework).

Third, Plaintiffs cite *Casey* for the proposition that abortion is constitutionally protected because it involves a "woman's right to terminate her pregnancy before viability." Doc. 13, p. 9. Again, as explained above, that's not the rule of *Casey*. But even if it were, as *Casey* acknowledges, abortion is a "unique act." 505 U.S. at 852.

It is different from the privacy cases on which the *Roe* Court purportedly relied[3] because abortion, unlike other privacy rights, ends the life of another human being. And contrary to *Roe*'s unsupported assertion, there is no doubt that the fetus is a human life—not mere tissue, not "potential life," and not "the product of conception." The *Roe* Court's failure to recognize this biological fact, a wrong turn that it made with no record and without the benefit of the adversarial process,[4] led it to invent a right to extinguish another life based on a line of victimless privacy cases. Given that the decision whether to carry a fetal human life to term is *sui generis*, these cases are inapposite and have caused courts to give short shrift to the State's profound interests in the protection of fetal human life. Indeed, fresh consideration of the Supreme Court's stare decisis factors favor overruling *Roe* and *Casey*. *See, e.g.*, *Casey*, 505 U.S. at 855 (plurality op.).

Abortion also should not be used by women as a method of birth control. Abortion is far more damaging on the women's health than any form of the birth control. By allowing abortions after conception, women are encouraged not to take personal responsibility for their own fertility. Furthermore, women's rights should not be about having an opt-out for unwanted or unplanned pregnancies. All rights come with responsibilities, such as the responsibility for fertility.

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[3] *See*, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[4] *See* Br. of Connecticut, Amicus Curiae, in Supp. of Pet. for Reh'g Filed by Georgia and Texas, No. 70-18, *Roe v. Wade*, and No. 70-40, *Doe v. Bolton*, 1973 WL 159525 at *2-3 (Feb. 15, 1973) (seeking rehearing on the grounds that (1) Connecticut's "case (No. 72-730) is believed to be the only one involving the constitutional issue of abortion wherein an evidentiary record has been made," (2) "The evidence in the Connecticut case demonstrates that an unborn child is an alive, separate and distinct human being from the time the child is conceived," and (3) "This evidence was wholly uncontradicted.").

These are just some of the reasons that the core holding of *Roe*, recognized in *Casey*, should be overturned and why regulation of abortion should be returned to the States, where the people resolve such weighty questions through their elected representatives. *See Thornburgh,* 476 U.S. at 787 (White, J., dissenting) ("But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation."); *Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."). States may (and do) reach different conclusions on these difficult questions, but that is where their authority lies under the Constitution as properly interpreted.

But at the end of the day, even on the most generous reading to Plaintiffs, *Roe* and *Casey* do not require that Plaintiffs' motion for a preliminary injunction be granted with respect to the Act's ban on post-viability abortions or abortions performed at any stage of pregnancy by non-physicians. *See Smith v. Bentley*, 493 F. Supp. 916, 926 (E.D. Ark. 1980) (per curiam) (enjoining a similar abortion prohibition as applied to physicians but not to laymen). To the extent that plaintiffs request an injunction that would apply post-viability, such an injunction would be overbroad and unsupported by the case law they rely upon and that request should be denied.

C. The remaining preliminary injunction factors favor the State.

Although at the preliminary injunction phase this Court is bound by *Casey*, an injunction is not in the public interest. The Act addresses Arkansas's legitimate interest from the outset of the pregnancy in protecting the life of the unborn human who may be born. That is a vital public interest, and the Court should sustain Arkansas's law.

Additionally, a decision to grant a preliminary injunction would "subject[] [the State] to ongoing irreparable harm." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). As Supreme Court Justices have recognized over the years, "'[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Id.* (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

WHEREFORE, this Court should deny Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Maryna O. Jackson, Assistant Attorney General, do hereby certify that on June 28, 2021, I filed this Response via CM/ECF which should send notification of filing to all parties of record.

Maryna Jackson